

NEGLIGENCE IS NEGLIGENCE: IMPLICATIONS FOR AN EGALITARIAN AGENDA

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INTRODUCTION

Much of the work we do is shaped by a convention of presenting neat, linear argument based upon expertise and insight in a way that the present author at least, finds difficult to do as part of a conversation around 'constitutionalism of private law'. She is largely an outsider to a broader European debate in which concepts of not only 'constitutionalism' but 'private law' admit of multiple meanings, shaped by geography, political and historical context and the distinct legal cultures in which those concepts and systems have emerged. Even from a domestic perspective, the applicability of what she discusses is incredibly limited; not all of us will be speaking to the same brand of private law, and few of us can profess to cover private law as a whole. For the present author her private law is largely conceptualised as the tort of negligence, which is rather a narrow lab. Nevertheless, these caveats aside, undoubtedly there are important and interesting doctrinal question for private lawyers as to what is likely to substantially determine the outcome of disputes between private parties (fundamental rights law or private law),¹ as well as broader questions too: whether a greater convergence of human rights with private law changes much of significance in the context of private law, and indeed whether convergence is desirable.²

Whether a greater convergence of fundamental rights law and private law is desirable or not is hard to evaluate. My own approach to this is to explore its potential significance to the tort of negligence in egalitarian terms. It is worth noting that the concept of egalitarianism arises here in two ways, which quickly make apparent my stance. The first is legal egalitarianism, where one might for example encourage particular shifts in tort policy to encompass a range of previously unrecognised harms for fairness and equality before the law. The second is social egalitarianism, which takes a quite different stance in asking whether the system as a whole serves society well and advances the ideals of fairness and equality in a more general and significant way. Both lead to quite different conclusions in terms of how one views constitutionalism. From the perspective of legal egalitarianism, there is little doubt that we could welcome an approach which seems to me to have the capacity to radically challenge existing categories within the tort of negligence, and make more evident distinctions drawn by conventional negligence law which seem capricious and unfair. But from the perspective of social egalitarianism, legal egalitarianism really doesn't amount to much; given the way that the tort of

negligence operates in practice, which in itself is a pretty limited vehicle for social justice, constitutionalism of private law as it speaks to negligence, is bound to also promote the most negligible contribution to social justice.

LEGAL EGALITARIANISM: CONSTITUTIONALISING DAMAGE

To a significant degree I map the constitutionalism debate onto a line of analysis which centralises the concept of damage in the context of negligence. Admittedly, this is a narrow focus but beyond an evidenced obsession with the concept,³ my case for it is this: a focus on damage, rather than 'rights' or 'interests' in a more general sense, allows one to track more keenly the kinds of harms and injuries that the law picks up, and those that it does not, as well as the way that law expands over time to accommodate harms of a different kind. Or indeed, retracts; my initial fascination with damage as a category developed as a result of wondering why it should be that judges at the highest appellate level were prepared to change the law so as to deny parents of an unwanted but healthy child born as a result of negligence in family planning compensation relating to the maintenance costs of raising that child.⁴ From the perspective of legal egalitarianism, the rhetoric of the courts in depicting the birth of an unwanted child, for whom someone will have caring, emotional and financial responsibilities, as an inappropriate subject-matter of damage (rather, a 'joy' or a 'blessing') or as purely economic loss, struck me as highly problematic. But it also presented the concept of damage as an interesting hermeneutic for exploring a range of cases and for adjudging negligence more generally. One can ask with this concept in mind, is the law internally consistent in the harms it picks up and those it denies, what does 'damage' mean and to what extent do the lines that law draws in deciding the difference between harm/no harm, actionability or non-actionability really make sense? What justifications are given for those lines, and are they fair?

So that's the starting point for discussion. Here I'm trying to boil down quite a large thesis, so hopefully the reader will forgive what follows, for it's really crudely summarised.⁵ Elsewhere I talk about personal injury as a form of damage, and ask questions about how personal injury comes to be defined, explore how the law has defined it as it plays out in different cases, and question what overarching justification can be found for the harm/no harm boundary. The basic thrust of what I argue is that if these boundaries are justified by the practical legal need to simply draw boundaries, insofar as negligence cannot admit every harm, then we can to some degree accept that the often capricious, unfair and inegalitarian choices that the law of negligence makes about actionability is largely what makes negligence work. That is, in fact, what I think. Start pushing fairness in the door, negligence starts slipping. There are a few reasons for this; the first is that 'drawing lines' isn't much of a justification, and in cases where claimants have clearly suffered dreadful harm, 'drawing lines' presents judges with no narrative explanation to make their decisions – or indeed legal policy – sound logical, coherent, or remotely sensible. As a result, I claimed that judges guided by different considerations like fairness, equality, treating like cases alike, will deeply struggle to maintain these boundaries. Furthermore, and significant to the current contribution, constitutionalisation as a process, helps to unravel this latter process; it challenges the way that the concept of damage has been

conventionally understood by subtly changing the kinds of lens by which ideas of 'harm' come to be adjudged.

