Autonomy, Affinity and the Assessment of Damages: ACB v Thomson Medical Pte Ltd [2017] SGCA 20 and Shaw v Kovak [2017] EWCA Civ 1028.

**Abstract**: In *ACB v Thomson Medical Pte Ltd* [2017] SGCA 20 and *Shaw v Kovak* [2017] EWCA Civ 1028 the idea that ‘lost autonomy’ should be recognised as a new form of actionable damage in the tort of negligence was rejected In Singapore and England respectively. This, it will be argued, was the correct outcome. Protecting an interest in autonomy via the tort of negligence would undermine the coherence of that tort. In *ACB*, however, a new, different, form of damage was recognised: loss of ‘genetic affinity.’This commentary will discuss some problems that protecting an interest in ‘genetic affinity’ raises before critiquing the approach to assessing damages in *ACB*.

# INTRODUCTION

Apparent conflicts between ensuring a fair outcome and preserving the integrity of established legal principles are an established feature of tort law. More recent, though, is the trend that suggests protecting an interest in ‘autonomy’ might be one method of resolving such impasses in the medical negligence context.[[1]](#footnote-1) This position has been on the ascendant, with Lady Hale recently stating in *Montgomery v Lanarkshire* that ‘[i]t 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.’[[2]](#footnote-2)Alas, recognition of ‘lost autonomy’ as a new form of actionable damage in negligence will lead to much worse outcomes than sending the occasional sympathetic claimant home empty-handed: it has the potential to destroy whatever coherence remains of this tort.

In two recent cases, *ACB v Thomson Medical Pte Ltd*[[3]](#footnote-3) and *Shaw v Kovak*,[[4]](#footnote-4) this idea had its wings clipped. In *ACB*, however, a new, different, form of damage was recognised: loss of ‘genetic affinity.’After the facts and issues in both cases have been outlined it will be argued in this commentary that the decision to reject lost autonomy as a new form of damage in negligence in these cases was correct. I will then discuss some problems that protecting an interest in ‘genetic affinity’ raises before critiquing the approach to assessing damages in *ACB*.

Although this commentary will address both cases, the focus will very much be on *ACB.* The fact that *ACB* grapples with several controversial doctrinal problems that have troubled tort scholars in recent years – the recognition of intangible interests, whether damages should be awarded for raising a healthy child and the correct approach to exemplary damages – means it is arguably one of the most important negligence judgments handed down this decade.

# THE FACTS OF ACB

*ACB* involved a mix-up in the administration of in-vitro fertilization (IVF). The appellant was a Singaporean Chinese woman married to a German man of Caucasian descent. Her egg was wrongly fertilised by the sperm of an unknown Indian donor instead of that of her husband. After birth, it was noticed that her daughter, Baby P, had darker skin and hair than both the appellant, her husband and their first child. The respondents pleaded guilty to lapse in their license to provide assisted reproductive services and a claim was brought by the appellant in negligence and contract. Although Baby P was accepted as part of the family by the appellant and her husband, the appellant claimed for (1) pain and suffering relating to the pregnancy as well as damages for mental distress and (2) the upkeep costs for Baby P. The case eventually came before the Court of Appeal of Singapore (CAS), the highest court in the country. The judgment of the CAS was given by Phang JA, in an opinion notable for its analytical rigour and sensitivity to the plight of the appellant.

# THE NATURE OF THE CLAIM IN ACB

Although these facts are certainly enthralling, they are, alas, far from unique. Litigation from IVF mix-ups has arisen before.[[5]](#footnote-5) What makes *ACB* noteworthy is the nature of the dispute. This was a claim of ‘wrongful fertilisation’. That is, one which arises:

where assisted reproduction technology, usually IVF, is used and a claim is brought by the gestational mother…and/or her partner in circumstances where a healthcare professional uses the wrong gametes in the fertilisation procedure or where the "wrong” embryo is implanted in the womb of the gestational mother and carried to term.[[6]](#footnote-6)

In this respect, the claim in *ACB* was an action by a *parent* alleging negligence before birth. These types of claim are sometimes referred to as claims for ‘wrongful pregnancy’ and can be divided into claims for ‘wrongful conception’, ‘wrongful birth’ and, now, ‘wrongful fertilisation.’ Let us consider each in turn.

## *Wrongful Conception*

The essence of a wrongful conception action is that the parents never wanted to have (further) children and so the conception of the child is unwanted. Such claims are ‘brought by the parents for the failure of a healthcare professional to perform a sterilisation operation properly or to properly advise on the efficacy of the procedure.’[[7]](#footnote-7) English law used to permit the recovery of child-rearing costs in this type of case until the House of Lords decision of *McFarlane v Tayside Health Board.*[[8]](#footnote-8) That decision, together with two cases that followed it, *Parkinson v St James and Seacroft University Hospital NHS Trust*[[9]](#footnote-9)and *Rees Darlington Memorial NHS Trust*,[[10]](#footnote-10) has left the law in this area a mess. It can be summarised as follows.

1. The mother is entitled to damages for the pain, suffering and inconvenience of pregnancy and childbirth[[11]](#footnote-11) and to special damages for extra medical expenses, clothing and loss of earnings associated therewith;[[12]](#footnote-12)
2. The upkeep costs of raising a *healthy* child are irrecoverable;[[13]](#footnote-13)
3. If the child is disabled then the claimants can recovery the *additional* costs associated with the child’s disability. One takes the full costs of raising the child and deducts the cost of raising a healthy child to arrive at the appropriate amount of compensation.[[14]](#footnote-14)
4. Any extra childrearing costs incurred because a *parent* is disabled are not recoverable.[[15]](#footnote-15)
5. *Rees* added a gloss to *McFarlane.* In addition to the above damages, *all* parents will receive a £15,000 conventional award ‘for the denial of an important aspect of their personal autonomy.’[[16]](#footnote-16) This is awarded to all parents in this type of case irrespective of their disability or their child’s.

By way of contrast, in *Cattanach v Melchior*[[17]](#footnote-17)the High Court of Australia, by a 4:3 majority declined to follow the English position and held that the full costs of raising a healthy child can be recovered.

