

## **HUMANISING NEGLIGENCE: DAMAGED BODIES, BIOGRAPHICAL LIVES AND THE LIMITS OF LAW**

### ABSTRACT

The central query of this article is the extent to which the law of negligence should expand to better accommodate our human experience of personal harm and injury. As the following discussion explores in the context of human harms, negligence illustrates a continued preference for physical bodily harm in determinations of actionability. In the face of an emerging set of ‘hybrid’ claims which present hair-splitting scenarios, in having the look and feel of a conventional personal injury case but lacking the physical bodily damage strictly demanded, what is becoming increasingly apparent is the absence of a robust normative justification to guide the courts as to what, for the purposes of negligence, should count as actionable harm and what should not. The author argues that an analysis of the tensions around this issue reveals a pressing need to return to far more foundational questions around negligence and the role it plays for society. Providing an illustration of what this foundational approach might consist of, the author questions one of the most significant pillars of the reparative ideal in negligence: that physical bodily harm is experienced as universally and especially harmful and causative of serious loss. Viewing the assumptions which inform this ideal with the benefit of insights from behavioural science and litigation practice not only raises serious questions which go to the core of what negligence *is*, but ultimately raises doubts as to the potential of negligence to *ever* operate as an egalitarian system.

### I INTRODUCTION

**T**he central query of this article is the extent to which the law of negligence should expand to better accommodate our human experience of personal harm and injury. It is well recognised that the law of negligence falls far short of offering universal coverage in responding to harm. As Conaghan and Mansell note, ‘[w]hile some kinds of harms are easily assimilated within the traditional corpus of law, others do not lend themselves so easily to tortious characterisation’.<sup>1</sup> In social life, while it may seem obvious that a serious harm has been sustained, in negligence some claims quickly fall between the floorboards. This may be owing to the absence of fault, or the inability to show a causal link. However, of interest here are those kinds of harms which negligence struggles to

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\* Reader, Director of the Cardiff Centre for Ethics, Law & Society, Cardiff Law School, Cardiff University.

admit, and those which it treats as thoroughly unproblematic. As the following discussion explores in the context of human harms, negligence illustrates a continued preference for physical bodily harm in determinations of actionability. Only on rare occasions does the damage concept acknowledge harms which flow from anything other than a physical bodily injury. On one hand, this seems to accord with commonsense given that many of us might think of a physical injury such as a fractured skull as evidently harmful. But where the *preference* for physical bodily harms in negligence operates perniciously is by virtue of what is generally excluded: harms, which though often just as serious and potentially corrosive of life, fail to manifest themselves principally through the physical body, but rather admit of a psycho-social nature.

That the damage concept operates so exclusively has attracted an extensive critical commentary across several decades. While negligence has been subject to widespread criticism for being unprincipled, inegalitarian and capricious, as well as embracing archaic views of humanity which smack of unreality, on the specific question of what harms negligence picks up (or does not), the concentration of literature comes not from mainstream torts theory, but feminist legal scholarship.<sup>2</sup> For some, it may be that questions of harm or damage were viewed as more derivative issues as to how negligence generally operates and the interests it generally protects,<sup>3</sup> but in feminist quarters, such questions have been central. Attention to what kinds of harms negligence embraces tells us much about the general operation of law, and in particular, to whom negligence speaks and whose interests it protects. Insofar as negligence has operated to *generally* exclude harms of a psycho-social character (an exclusion which in terms of formal equality applies to all), once we scratch below the formal surface of that policy, we find a less than universal impact or distribution. For example, an analysis of the damage concept illustrates a long-standing neglect of harms which women suffer as women. Tort law, as Conaghan argues, ‘while quick to defend and protect interests traditionally valued by men, is slow to respond to concerns which typically involve women, for example, sexual harassment or sexual abuse.’<sup>4</sup> In this respect then, if the aim is for a fair system, any reform agenda will need to pay close attention to the general and the particular operation of legal policy.