As I explore elsewhere at length, an analysis of the concept of damage allows one to see this process of gradual expansionism.⁶ In broad topological terms it looks a bit like this. We start from a position where the courts have typically taken a restrictive definition of what counts as a personal injury, so that for an actionable claim one needed to manifest physical damage – a deleterious corporeal impact. The first inroad to this this conception of damage might well include those narrowly circumscribed situations where claimants can demonstrate that a duty of care exists to protect them from purely psychological harm. Other than these, harms of a psycho-social nature, those which are not simply consequential upon physical loss, fall outside the actionability ideal. However, the second potential inroad to the orthodox conception of personal injury, and by far the most serious, I claimed was likely to come from the 'damage hybrid' suit – something that looked so analogous to a personal injury – every bit as damaging in its effects and repercussions (perhaps more so) as a physical injury, that to deny such claims would seem manifestly unfair. And they would be manifestly unfair; insights from feminist theory, from psychology, and indeed, appealing to our own intuitions about what it is that 'harms' us makes apparent how drawing a distinction between physical bodily harm and psycho-social harm cannot be justified on the grounds that the former kind of harm is more serious, more corrosive of life or more richly deserving of reparation. That would simply be fiction, but it is a fiction which some have come to believe for an incredibly long time.

As such, we should see general developments in negligence and in particular a movement away from quite sticky ideas about 'physical damage' as quite significant. Suits for wrongful conception in which the courts awarded a 'loss of autonomy' award,⁷ and claims for the careless destruction of sperm samples,⁸ are controversial illustrations of legal inventiveness where the factual variants had failed to squarely fit 'orthodox conceptions' of personal injury and damage. The success of the educational neglect claims alleging damage in the context of the failure to ameliorate dyslexia, though initially baffling the courts as to whether the damage should be typified as a mental injury sufficient to constitute a personal injury or a form of economic loss,⁹ were later accepted as claims for personal injury 'in a post-Cartesian World'.¹⁰ Even judges themselves can be artful at unwittingly pushing at the boundaries of damage. Though failing to fit what the damage concept in negligence requires, notably physical bodily harm, by a majority the House of Lords in *Rees* created a 'Conventional Award' of £15,000 that would apply to all cases of wrongful conception to reflect the loss of autonomy experienced as a result of unsolicited parenthood.¹¹ In so far as the present author saw this more as a consolation prize in the face of denying a proper remedy,¹² others see the award as representing 'a significant departure from previous categories of recognised harm' towards a more 'rights-based' conception of damage.¹³ While Nolan's reflection on such cases prompts him to suggest that the expansion of the categories of actionable damage 'should be welcomed as evidence' that courts are not privileged interests capable of precision in monetary terms over those which are not, like the intangible harms,¹⁴ that kind of conclusion seems slightly over-cooked. Nevertheless, undeniably these developments constitute a quite significant shift away from a strict conception of damage as

physical bodily harm, and towards a broader constitutionalised conception of harm that is more capable of accommodating critical aspects of our humanity.

For the doom-monger, this will surely be the opening of Pandora's Box, for in the wake of that shift, heavy intellectual challenges potentially lie before the court where lawyers will seek to capitalise upon the shifting boundaries of damage. Hybrid claims deeply challenge these demarcation lines because unlike the say, bystander claims involving purely psychological injury, these cases look very similar to the contexts in which conventional personal injury claims arise. Where the circumstances look so hair-splittingly similar, courts keen to restrict negligence will be left having to draw flawed distinctions between physical harm and psycho-social harm – a distinction, which seems impossible to do. This will be a major challenge for English law. Within the paradigm of negligence, there is no real conceptual machinery for restricting the damage concept to physical damage; from ideas of the 'seriousness' of the harm, ideas of fairness or equality, none really bears out in practice. Rather the most robust defence of drawing such (frequently capricious) lines in negligence owes more to the need to draw lines to be negligence.