In many respects, the claim in *ACB* is similar to that in wrongful conception cases: if the defendant had not been negligent then the child would not have been born and so the appellant would not have the expense of raising the child. However, an important point of difference is that the appellant in *ACB* did want *a* child, whereas the claimants in *McFarlane, Parkinson, Rees* and *Cattanach* did not.[[18]](#footnote-18)

## *Wrongful Birth*

Wrongful birth cases are different from wrongful conception claims because in the latter, ‘the act which is complained of (that is to say, the negligent sterilisation or the negligent advice) takes place pre-conception; whereas in wrongful birth cases, the tortfeasor’s wrongful act takes place post-conception.’[[19]](#footnote-19) Wrongful birth claims are brought by the mother and usually occurs where a healthcare professional has ‘either failed to (i) inform them that the mother was pregnant; or (ii) to advise them, while the child was in utero, that the foetus would be born disabled.’[[20]](#footnote-20) The essence of such a claim is ‘that the mother would have terminated the pregnancy had she been informed timeously that she was pregnant or that the foetus which she was carrying would be born disabled.’[[21]](#footnote-21) In English law, a claimant mother will not be able to recover the full costs of raising a *healthy* child but will be able to claim for the extra costs of raising a *disabled* child.[[22]](#footnote-22)

Although *ACB* bears some similarities to a wrongful birth action – the parents wanted a child, just not this one – in *ACB* the CAS held that the wrongful birth cases are ‘also not material because…the Appellant neither pleaded nor did she ever aver that she would have terminated the pregnancy if she had been informed of the mix-up ahead of time.’[[23]](#footnote-23)

## *Wrongful Fertilisation*

*ACB* therefore ‘does not fit neatly into any of the aforementioned categories.’[[24]](#footnote-24) The essence of the claim is ‘that the plaintiffs never planned to have *this child* (that is to say, the child who was born as a result of the use of the wrong genetic material) but instead planned for and desired to have a child with whom they would share genetic kinship.’[[25]](#footnote-25) The CAS therefore had to consider whether the upkeep costs of raising Baby P should be recoverable in these circumstances but its reasoning applies equally to other cases where the upkeep costs of a child are pleaded.

The Court concluded that the ‘upkeep claim’ should not be allowed as it was contrary to public policy.[[26]](#footnote-26) The Court was persuaded by two arguments against awarding the upkeep costs of Baby P. These were:

1. **The obligation to maintain one’s child is an obligation at the heart of parenthood and cannot be a legally cognisable head of loss.[[27]](#footnote-27)**

This was a normative claim about family relationships. Once the appellant had accepted Baby P then she also ‘must be taken to have simultaneously assumed the responsibility of maintaining her (financially and in all other respects).’[[28]](#footnote-28) This is because parenthood comprises ‘an indivisible bundle of rights and obligations which cannot be peeled away and hived off *à la carte…*the obligations of parenthood are fundamental, indivisible, and incapable of sounding in damages.’[[29]](#footnote-29)

1. **To recognise the upkeep claim would be fundamentally inconsistent with the nature of the parent-child relationship and would place the appellant in a position where her personal interests as a litigant would conflict with her duties as a parent.**

If the upkeep costs were awarded ‘parents would have to come to court to prove that their children represent a net *loss* to them.’[[30]](#footnote-30) Such an exercise would be at odds with the parents’ duty to care for and love their child as it ‘encourages the exaggeration of any infirmities and the diminution of benefits as might exist in their children, in order that the account may be as favourable to the parents as possible.’[[31]](#footnote-31) If recovery were to be permitted some off-set must be made for the benefits brought by the child.[[32]](#footnote-32) Allowing some form of off-setting would permit ‘perverse incentives to enter into the parent-child relationship and taint its essential character.’[[33]](#footnote-33) The public interest therefore lies ‘in the adoption of a bright-line rule…that absolutely precludes parents from being placed in a position where their personal interests might conflict with their parental duties.’[[34]](#footnote-34)

Space constraints prevent me from adding the vast literature on whether the costs of raising a child should be recoverable in negligence here.[[35]](#footnote-35) Instead, I will focus on the novel aspects of the judgment.

Rejecting the upkeep claim appeared to create discomfort for the Court. It might lead to ‘an incongruous − and even unjust as well as unfair – result.’[[36]](#footnote-36) Phang JA went on to consider whether another form of damage, violation of autonomy, ought to be actionable. This idea first mooted by Lord Millett in *McFarlane* and later adopted by a bare majority in *Rees*. Recognising this new form of damage would avoid the policy objections of the upkeep claim as it would be an independent interest of the parents which have been transgressed because of the respondent’s negligence.[[37]](#footnote-37) Ultimately, though, the court declined to do this. It would ‘pose significant problems of legal coherence and would be contrary to well-established principles on the recovery of damages.’[[38]](#footnote-38) This aspect of the decision will be considered below after outlining the facts and decision in *Shaw.*

# THE DECISION IN SHAW

The claimant, Mrs Shaw, was the personal representative of the estate of her father, Mr Shaw. Mr Shaw died following an operation for a trans-aortic valve implant performed in 2007 by the first defendant, Dr Kovac. Dr Kovac was a cardiologist at a hospital managed by the second defendant, the University Hospitals of Leicester NHS Trust.

The defendants accepted that they had breached their duties of care by failing to sufficiently inform Mr Shaw of the risks inherent in the operation and that, as he would not have undergone the operation had he been warned, that this breach was the cause of his death. The issue at the trial was the assessment of damages. HHJ Platt assessed damages at £15,591.83 including £5,500 for pain, suffering and loss of amenity.

Originally, the schedule of loss included a claim for ‘damages for loss of life’.[[39]](#footnote-39) Given that damages for loss of expectation of life are barred by section 1 of the Administration of Justice Act 1982, this aspect of the claim was, unsurprisingly, unsuccessful. In addition, the claimant argued that there should be compensation for ‘the unlawful invasion of the personal rights’ of Mr Ewan and his ‘loss of personal autonomy.’[[40]](#footnote-40) The figure suggested was £50,000. This argument was rejected by the England and Wales Court of Appeal (EWCA).

It was also argued that the invasion of Mr Ewan’s autonomy ‘represented a separate and free-standing *cause of action*.’[[41]](#footnote-41) If this was the case then damages for lost autonomy could be awarded independently of the claim for personal injury. However, Davis LJ, giving the leading judgment (Underhill and Burnett LLJ delivered short concurring judgments), held that this argument was not open to the appellant as it had never been pleaded.[[42]](#footnote-42) His Lordship then went to consider whether damages should be awarded for violation of autonomy.

# AUTONOMY AS A NEW INTEREST IN NEGLIGENCE

## *Conceptual Confusion*

The EWCA in *Shaw* considered whether lost autonomy ought to be recognised as a new ‘head of loss’. Before proceeding, it is important to be clear about the conceptual distinction between ‘actionable damage’ and ‘damages.’ Negligence is not actionable per se.[[43]](#footnote-43) In order to succeed in this cause of action, the claimant must demonstrate that the defendant’s breach of his or her duty of care caused the claimant *actionable damage*. Once these elements of the cause of action are established the normal judicial remedy is compensatory damages. The claimant will receive damages for their loss (different heads of loss, such as loss of amenity or the costs of care, will be distinguished in this calculation). For example, anxiety and fear alone are not sufficient to constitute *actionable damage*.[[44]](#footnote-44) However, if a claimant has suffered a form of actionable damage, such as a physical injury or recognised psychiatric illness then they can claim for pain and suffering (which includes fear and anxiety) associated with that damage.[[45]](#footnote-45) Their *damages* will reflect this loss.

The judgment in *Shaw* confuses these issues. Davis LJ suggested that if autonomy was recognised as a new head of loss then in cases where a patient has not been informed about the risks in a procedure ‘an award would also in principle be recoverable…if the operation performed on a patient was a complete success’[[46]](#footnote-46) and even if it were established that the patient still would have consented if he had been given the proper information. This, however, is only accurate if discussing whether autonomy ought to be recognised as *actionable damage*. In such circumstances, the claimant’s autonomy would have been interfered with regardless of the outcome of the procedure. As such, the claimant would have suffered actionable damage and entitled to compensation.

If, however, we are considering whether autonomy ought to be recognised as a new *head of loss* then some form of actionable damage must have been suffered. The calculation of different heads of loss will not take place if the cause of action is not complete. If the patient would have undergone the operation anyway if warned, or if the operation was a success, then the defendant’s breach would not have caused any personal injury and thus no actionable damage (assuming lost autonomy is not a form of actionable damage). The cause of action in negligence would not be complete and so the claimant would not get any damages in such circumstances. Despite this confusion, I will interpret Davis LJ’s judgment as considering whether autonomy should be recognised as *actionable damage* in negligence.

## *Authority*

First, the EWCA considered previous authorities and concluded that cases such as *Chester v Afshar* and *Montgomery* did not support a free-standing award compensating lost autonomy.[[47]](#footnote-47) Davis LJ also distinguished the present case from *Rees*. In that case the claimant‘was in effect being deprived on policy grounds of damages to which otherwise, on a conventional ‘but for’ approach, she might well have been entitled.’[[48]](#footnote-48) In contrast, Mr Ewan's estate was ‘not being deprived of damages for invasion of his personal autonomy on policy grounds: rather, his estate is not to be granted an additional award for damages just because appropriate compensation has been available in the award of general damages which has been made.’[[49]](#footnote-49)

Davis LJ acknowledged that the conventional award, despite comments to the contrary by one member of the House of Lords,[[50]](#footnote-50) was designed to ‘compensate the claimant for the loss of the opportunity to live her life in the way she had wished and planned: and so a conventional award would ‘mark the injury and loss’.’[[51]](#footnote-51) Oddly, he then said that those circumstances are ‘exceptional and a long way from the present.’[[52]](#footnote-52) Although Mr Ewan had lost his expectation of life, such an award is not available to him due to the 1982 Act. But surely the same reasoning applies equally to *Rees*? Ms Rees had suffered financial loss after giving birth to a healthy child after a negligent sterilisation. Such an award was not available to her due to *McFarlane* preventing upkeep costs being awarded in wrongful conception cases. So why should Ms Rees be able to claim for lost autonomy and Mr Ewan not? Davis LJ does not provide a convincing reason for distinguishing the two cases. Either autonomy is a separate form of damage and so both claimants should receive damages for violation of this interest; or it is not and they should not. The point that Mr Ewan received some compensation for his pain and suffering does not distinguish the twoeither: Ms Rees would have received *some* damages for the pain and suffering associated with pregnancy and childbirth. Both claimants were arguing that their damages were insufficient. Whatever one thinks of *Rees*, it supports the claimant’s argument in this case.

## *‘Principle’*

According to Davis LJ, the claim in *Shaw* was also ‘contrary to principle.’[[53]](#footnote-53) He questioned ‘just what it is that the appellant's proposed award is required to compensate, over and above what is already comprehended in the award of general damages for pain, suffering and loss of amenity.’[[54]](#footnote-54) He could identify no such candidate. If ‘an individual's suffering is increased by his or her knowing that his or her “personal autonomy” has been invaded through want of informed consent…then that can itself be reflected in the award of general damages.’[[55]](#footnote-55) In other words, there was no need to award damages for lost autonomy.

Davis LJ also questioned the principles for assessing these damages. He disputed the idea that the award might vary:

[I]t is very difficult to see why the importance and value of the right to personal autonomy and the right not to have one's body invaded without informed consent should vary from one context to another, from one individual to another. It is surely the same fundamental right for all adult people of sound mind.’[[56]](#footnote-56)

There was ‘no principled answer’[[57]](#footnote-57) why the sum of £50,000 was being claimed: ‘it was simply put forward, without elaboration or explanation, as an appropriate amount.’[[58]](#footnote-58)

It might be countered that there is no principled answer why the quantum of *any* award of non-pecuniary loss is set at the amount it is. The basic principle governing the assessment of compensatory damages is that there should be *restitutio in integrum* (return to original condition). In *Livingstone v Rawyards Coal Co,[[59]](#footnote-59)* Lord Blackburn described this rule in the following terms:

[I]n settling the sum of money to be given for reparation of damages you should as nearly as possible get at that sum of money which will put the party who has been injured…in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation.[[60]](#footnote-60)

With the assessment of damages for intangible injuries, the courts admits that ‘there is no pecuniary guideline which can point the way to a correct assessment.’[[61]](#footnote-61) In such cases,

All that judges and courts can do is to award sums which must be regarded as giving reasonable compensation. In the process there must be the endeavour to secure some uniformity in the general method of approach. By common assent awards must be reasonable and must be assessed with moderation.[[62]](#footnote-62)

As Cane has stated, ‘All such damages awards could be multiplied or divided by two overnight and they would be just as defensible or indefensible as they are today.’[[63]](#footnote-63) This argument against compensating violations of autonomy applies to all non-pecuniary losses and is not convincing.

## *Policy*

The main policy reason given in *Shaw* against awarding such damages is the floodgates argument. Davis LJ questioned: ‘Would such awards by extension be available for other torts generally (given that most torts can be said to involve a "loss of autonomy")?’[[64]](#footnote-64) In the ‘current climate of claims farming’[[65]](#footnote-65) there was a risk for a proliferation of such claims:

The fact that any prospective conventional award...might be for a relatively modest amount is no answer. On the contrary, the relative modesty of any prospective award of the kind for which the appellant now argues may, as experience teaches, of itself prove a spur to claims: in the hope that defendants will, fearful of costs, seek speedily to settle.[[66]](#footnote-66)

Although this policy reason is more convincing than other aspects of Davis LJ’s judgment, better reasons for rejecting lost autonomy were put forward by Phang JA in *ACB*. These were termed (a) the conceptual objection; (b) the coherence objection; and (c) the over-inclusiveness objection. These will now be considered in turn.

## *The conceptual objection*

This is the idea that ‘the concept of "autonomy” is too nebulous and too contested a concept to ground a claim.’[[67]](#footnote-67) Although the word literally means ‘self-determination’ and a person will be autonomous only if they can choose and act on their own decisions, there are divergences in opinion about what being autonomous entails.[[68]](#footnote-68) The main accounts are:

1. **The liberal, individualist account (or ‘current desire’ autonomy)[[69]](#footnote-69)**

Under this conception, autonomy is ‘chiefly understood in negative terms as the liberty to live one’s life free from external interferences or control.’[[70]](#footnote-70) Based upon the ideas of Mill,[[71]](#footnote-71) it reflects an individual’s ‘immediate inclinations.’[[72]](#footnote-72) A person’s actions will be autonomous if, provided then person is competent to make the decision and it is free and informed, such choices reflect their desires.[[73]](#footnote-73) This ‘thin’ view of autonomy is often said to be ‘content-neutral’, in the sense that it is ‘not concerned with the desirability of the choices which are made, so long as they are freely chosen.’[[74]](#footnote-74)

1. **‘Best desire’ autonomy**

This version of autonomy ‘seeks to give effect not only to the *current* desires of the decision-maker, but also to his *long-term* desires and values as well.’[[75]](#footnote-75)

1. **‘Ideal desire’ autonomy**

This version is influenced by the work of Immanuel Kant. It reflects what a person *should* want is measured ‘by reference to some purportedly universal or objective standard of values.’ It is not based upon an individual’s preferences but on what they *should* choose.