Cases faring less well in the past for failing to demonstrate an obvious physical injury or satisfy the requirements of primary victim status may be repackaged for success. For example, while the action of claimants suffering distress after being trapped in a lift failed on the grounds of there being no actionable damage in *Reilly v Merseyside Regional Health Authority* (1995) 6 Med LR 246, cases involving negligent imprisonment might more convincingly run in serious instances where claimants have been deprived of their liberty, given the importance of 'freedom of movement as an interest in its own right'.¹⁵ For some, the educational neglect claims whilst only intended to apply to cases involving an undiagnosed and untreated learning disorder, constitute the starting point for a range of broader challenges;¹⁶ on compelling facts, the right to education might seem sensibly embraced within the damage concept and only a small incremental step away from *Phelps*.¹⁷ From these kinds of cases, to the reproductive torts, it is not difficult to imagine factual variants. While the Court of Appeal in *Yearworth* found that the destruction of cancer survivors' stored sperm admitted an actionable claim, the principle seems barely stretched by extending this to permit claims for the wrong embryo being implanted, and indeed to all the claimants thereby affected.¹⁸ It is just one small step. These and even farther reaching claims such as sex ratio skewing of an entire community as a result of environmental pollution,¹⁹ suggest that a broader conception of damage at least sends out a wider invitation to 'have a go'. Meantime, the pressure for negligence law to adopt a more generous approach to the highly restricted purely psychological damage-via-shock cases, continues unabated.²⁰ The point however is this; the greater recognition of the hybrid claim and shift away from an admittedly capricious notion of damage changes the legal landscape. The moment that the courts discern a greater inquisitiveness into the psycho-social aspects of these cases, the line between deserving and undeserving cases will fall away. So much of what it means to be injured and harmed is located at psycho-social level. As such, some well-meaning commentators might argue, the appropriate response to this incoherence and unfairness would be for the law to expand so as to encompass them.

SOCIAL EGALITARIANISM: NEGLIGENCE IS NEGLIGENCE

How might one view these developments? From the perspective of legal egalitarianism such developments look entirely promising. If one seeks to use private law as a strategic vehicle for egalitarian ends, expansionism appears like a positive development; indeed, the inclusion of purely psychological damage as a recognised form of damage was vociferously argued for by feminist commentators who rationalised that this kind of harm was one more often experienced by women, as women. The shift away from the ‘physical hook’ ideal for actionability opens up possibilities for embracing a range of harms which fairness, equality and treating like cases alike seems to demand. Nevertheless, there are those, like David Nolan who concerned with the constitutionalisation of negligence law, have noted its capacity to expand categories like damage in ways that will render negligence incoherent. Pointing to the disparities between ‘Convention legal order’ and the domestic law of negligence, Nolan notes that forms of harm which would not be actionable in English law, such as ‘distress, anxiety, inconvenience and feelings of injustice, helplessness or humiliation’ come to be compensable by virtue of standing as a human rights violation.²¹

In one respect, the present author is slightly sympathetic to Nolan’s concerns. This is not, to be clear justified by ‘coherence’ worship however; given a choice between coherent capriciousness and incoherent legal logic which values fairness and equality, my preference is for the latter. We often value logic more than we ought, and most forms of logic can look illogical depending on what one’s overarching logic is. Rather my concern is slightly different, for I wonder what brand of fairness is being served up through negligence. This is the social egalitarian view. Given the variety of situations that have arisen thus far, from frustrated reproductive plans, to deprivations of liberty, it is difficult to conceptualise a sensible ‘end game’ position here, for two reasons. Firstly, while the courts are open to criticism for their heavily reliance upon the floodgates argument in the context of purely psychological damage – which appears speculative in the absence of evidence or a comparative analysis of jurisdictions who seem far less troubled by the prospect of broader liability in the context of occasional but avoidable catastrophe as to discount it – the hybrid claims, much aided by an increasingly constitutionalised form of damage, nevertheless do seem to raise different considerations. The circumstances which shape them are amorphous, unlimited and could arise in virtually in any sphere of normal, daily life. For those that would point to the capability of other essential ingredients of negligence concepts to fend off the floodgates to manage a more fluid damage concept, this appears fairly myopic given the extent to which all the concepts of negligence are conceptually linked and quite critically, informed by the damage sustained. As such a loosening of the damage concept beyond physical harms alone may achieve little, or too much, as to constitute a significant if not irreparable breach in the sea-wall. Arguably, arbitrariness in determining which kinds of damage should be the subject-matter of redress may be the thing that sustains the negligence tort itself.