1. **Relational autonomy.**

This theory of autonomy was developed by communitarians and feminists who were critical of the above theories.[[76]](#footnote-76) Being individualistic in nature, the above ‘do not adequately take into account the socially embedded nature of human beings and the importance of social relations to one’s sense of self and to self-determination’[[77]](#footnote-77) as they would ascribe autonomy to individuals who have internalised oppressive values due to pressure from restrictive life conditions and norms.[[78]](#footnote-78)

The Court maintained that the theoretical disagreement about the very concept of autonomy ‘turn on more fundamental questions of political (the proper relationship between the State and its citizens) as well as moral (different conceptions of "the Good”) philosophy.’[[79]](#footnote-79) It was not possible nor the place of the court to decide such questions.[[80]](#footnote-80) However, without a workable concept of autonomy, ‘it is impossible to say that autonomy can, in and of itself, be the subject matter of legal protection.’[[81]](#footnote-81)

The Court is correct in their conclusion that ‘[a]utonomy is a slippery concept’[[82]](#footnote-82) but this is not an insurmountable obstacle. There have been several cases where the courts have either explicitly or implicitly adopted the liberal, individualistic account of autonomy in other branches of the law. Notably, and as acknowledged by Phang JA in *ACB*,[[83]](#footnote-83) in *Re T[[84]](#footnote-84)* Lord Donaldson adopted this definition for determining whether a person should be able to refuse life-saving medical treatment. He observed that ‘the patient’s right of choice exists whether the reasons for making the choice are rational, irrational, unknown or even non-existent.’[[85]](#footnote-85) If a choice should be respected even if it is irrational or there are no reasons for making it then it is hard to see how the court is furthering ‘ideal desire’, ‘best desire’ or ‘relational’ versions of the concept.[[86]](#footnote-86)

In any event, there are many concepts that are contested but which judges choose to take a stance on. ‘Property’ is a prominent example. What counts as property?[[87]](#footnote-87) When should property rights be enforced? The idea that there are non-ideological answers to such questions is an illusion.[[88]](#footnote-88) While Phang JA should be commended for looking before leaping on this issue the conceptual objection does not necessarily prevent autonomy being recognised as a new interest protected by the tort of negligence. Indeed, the ‘coherence’ and ‘over-inclusiveness’ objections considered below are constructed on the liberal, individualistic account of autonomy. They do not necessarily apply if definitions (2), (3) or (4) are used. Unlike the EWCA in *Shaw*, though, at least Phang JA actually considered what the word ‘autonomy’ means and engaged with some of the vast literature on this topic. To describe the discussion of the concept in *Shaw* as scant would be to pay the English Court far too high a compliment.

## *The coherence objection*

The mere fact that a workable definition of autonomy can be found does not mean that the appellant’s arguments should succeed. What Phang JA calls the ‘coherence objection’ is fatal to its recognition. This is the idea that ‘the notion of a loss of autonomy does not comport with the concept of damage in the tort of negligence.’[[89]](#footnote-89)

For damage to be actionable in negligence a claimant must show that they are objectively, and more than minimally, worse off.[[90]](#footnote-90) However, ‘most interferences with autonomy would fall far short of this standard.’[[91]](#footnote-91) There are many interferences with autonomy that make people objectively better off,[[92]](#footnote-92) have only a minimal effect on an individual[[93]](#footnote-93) and, if the liberal individualistic definition is adopted, autonomy is an inherently subjective concept. As such, it is not consistent with the law’s definition of actionable damage.[[94]](#footnote-94) Phang JA stated:

Any paternalistic act, such as that of forcing someone to belt up while in a motor vehicle, would technically constitute an interference with autonomy, *even if* it made the person *better off*. It would be difficult, in those circumstances, to identify precisely what it is that the claimant should be compensated for. This is quite different from damage in the form of physical injury, for instance, which is almost universally considered to be detrimental and therefore always sounds in damages.[[95]](#footnote-95)

## *The ‘over-inclusiveness objection’*

There is a further argument why lost autonomy should not be recognised as a new form of damage in negligence. The ‘over-inclusiveness objection’ is that ‘recognition of such a head of damage would undermine existing control mechanisms which keep recovery in the tort of negligence within sensible bounds.’[[96]](#footnote-96) As ‘any form of damage can, with some ingenuity, be reconceptualised in terms of a damage to autonomy’[[97]](#footnote-97) recognition of lost autonomy as a new form of damage would undermine these restrictions and make the law incoherent.

Phang JA gave the example of the claimants who failed in *Rothwell v Chemical and Insulating Co Ltd.*[[98]](#footnote-98)as their asymptomatic pleural plaques and anxiety did not constitute actionable damage. They would be able to reframe their claim as one of lost autonomy ‘on the basis that their "right” to be free of physiological changes to their body had been infringed…[and] their "right” to be free from the fear of developing a life-threatening disease had been infringed, even though their anxiety had not risen to the level of being a recognisable psychiatric illness.’[[99]](#footnote-99) Many other illustrations can be given supporting this objection.[[100]](#footnote-100) Ultimately, it is hard to disagree with the Court’s conclusion that the coherence and over-inclusiveness objections are fatal to protecting an interest in autonomy through this tort. Doing so would be entirely inconsistent with basic negligence doctrine.

# GENETIC AFFINITY

Although the Singapore Court refused to recognise lost autonomy as actionable damage in its own right, it identified the appellant’s ‘true loss’ as one of *genetic affinity*.[[101]](#footnote-101) Ties of affinity are ‘partly a result of genetic relatedness and partly a result of the social significance which it carries’[[102]](#footnote-102) and distinguishable from ties of friendship. This difference ‘lies at the root of why the obligations of parenthood and the relationship between parents and children are so special and socially fundamental: obligations of kinship are inherited and not voluntarily assumed.’[[103]](#footnote-103) Accordingly, ‘when a person has been denied this experience due to the negligence of others then she has lost something of profound significance and has suffered a serious wrong.’[[104]](#footnote-104) The consequences of the respondent’s negligence had not only frustrated the appellant’s autonomy but had ‘also in the substantive impact that it has had on the Appellant’s well-being.’[[105]](#footnote-105) The Court stressed that the issue was not to be understood as being about race or genetic mix.[[106]](#footnote-106)

Yet this new interest may not be free from problems. It is true that a significant number of people see biological parenthood as important but this does not mean that the law should encourage such attitudes. Recognising an interest in genetic affinity arguably overstates the importance of genetics to the parent-child relationship. An example of this is Phang JA’s disputable observation that ‘obligations of kinship are inherited and not voluntarily assumed.’[[107]](#footnote-107) Despite the Court being keen to clarify that it was not denigrating adoption or laying out a prescriptive definition of what a family should be,[[108]](#footnote-108) perceiving lack of genetic affinity as a form of *damage* means that families where such genetic ties are missing could be seen as defective.

If genetic affinity is important, then could the siblings and grandparents of Baby P also bring a claim? After all, Baby P is not as genetically related to them as she otherwise would be but for the respondents’ negligence. There appears to be no reason why they could not, unless the Court wishes to get into the quagmire of quantifying how many genes are needed for ties of affinity to exist.

It is also worth noting that the law is selective about when it perceives genetic ties to be important. In England, the gestational mother is the legal mother, regardless of whether she has any genetic link with the child.[[109]](#footnote-109) The legal father need not have any genetic ties with the child either. If an embryo is created using a couple’s egg and sperm and then carried by a surrogate then the surrogate, rather than the genetic and intended mother, will be the child’s legal mother and *her* husband will be the legal father (unless he objects), even if his sperm is not used.[[110]](#footnote-110) Why does the law see genetics as important in *ACB* but not in this context?

These issues do not necessarily rule out the recognition of lost genetic affinity as a new form of actionable damage. It may be that the law on surrogacy should be reformed instead. Furthermore, this new interest does not suffer from the same problems as protecting an interest in autonomy would raise. Being narrowly defined, it does not undermine other control mechanisms in tort law. Unlike autonomy, it is not inherently subjective and so it is consistent with the law’s definition of actionable damage. While the concept of damage is, like all law, socially constructed, it is also objective.[[111]](#footnote-111) This means that in theory it could be held that loss of genetic affinity is objectively bad (those who have adopted a child or otherwise lack genetic affinity would not be able to bring any claim for lost genetic affinity as no duty of care would have been breached and, by choosing to undertake such a relationship, any claim would be barred by the *volenti* defence). Whether it is desirable for the law to take such a stance, though, is open to question.

# COMPENSATING LOST GENETIC AFFINITY

Loss of genetic affinity is a non-pecuniary loss and therefore its quantification is ‘inherently challenging.’[[112]](#footnote-112) The Court considered awarding a‘conventional award’ similar to that in *Rees*[[113]](#footnote-113) oran award for ‘necessary expenses in avoiding or coping with restrictions on autonomy’[[114]](#footnote-114) but instead favoured general damages for non-pecuniary loss tailored to the particular motivations which the appellant had for seeking IVF.[[115]](#footnote-115) The harm will therefore vary and depend upon ‘the personal circumstances of the plaintiff (such as the presence of other children or the familial and/or cultural histories particular to him or her).’[[116]](#footnote-116)

This still left a problem of assessing the quantum of damages to be awarded. The Court believed that they ‘should benchmark the eventual award as a *percentage* of the financial costs of raising Baby P.’[[117]](#footnote-117) Thus, although the financial costs of raising Baby P could not be awarded, they were not irrelevant. The award should lie somewhere between the extreme of giving the appellant an indemnity for the cost of raising the child and giving her merely a nominal sum that would ‘make a mockery of the value of the interest at stake.’[[118]](#footnote-118) The Court believed it would be just, equitable and proportionate to award the appellant substantial damages of 30% of the financial costs of raising Baby P.[[119]](#footnote-119)

It is this aspect of the judgment in *ACB* that is most troubling. Leaving aside that using the pecuniary loss suffered by the appellant as a benchmark for assessing her non-pecuniary loss is highly unorthodox, this methodology encounters the same problems that the court faced when rejecting the upkeep award. It will still cause parents to denigrate the loss caused by the child. Let us say that the upkeep costs are £100,000. The damages for lost genetic affinity will be thirty per cent of this and so the appellant would be awarded £30,000. There would be a temptation for the appellant to disparage the benefits of the child and inflate the costs. For if the appellant could do this successfully so that the upkeep costs were assessed as being, say £150,000, then her damages would be increased to £45,000. Damages for loss of genetic affinity therefore face the same policy objections that the Court accepted for the upkeep claim. It will be hard to convince the victims of failed sterilisations that there is a fair basis for them receiving nothing but that the (partially successful) claim in *ACB* can be distinguished from their own.

Furthermore, why should the fact that the parents are rich or poor affect the quantum of damages for loss of genetic affinity? Imagine a couple that is poorer than the appellant and her husband.[[120]](#footnote-120) If this poorer couple were not planning to send their child to expensive international schools, for example, then the upkeep costs would be smaller, with reduced damages for lost genetic affinity as a result. But can it really be said that this imaginary couple’s loss of genetic affinity is any less than that suffered by the appellant and her husband? If the CAS thinks there are good reasons for not awarding the upkeep costs then they should not be awarded through the back door in this manner.

Questions also remain as to how these damages would be calculated if there was a slight factual variation. What if the appellant’s husband had rejected the child? It may be that the *affinity* in such cases is worsened but it seems likely that the loss of *genetic* affinity in each case where the wrong sperm is used would be exactly the same for each parent. What if, rather than their being a mix-up with the sperm used, there was a mix-up with *embryos*? In such circumstances the child would not be related to either the appellant or her husband. The loss of *genetic* affinity would be greater. Perhaps the damages in such cases should also be greater. Given that the loss of *genetic affinity* will be the same in every case where the wrong sperm is used, if the Court is going to recognise this new form of damage, the better solution would therefore have been to award a conventional award (and possibly awarding a larger award where the wrong sperm *and* eggs were fertilised and implanted). Such awards, by their very nature, would be somewhat arbitrary but so are all damages for non-pecuniary loss. The lack of a previous precedent to guide the court should not prevent it either. This is, after all, a novel case.

# PUNITIVE DAMAGES

Finally, the Court in *ACB* considered the correct approach to exemplary or punitive damages (the terms are synonymous) in Singapore and whether such damages could ever be awarded for the tort of negligence. This alone would be enough to make *ACB* a landmark decision.

Awarded in addition to compensation, the aim of punitive damages is to ‘punish and deter.’[[121]](#footnote-121) They teach the defendant, and others, that ‘tort does not pay’.[[122]](#footnote-122) On the issue of exemplary damages England is ‘still toiling in the chains of *Rookes v Barnard.*’[[123]](#footnote-123) In that case the House of Lords restricted their availability. Aside from where they are authorised by statute, they would be available in two situations. First, where there is ‘oppressive, arbitrary or unconstitutional action by the servants of the government.’[[124]](#footnote-124) Second, where ‘the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff.’[[125]](#footnote-125) This is known as the ‘categories condition.’[[126]](#footnote-126)

*Rookes* has not found a favourable reception in other common law countries.[[127]](#footnote-127) This is hardly surprising. If there is a good reason for using the mechanism of tort damages to punish or deter people then there will be situations outside of the categories where exemplary damages will be justified.[[128]](#footnote-128)

The CAS rejected the approach in *Rookes.* Instead, exemplary damages would be awarded in tort ‘where the totality of the defendant’s conduct is so outrageous that it warrants punishment, deterrence, and condemnation.’[[129]](#footnote-129) The fact a defendant had already been punished by the criminal law was a weighty *factor* to be *considered* when deciding whether to award punitive damages but it was ‘*not* determinative or conclusive.’[[130]](#footnote-130) A punitive award should not be made ‘when there is *no need to do so*.’[[131]](#footnote-131)