However, given that the present author is not much of an advocate for negligence, her second concern as to ‘end game’ is by far the most important, for what is questionable is what might be gained by extending negligence to accommodate broader harms in the sense of what precisely that

can do for humanity. For the author, working on the reproductive torts cases and seeing evident gender injustice within the law, the law struck her as an instrument for equality in a way she now thinks was misguided and based on a romanticised Erin Brockovich portrayal of tortious justice. A striking feature of the debates as to how negligence might advance particular sections of society is how disconnected these are from what constitute pretty fundamental weaknesses attending the torts system. Though there are compelling moral and legal grounds for extending negligence, many of the ‘advances’ we perceive ourselves as making within the law start to look somewhat partial when situated in their broader social context. Take for example the efforts of scholars to extend the law of tort to recognise traditionally excluded forms of injuries in the name of ‘equality’²² – this really boils down to ‘equality’ within tort. Tort law abiding by the principle of equality in the sense of drawing no formal distinctions between individuals on the pure grounds of gender, race or ability, must surely be viewed as significant – at least, gains for those that come before the law. But that is legal egalitarianism, which is really quite minor indeed. Beyond aspirations for equality within negligence, the overall social accomplishment will be a great deal harder to make out.

For some, this will read as traditional Ayitah – but Atiyah’s concerns are every bit as valid now, as they were in his heyday. If one takes into account the fact that tort reaches a rather small (and privileged) community of injured beneficiaries, that many injuries are sustained without fault and in ways that tort simply doesn’t capture,²³ that many claims are settled and never reach court, that much of negligence is really chasing insurance so that compulsorily insured areas make up the vast bulk of claims (e.g. RTA and work accidents) which in turn are addressed in a highly institutionalised and routine fashion (rather than through the ‘court’ ideal),²⁴ and that our response to injury is financial compensation, equality gains start to look far less impressive outside of tort. The vast majority of tort claimants sustain only minor injury;²⁵ and where road traffic accidents are concerned, seventy per cent of the injuries are attributable to whiplash effects. That is not to say that minor injuries or even whiplash should not be considered compensable items, but merely to note that the idea that torts addresses serious injuries, compensates claimants who suffer catastrophic effects is the stuff of fairy tales. Rather these categories of injury and injured in the context of the work of torts as a whole are very unusual indeed. Rather as Lewis and Morris note,

‘it is these minor injury cases which account for the extraordinarily high costs of the system compared to the damages it pays out. But the essential point to note here is that the image of the tort system as caring for the immediate financial needs of mostly severely injured people in society is far from the reality’.²⁶

The point is this: we have been so concerned with making gains within the law that we have neglected to address the system as a whole. The gains made within the system may serve largely rhetorical ends because of the way that negligence really works. And it does not look like a system driven by some higher purpose, directed towards the social good. It looks like a system which is highly institutionalised, run by multiple actors, with different purposes, intentions and interpretations of what negligence serves. The bigger picture suggests that if negligence is the sum of its parts, its purpose really ends up looking like being negligence.

For those committed to using the legal project as an instrument for achieving equality this poses a sizeable dilemma. Extending the negligence to embrace the kinds of experiences which profoundly harm us may be a laudable aim in theory, but in practice, we are only reaching a limited and privileged range of beneficiaries, in a highly limited way. Hybrid claims, I think, strongly compel some reflection as to how we respond to harm, and the limits of our current approach. Though the arguments that financial compensation is not commensurable with harms of an intangible nature and cannot 'restore' tend to be commercially motivated and consciously designed to encourage policy-makers to cap or abolish such awards,²⁷ there is nevertheless something in the claims. There is no doubt that the hybrid cases looked at here can resonate in economic loss, however, like physical harms, most will also possess a significant intangible component too. We would do well to consider whether financial compensation might be a rather lazy and impoverished means of providing account to victims for the non-economic consequences of injury whether stemming from physical injury or indeed, 'messed up lives'. Either way, it looks like something less than genuine account for the losses victims do sustain, or indeed something out of kilter with what we expect most tort victims sustain. A broader analysis raises questions about even the most foundational aspects of the negligence ideal – notably those harms accepted unproblematically as damage; physical damage may seem to connote the presence of 'obvious' and 'evident' injury, so that we can assume that serious effects flow from it, yet this too can be brought into question given the prevalence of minor physical injuries. An analysis of this raises questions that go to the heart of the reparative ideal itself. None of this is to say that no advances have been achieved through, for example, feminist legal activism in extending torts to embrace broader harms, but simply that our efforts may achieve diminishing returns within tort. We might have become a little too addicted to "bolting on" new forms of harm because this seems like the right thing to do, or the legal thing to do, but possibly to the neglect of other tasks which will be every bit as important for achieving equality for all: checking to see whether the foundations upon which we build are solid.