The Court also held that, in principle, punitive damages could be available for inadvertent conduct. While most cases where exemplary damages would be awarded involve intentional or subjectively reckless conduct, judges ‘should not have to disguise their true reasons for imposing a punitive award by characterising cases of inadvertent conduct as cases involving subjective recklessness.’[[132]](#footnote-132) This means such damages can be awarded in tort of negligence. Despite this, all parties in *ACB* were in agreement that punitive damages were not appropriate on the facts, which were ‘simply too scant to support a finding of outrageous conduct.’[[133]](#footnote-133)

It is beyond question that the categories test is a ‘glaring defect in the law’.[[134]](#footnote-134) But it is a shame that the Court expanded the availability of exemplary damages rather than abolishing them altogether. The main argument in favour of exemplary damages is that they serve a useful purpose in punishing ‘minor criminal acts which are in practice ignored by police too caught up in the pursuit of serious crime’[[135]](#footnote-135) or those who are unlikely to face criminal proceedings, such as the police themselves. In this respect, they can fill a gap in the law and remedy defects in the criminal justice system.[[136]](#footnote-136) These arguments, of course, involve taking a rather rose-tinted view of the judiciary as champions of victims of police misconduct.[[137]](#footnote-137)

A more persuasive view is that there is little need for punitive damages. As Burrow has noted:

… civil law jurisdictions manage without any notion of exemplary damages. If they are felt to be so useful, how is it that by crossing the bridge to Gretna Green, or travelling through the Channel Tunnel, one arrives at a jurisdiction where they have never been found necessary or important?[[138]](#footnote-138)

Lord Scott acknowledged in *Kuddus v Chief Constable of Leicestershire*, that since *Rookes* here have been developments in public law, judicial review and in the availability of restitutionary damages mean the remedy ‘no longer serv[es] any useful function in our jurisprudence.’[[139]](#footnote-139) Where a defendant has behaved outrageously an award of aggravated damages will usually be available and will vindicate the law just as effectively as an award of punitive damages:

[H]ow can it be supposed that the award of exemplary damages adds anything at all to the deterrent effect of the trail judge’s finding of fact in favour of the injured person and his condemnation of the conduct in question?[[140]](#footnote-140)

There is no evidence that exemplary damages deter putative defendants from committing wrongs any more than liability in tort, compensatory (including aggravated) damages or the criminal law already do. Furthermore, there are potential downsides to such awards, such as the fact they ‘over-compensate the injured person and encourage vindictive gold-digging’,[[141]](#footnote-141) and punish defendants based upon vague criteria – ‘outrageousness’ – without giving them the same protections they have in the criminal prosecutions. In *Broome v Cassell* Lord Reid opined: ‘To allow pure punishment in this way contravenes almost every principle which has been evolved for the protection of offenders.’[[142]](#footnote-142)

McBride describes the latter as only a ‘conditional objection’[[143]](#footnote-143) to exemplary damages as we could introduce criminal law safeguards into civil trials where punitive damages are pleaded. Without evidence that punitive damages actually have a deterrent effect it is hard to see why the changes needed to make them fair to defendants is worth the effort. While the CAS was right to dispense with *Rookes*, the better approach would have been to declare that exemplary damages are superfluous and serve no useful purpose.