CONCLUSION

None of this is to say that constitutionalism does not shift the substantive or procedural boundaries of the private law dispute. Whether typified by a direct application of fundamental rights or the more subtle incremental embrace of human rights as would seem to be the case in English law, constitutionalism certainly offers new opportunities to push the boundaries of the kind of 'justice' that negligence delivers. It may more quickly reveal the capricious boundaries between what is adjudged actionable and what is not, that continue to inhabit the substantive law of negligence, and in turn, make it harder for the domestic courts to resist incremental expansionism. As such, constitutionalism of private law may be significant from a legal egalitarian perspective. However, in a broader context, it does not seem so significant. Because the concept of justice within negligence is necessarily bounded, the purposes that negligence serves are individuated and fragmented, dictated by the individual use value in the context of a system driven by conservative incremental logic, constitutionalisation may provide a different peg upon which individual users can attach their claims to encourage incremental expansion – but that expansion heralds little in terms of social justice. Constitutionalism cannot in the broader sense shift negligence towards the attainment of social

egalitarian ideals. Only on the narrowest construction of egalitarianism, one that is founded upon a romantic version of what social purpose negligence serves, can negligence be interpreted as serving such ends – for at the end of it all negligence remains negligence.

1 Olha Cherednychenko, 'Fundamental rights and private law: A relationship of subordination or complementarity?', *Utrecht Law Review*, 3 (2007), 1-25.

2 David Nolan, 'Negligence and Human Rights Law: The Case for Separate Development', *Modern Law Review*, 76 (2013), 286–318.

3 See for example, Nicky Priaulx, *The Harm Paradox* (London: Routledge Cavendish Publishing, 2007).

4 *McFarlane v Tayside Health Board* [2000] 2 AC 59.

5 Nicky Priaulx, 'Endgame: on negligence and reparation for harm', in *Feminist Perspectives on Tort Law* (Abingdon: Routledge, 2012), pp. 35-54.

6 Priaulx, above note 5.

7 See, *McFarlane* above, 5; *Rees v Darlington Memorial Hospital NHS Trust* [2003] UKHL 52.

8 *Yearworth and others v North Bristol NHS Trust* [2009] EWCA Civ 37.

9 *Phelps v London Borough of Hillingdon* [2001] 2 AC 619.

10 Per Lord Hoffmann in *Adams v Bracknell* [2004] UKHL 29, [10].

11 Above n 7.

12 Priaulx, above n 3.

13 D Nolan, 'New Forms of Damage in Negligence' (2007) 70 *Modern Law Review* 59, 71.

14 *Ibid*, 87.

15 Nolan, above n 13, 63.

16 N Harris, 'Liability under education law in the UK – How much further can it go?' (2000) 4 *European Journal for Education Law and Policy* 131.

17 Above n 9.

18 Above n 8.

19 D Scott, 'Injuries without Remedies: Body Polluted: Questions of Scale, Gender and Remedy' (2010) 44 Loyola of Los Angeles Law Review 121.

20 Teff Harvey, *Causing Psychiatric and Emotional Harm: Reshaping the Boundaries of Legal Liability* (Oxford: Hart Publishing, 2009).

21 Nolan, above note 2, p. 309.

22. See for example, Martha Chamallas and Jennifer Wriggins, *The Measure of Injury: Race, Gender and Tort law* (2010), in which the authors explore the doctrinal, practical and structural obstacles to gender and race equality, and advocate reforms that will extend tort law's protection to disadvantaged categories of person.

23 Most accidents are, as Lewis and Morris note, suffered in the home, or in leisure activities or sport, yet few become the subject of a damages award. From an estimate of 7.8 million accidents occurring in the home, only 0.5 of these formed the potential for a successful tort claim (Richard Lewis and Annette Morris, 'Tort Law Culture: Image and Reality', *Journal of Law and Society*, 39 (2012), 562-92).

24 Ibid.

25 See for example, Richard Lewis, 'The Politics and Economics of Tort Law: Judicially Imposed Periodical Payments of Damages' (2006) 69 *Modern Law Review* 418.

26 Lewis and Morris, above note 23.

27 R M Janutis, 'Struggle over Tort Reform and the Overlooked Legacy of the Progressives' (2006) 39 *Akron Law Review* 943.