1. See the references in Craig Purshouse, ‘Liability for Lost Autonomy in Negligence: Undermining the Coherence of Tort Law?’ (2015) 22 TLJ 226, fn 22. More recently, see Sarah Green, *Causation in Negligence* (Hart, 2015) ch 7; José Miola, ‘Legal Commentary: Taking Autonomy Seriously? Loss of Autonomy as a Legal “Harm”’ in Stephen W Smith *et al* (Eds), *Ethical Judgments: Re-Writing Medical Law* (Hart, 2017); Tsachi Keren-Paz, ‘Compensating Injury to Autonomy: A Conceptual and Normative Analysis’ in Kit Barker, Karen Fairweather and Ross Grantham (Eds) *Private Law in the 21st Century* (Hart, 2017); Gemma Turton, *Evidential Uncertainty in Causation in Negligence* (Hart, 2015) ch 4. Not all of the above authors approve of recognising lost autonomy as actionable damage in negligence. [↑](#footnote-ref-1)
2. [2015] UKSC 11 [108] per Baroness Hale DPSC. [↑](#footnote-ref-2)
3. [2017] SGCA 20. [↑](#footnote-ref-3)
4. [2017] EWCA Civ 1028. [↑](#footnote-ref-4)
5. See *Leeds Teaching Hospitals NHS Trust v A* [2003] EWHC 29 and the commentary by Mary Ford and Derek Morgan, ‘*Leeds Teaching Hospitals NHS Trust v A* – Addressing a Misconception’ (2003) 15 Child & Fam L Q 199; *Andrews v Keltz* (2007) 838 NY S 2d 36, *A and B v A Health and Social Services Trust* [2010] NIQB108 and the commentary by Sally Sheldon, ‘Only Skin Deep? The Harm of Being Born a Different Colour to One’s Parents’ (2011) 19 Med L Rev 657 and *Cramblett v Midwest Sperm Bank* 2017 IL App (2d) 160694-U. [↑](#footnote-ref-5)
6. *ACB* (n 3) [34]. [↑](#footnote-ref-6)
7. *ACB* (n 3) [29]. [↑](#footnote-ref-7)
8. [2000] 2 AC 59. For the law prior to this case see *Emeh v Kensington and Chealsea and Westminster AHA* [1985] QB 1012. [↑](#footnote-ref-8)
9. [2002] QB 266*.* [↑](#footnote-ref-9)
10. [2004] 1 AC 309. [↑](#footnote-ref-10)
11. *McFarlane* (n 8)(Lord Millett dissenting). [↑](#footnote-ref-11)
12. Ibid (Lord Millett and Lord Clyde dissenting). [↑](#footnote-ref-12)
13. Ibid. This was reaffirmed in *Rees* (n 10). [↑](#footnote-ref-13)
14. *Parkinson* (n 9). [↑](#footnote-ref-14)
15. *Rees* (n 10) (Lord Steyn, Lord Hope and Lord Hutton dissenting). [↑](#footnote-ref-15)
16. Ibid [123] per Lord Millett. [↑](#footnote-ref-16)
17. [2003] HCA 38. [↑](#footnote-ref-17)
18. *ACB* (n 3) [30] per Phang JA. [↑](#footnote-ref-18)
19. Ibid [29]. [↑](#footnote-ref-19)
20. Ibid. [↑](#footnote-ref-20)
21. Ibid. [↑](#footnote-ref-21)
22. See *Rand v East Dorset HA* [2001] Lloy’d Rep Med 181, *Lee v Taunton & Somerset NHS Trust* [2001] 1 FLR 419 and *Farraj v King’s Healthcare Trust and Cytogenetic Data Services* [2008] EWHC 2468. [↑](#footnote-ref-22)
23. *ACB* (n 3) [30] per Phang JA. [↑](#footnote-ref-23)
24. Ibid. [↑](#footnote-ref-24)
25. Ibid [34]. [↑](#footnote-ref-25)
26. Ibid [24] [↑](#footnote-ref-26)
27. Ibid [90] [↑](#footnote-ref-27)
28. Ibid [93] [↑](#footnote-ref-28)
29. Ibid. [↑](#footnote-ref-29)
30. Ibid [95]. [↑](#footnote-ref-30)
31. Ibid. [↑](#footnote-ref-31)
32. Ibid [98]. This was also the view expressed in *Rees*(n 10) [134] per Lord Scott. [↑](#footnote-ref-32)
33. Ibid [99]. [↑](#footnote-ref-33)
34. Ibid. [↑](#footnote-ref-34)
35. Some highlights: Laura Hoyano, ‘Misconceptions about Wrongful Conception’ (2002) 65 MLR 883, JK Mason, ‘Wrongful Pregnancy, Wrongful Birth and Wrongful Terminology’ (2002) 6 Edin LR 46, Peter Cane, ‘Another Failed Sterilisation’ (2004) 120 LQR 189; Stephen Todd, ‘Wrongful Conception, Wrongful Birth and Wrongful Life’ (2005) 27 Sydney L Rev 525, Nicolette Priaulx, *The Harm Paradox* (Routledge-Cavendish, 2007) and Victoria Chico, *Genomic Negligence* (Routledge-Cavendish, 2011). [↑](#footnote-ref-35)
36. *ACB* (n 3) [106]. [↑](#footnote-ref-36)
37. Ibid [108]. [↑](#footnote-ref-37)
38. Ibid [115]. [↑](#footnote-ref-38)
39. *Shaw* (n 4) [35] per Davis LJ. [↑](#footnote-ref-39)
40. Ibid [4]. [↑](#footnote-ref-40)
41. Ibid [48]. [↑](#footnote-ref-41)
42. Ibid. The EWCA’s reasons were not particularly convincing – *obiter* *dicta* in some cases that information disclosure should be pleaded in negligence rather than battery apparently ruled out the creation of a new tort even though that was not the issue being discussed in those cases – but they need not detain us here. [↑](#footnote-ref-42)
43. *Sidaway v* *Board of Governors of the Bethlem Royal Hospital* [1985] AC 871, 883 per Lord Scarman. [↑](#footnote-ref-43)
44. See *McLoughlin v O’Brian* [1983] 1 AC 410, 432 per Lord Bridge. [↑](#footnote-ref-44)
45. See *Malcolm v Broadhurst* [1970] 3 All ER 508. [↑](#footnote-ref-45)
46. *Shaw* (n 4) [71]. [↑](#footnote-ref-46)
47. Ibidat [61] and [64]-[65]. [↑](#footnote-ref-47)
48. Ibid [79]. [↑](#footnote-ref-48)
49. Ibid. [↑](#footnote-ref-49)
50. *Rees* (n 10) [9] per Lord Bingham. [↑](#footnote-ref-50)
51. *Shaw* (n 4) [80]. [↑](#footnote-ref-51)
52. Ibid [81]. [↑](#footnote-ref-52)
53. Ibid [67]. [↑](#footnote-ref-53)
54. Ibid [68]. [↑](#footnote-ref-54)
55. Ibid [70]. [↑](#footnote-ref-55)
56. Ibid [71]. [↑](#footnote-ref-56)
57. Ibid [73] [↑](#footnote-ref-57)
58. Ibid. [↑](#footnote-ref-58)
59. (1880) 5 App Cas 25. [↑](#footnote-ref-59)
60. Ibid, 39. [↑](#footnote-ref-60)
61. *Lim Poh Choo v Camden and Islington AHA* [1980] AC 174, 189 per Lord Scarman [↑](#footnote-ref-61)
62. *H West & Son Ltd v Shepherd* [1964] AC 326, 346 per Lord Morris. [↑](#footnote-ref-62)
63. Peter Cane, *Atiyah’s Accidents, Compensation and the Law* 8th Edn (CUP, 2013) 161. [↑](#footnote-ref-63)
64. *Shaw* (n 4) [81]. [↑](#footnote-ref-64)
65. Ibid [82]. [↑](#footnote-ref-65)
66. Ibid. [↑](#footnote-ref-66)
67. *ACB* (n 3) at [115]. [↑](#footnote-ref-67)
68. Søren Holm, ‘Autonomy’ in Ruth Chadwick (Ed), *Encyclopedia of Applied Ethics Volume 1* (Academic Press, 1998) 269. [↑](#footnote-ref-68)
69. The terminology used for the first three accounts is derived from an article by John Coggon, ‘Varied and Principled Understandings of Autonomy in English Law: Justifiable Inconsistency or Blinkered Moralism?’ (2007) 15 Health Care Analysis 234, 240. [↑](#footnote-ref-69)
70. *ACB* (n 3) [116]. [↑](#footnote-ref-70)
71. John Stuart Mill, ‘On Liberty’ in John Gray (Ed), *On Liberty and Other Essays* (Oxford University Press, 1991) 14 [↑](#footnote-ref-71)
72. Coggon (n 69) 240 [↑](#footnote-ref-72)
73. See also Jonathan Glover, *Causing Death and Saving Lives* (Penguin, 1977) 77. [↑](#footnote-ref-73)
74. *ACB* (n 3) [116]. [↑](#footnote-ref-74)
75. Ibid at [117]. See also Coggon (n 69), Harry Frankfurt, ‘Freedom of the Will and the Concept of a Person’ (1971) 68 J Phil 5 and Gerald Dworkin, ‘Autonomy and Behaviour Control’ (1976) 6 The Hastings Centre Report 23. [↑](#footnote-ref-75)
76. See Jennifer Nedelsky, ‘Reconceiving Autonomy: Sources, Thoughts and Possibilities’ (1989) 1 Yale J Law Feminism 7; Catriona Mackenzie and Natalie Stoljar (Eds), *Relational Autonomy: Feminist Perspectives on Autonomy, Agency, and the Social Self* (Oxford: Oxford University Press, 2000) and Antony Blackburn-Starza, ‘Compensating Reproductive Harms in the Regulation of Twenty-First Century Assisted Conception’ in Kirsty Horsey (Ed), *Revisiting the Regulation of Human Fertilisation and Embryology* (Routledge, 2015). [↑](#footnote-ref-76)
77. *ACB* (n 3) [118]. [↑](#footnote-ref-77)
78. John Christman, ‘Autonomy in Moral and Political Philosophy’ in E.N. Zalta (Ed) *The Stanford*

    *Encyclopedia of Philosophy* (Spring 2011 Edition) <http://plato.stanford.edu/archives/spr2011/entries/autonomy-moral/> [↑](#footnote-ref-78)
79. *ACB* (n 3) [119]. [↑](#footnote-ref-79)
80. Ibid. [↑](#footnote-ref-80)
81. Ibid. [↑](#footnote-ref-81)
82. Ibid. [↑](#footnote-ref-82)
83. Ibid [116]. [↑](#footnote-ref-83)
84. *(Adult: Refusal of Treatment)* [1993] Fam 95. [↑](#footnote-ref-84)
85. Ibid, 112. [↑](#footnote-ref-85)
86. See Craig Purshouse, ‘How should lost autonomy be defined in medical negligence cases?’ (2015) 10 Clinical Ethics 107. [↑](#footnote-ref-86)
87. See *Yearworth v North Bristol NHS Trust* [2009] EWCA Civ 37. [↑](#footnote-ref-87)
88. Lorna Fox O’Mahony ‘Property Outsiders and the Hidden Politics of Doctrinalism’ (2014) 62 CLP 409. [↑](#footnote-ref-88)
89. *ACB* (n 3) [115]. I first put forward this argument in ‘Liability for Lost Autonomy in Negligence’ (n 1), 237. I should point out that Tsachi Keren-Paz has challenged my arguments (n 1). I intend to respond to these arguments in future work. [↑](#footnote-ref-89)
90. Purshouse, ibid, 237-240. [↑](#footnote-ref-90)
91. *ACB* (n 3) [120]. [↑](#footnote-ref-91)
92. See Purshouse (n 1) 237-240. [↑](#footnote-ref-92)
93. Ibid. [↑](#footnote-ref-93)
94. Ibid. [↑](#footnote-ref-94)
95. *ACB* (n 3) [120]. [↑](#footnote-ref-95)
96. Ibid [115]. [↑](#footnote-ref-96)
97. Ibid [123] [↑](#footnote-ref-97)
98. [2007] UKHL 39 [↑](#footnote-ref-98)
99. *ACB* (n 3) [123]. [↑](#footnote-ref-99)
100. See Purshouse, ‘Liability for Lost Autonomy’ (n 3), 242-248. [↑](#footnote-ref-100)
101. On this issue the Court was influenced by Fred Norton’s article ‘Assisted Reproduction and the Frustration of Genetic Affinity: Interest, Injury, and Damages’ (1999) 74 NYU L Rev 793. [↑](#footnote-ref-101)
102. *ACB* (n 3) [129]. [↑](#footnote-ref-102)
103. Ibid. [↑](#footnote-ref-103)
104. Ibid. [↑](#footnote-ref-104)
105. Ibid [130]. [↑](#footnote-ref-105)
106. Ibid [128]. [↑](#footnote-ref-106)
107. Ibid [129]. [↑](#footnote-ref-107)
108. Ibid. [↑](#footnote-ref-108)
109. Human Fertilisation and Embryology Act 2008, s 33. [↑](#footnote-ref-109)
110. Ibid, s 38 and Human Fertilisation and Embryology Act 1990, s 28. [↑](#footnote-ref-110)
111. See Donal Nolan, ‘New Forms of Damage in Negligence’ (2007) 70 MLR 59, 73-80. [↑](#footnote-ref-111)
112. *ACB* (n 3) [139]. [↑](#footnote-ref-112)
113. Ibid [141] [↑](#footnote-ref-113)
114. Ibid [143] [↑](#footnote-ref-114)
115. Ibid [147] [↑](#footnote-ref-115)
116. Ibid. [↑](#footnote-ref-116)
117. Ibid [148]. [↑](#footnote-ref-117)
118. Ibid [150]. [↑](#footnote-ref-118)
119. Ibid. [↑](#footnote-ref-119)
120. Laura Hoyano, ‘*McFarlane v Tayside Health Board* and *Cattanach v Melchior*’ in Jonathan Herring and Jesse Wall (Eds), *Landmark Cases in Medical Law* (Hart, 2015) 201 has said that the judges in *McFarlane* and the dissenting justices in *Cattanach* might have been influenced by the fact that in both cases a healthy child was accepted into an ordinary loving family that could meet the additional burdens from their own resources. She asks, ‘Is *McFarlane* an exemplar of easy facts making bad law?’ [↑](#footnote-ref-120)
121. *Rookes v* Barnard [1964] AC 1129, 1121 per Lord Devlin. [↑](#footnote-ref-121)
122. *Broome v Cassell & Co Ltd* [1972] AC 1027, 1073 per Lord Hailsham LC. [↑](#footnote-ref-122)
123. *A v Bottrill* [2003] 1 AC 449 [41] per Lord Nicholls. [↑](#footnote-ref-123)
124. *Rookes* (n 121), 1126 per Lord Devlin [↑](#footnote-ref-124)
125. Ibid. [↑](#footnote-ref-125)
126. *Kuddus v Chief Constable of Leicestershire* [2002] 2 AC 122 [152] per Lord Nicholls. [↑](#footnote-ref-126)
127. See *Uren v John Fairfax & Sons Pty Ltd* [1966] HCA 40 (Australia), *Taylor v Beere* [1982] 1 NZLR 81 (New Zealand) and *Paragon Properties Ltd v Magna Envestments Ltd* (1972) 24 DLR (3d) 156 (Canada). [↑](#footnote-ref-127)
128. See *Kuddus* (n 126) [66] per Lord Nicholls. [↑](#footnote-ref-128)
129. *ACB* (n 3) [176]. [↑](#footnote-ref-129)
130. Ibid [187]. [↑](#footnote-ref-130)
131. Ibid. [↑](#footnote-ref-131)
132. Ibid [202]. [↑](#footnote-ref-132)
133. Ibid [208]. In this regard the Singapore Court of Appeal followed the Privy Council decision of *Bottrill* (n 123) where the majority held that punitive damages should be available for negligence in New Zealand. [↑](#footnote-ref-133)
134. James Goudkamp, ‘Exemplary Damages’ in Graham Virgo and Sarah Worthington (Eds), *Commercial Remedies: Resolving Controversies* (CUP, 2017) 340. [↑](#footnote-ref-134)
135. Harvey McGregor (Ed), *McGregor on Damages* 19th Edn (Sweet and Maxwell, 2009) [13-001]. [↑](#footnote-ref-135)
136. Nicholas McBride, ‘Punitive Damages’ in Peter Birks (Ed), *Wrongs and Remedies in the Twenty-First Century* (OUP, 1996) 193. [↑](#footnote-ref-136)
137. A notion easily refuted by a glance at the case law on police negligence. SeeCraig Purshouse, ‘Arrested Development: Police Negligence and the *Caparo* “Test” for Duty of Care’ (2016) 23 TLJ 17-18. [↑](#footnote-ref-137)
138. Andrew Burrows, ‘Reforming Exemplary Damages’ in Peter Birks (Ed), *Wrongs and Remedies in the Twenty-First Century* (OUP, 1996) 157. [↑](#footnote-ref-138)
139. *Kuddus* (n 126) [121]. [↑](#footnote-ref-139)
140. Ibid at [108]. [↑](#footnote-ref-140)
141. *Atiyah* (n 63) 173. [↑](#footnote-ref-141)
142. *Broome* (n 122) 1087. [↑](#footnote-ref-142)
143. McBride (n 136) 195. [↑](#footnote-ref-143)