How negligence should develop to address these weighty concerns presents an enormous jurisprudential challenge. Negligence cannot accommodate all ‘harms’ so a choice must be made as to which are accommodated. As this article seeks to demonstrate, using case law developments in the UK as an example of a broader

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<sup>2</sup> See, eg, Martha Chamallas and Linda K Kerber, ‘Women, Mothers and the Law of Fright: A History’ (1990) 88 *Michigan Law Review* 814; Regina Graycar, ‘Damaged Awards: The Vicissitudes of Life as a Woman’ (1995) 3 *Torts Law Journal* 1; Regina Graycar and Jenny Morgan, *The Hidden Gender of Law* (Federation Press, 2<sup>nd</sup> ed, 2002).

<sup>3</sup> See, eg, William Lucy, *Philosophy of Private Law* (Oxford University Press, 2007) 223.

<sup>4</sup> Joanne Conaghan, ‘Gendered Harms and the Law of Tort: Remediating (Sexual) Harassment’ (1996) 16 *Oxford Journal of Legal Studies* 407, 408.

phenomena, there is a real need for us to scrutinise far more deeply than we have before what kinds of injuries our legal frameworks address, and in particular, why. In light of an emerging set of claims which present hair-splitting scenarios, in having the look and feel of a conventional personal injury case but lacking the physical bodily damage strictly demanded, what is becoming increasingly apparent is the absence of a robust normative justification to guide the courts as to where those lines should be drawn. Commentators are also divided on the question of line-drawing and generally fall into two broad camps. The first consists of those who advocate that negligence *extends* to accommodate broader harms, these being every bit as real and harmful as physical ones. By contrast, the second camp consists of those who argue that the boundaries of negligence should be preserved by *restricting* its remit to address only the repercussions of physical bodily harms — irrespective of whether that produces arbitrary and unfair results, negligence must have limits. These two positions leave us with quite a stark choice — between incrementally bolting on new forms of harm to existing kinds of damage recognised, or restricting it to a narrow range of harms which fail to speak to the experiences and life dialogues of many which tort ought to speak to.

Neither position presents a genuine solution once we consider the broader operation of negligence law. What both positions overlook are quite foundational questions concerning how negligence operates in practice, and the thorny question as to what we hope to achieve through providing reparation for harm via negligence. This is the ‘endgame’ question which I suggest that we now need to address: why do we provide redress at all? It is now critical that reformers return to ask foundational questions of torts and to more closely scrutinise taken-for-granted ideas that have shaped not only the damage concept but the reparative ideal itself. To illustrate the kind of foundational thinking the author has in mind, the focus here is upon what she regards as constituting the most critical but under-theorised pillar of negligence: physical bodily harm. The issue here is *not* the extent to which psycho-social harms have suffered comparative neglect within negligence, for there is already a rich and extensive literature addressing such themes. Rather, here I aim for a fresh approach. In this respect, this article seeks to critically explore the ‘common sense’ behind the taken-for-granted notion that physical bodily harm is experienced as universally and especially harmful and causative of serious loss. Embracing insights from behavioural science and litigation practice to inform this analysis not only raises serious questions which go to the core of what negligence *is*, but ultimately raises doubts as to the potential of negligence to *ever* operate as an egalitarian system.

## II CHALLENGING THE PREFERENCE FOR CORPOREAL HARM

In the law of negligence, ‘damage’ holds a central role and is said to form the ‘gist of the action.’<sup>5</sup> Therefore, a claimant will not only need to establish a duty of care, a breach of that duty, and that the breach has caused the damage complained of — she must also show that the type of harm she has suffered is one that is accepted by the law as ‘actionable’. Though the concept of ‘damage’ is poorly defined in negligence, the suffering of a ‘plain and obvious physical injury’ presents no

<sup>5</sup> Jane Stapleton, ‘The Gist of Negligence’ (1988) 104 *Law Quarterly Review* 213, 213.

problem.<sup>6</sup> Therefore, gastroenteritis suffered through swallowing parts of a snail in a bottle of ginger beer or cancer or lung diseases suffered through exposure to asbestos in the workplace, will most certainly constitute physical harms for the purposes of negligence.<sup>7</sup> Beyond these so-called ‘obvious’ injuries things become more complex. As defined in English law under s 38(1) of the *Limitation Act 1980* (UK), ‘personal injury’ ‘includes any disease and any impairment of a person’s physical or mental condition’. Yet while that definition of personal injury seems to allow for a more expansive reading in also addressing mental harms, in terms of what kind of injury may trigger an actionable claim in negligence, it is well known that emotional harm, which falls short of psychiatric illness (such as mere anxiety, inconvenience or discomfort) is never actionable, while a medically verified psychiatric illness is only actionable under limited circumstances.<sup>8</sup> As such, the concept of damage as it relates to human harm, constitutes a remarkably narrow category; as Lord Hoffmann noted in *Rothwell v Chemical and Insulating Co Ltd*:

Damage in this sense is an abstract concept of *being worse off*, physically or economically, so that compensation is an appropriate remedy. It does not mean simply a change in physical condition, which is consistent with making one better, as in the case of a successful operation, or with being neutral, having no perceptible effect upon one’s health or capacity.<sup>9</sup>

No reference is made to emotional harm as a form of damage; such harm is treated as a category of consequential loss for which one must first establish prior physical damage. Other than the narrowly circumscribed situations where claimants can demonstrate that a duty of care exists to protect them from purely psychological harm, claimants must demonstrate the prior existence of a physical injury ‘hook’ for emotional harms to be recoverable.<sup>10</sup>

It is at this point — the boundary between actionability and non-actionability — that the operation of the damage concept becomes objectionable. It is an exclusive category that acts as the gatekeeper for financial reparation. As such, while there is no problem in saying that generally a duty of care will be owed for a more than negligible physical injury which results from a positive act of a defendant, in

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<sup>6</sup> P S Atiyah, *The Damages Lottery* (Hart Publishing, 1997) 94.

<sup>7</sup> Christian Witting, ‘Physical Damage in Negligence’ (2002) 61 *Cambridge Law Journal* 189.

<sup>8</sup> Providing damage has been established (notably, of the physical sort) negligence has no problem in addressing intangible harms, such as psychological or emotional harms as items of consequential loss for the purposes of damages. The distinction, though muddied at times, is that ‘damage’ concerns liability and is a crucial factor for an actionable claim, whereas items of consequential loss are only relevant for the assessment of damages, once liability has been established. With one exception in the field of human harms, notably the restrictive category of purely psychological damage cases which are only cognisable (and for which a duty is owed only) under highly circumscribed conditions, consequential loss cannot frame the damage itself.

<sup>9</sup> [2008] 1 AC 281, 289 [7] (emphasis added).

<sup>10</sup> Stapleton, above n 5.

relation to psycho-social harms the same cannot be said. The kind of harm matters, and insofar as the law has general anxieties about the character of psycho-social harms and holding defendants liable for these, no matter how serious or disabling the harm that results and how careless the defendant, claimants will struggle to gain reparation for their loss. While there are established instances where psychological harm is treated as damage,<sup>11</sup> the courts restrict the liability situations via the concept of duty. As such, if psychological harm is a kind of damage, it is tenaciously guarded and ring-fenced. Though conceptually capable of embracing a broader understanding of what ‘damage’ means, far beyond physical bodily trauma, the law of negligence eyes with suspicion harms which manifest themselves not as bodily abnormalities, but as psycho-social tragedies.

That the damage concept works to offer minimal recognition of harms of a purely psycho-social nature has been the subject matter of a lengthy and voluminous critique. The modern-day consensus tends to point to the absence of justification for drawing distinctions between physical harm and psycho-social harm. The thrust of commentary suggests that if one searches for a robust justification as to *why* or *how* lines can be drawn between such harms, one will struggle to find it. As Conaghan and Mansell comment, ‘physical injury is often accompanied by emotional distress while psychiatric harm is regularly exhibited through an array of physical symptoms (such as vomiting, insomnia, weight loss and other ‘stress related’ illnesses)’.<sup>12</sup> While medicine and science illustrate the ‘close and symbiotic relationship between mental and physical health’, the distinction between these categories nevertheless remains ‘deeply embedded in the doctrinal substance of negligence law’.<sup>13</sup> Much of what can be said to be deleterious about a physical state, *is* psychological and subjective. Pain, for example, while having physiological dimensions has psycho-somatic ones too; it is also a ‘social and cultural phenomenon’.<sup>14</sup>

The arbitrariness inherent in such line drawing becomes more evident once we contemplate our own subjective experience. In view of how *we* feel, the assumption that physical harm makes us especially ‘worse off’ or provides an objective means of assessing when serious harm has occurred, rather crumbles. If we consider the impact of different events that we could experience, from breaking a leg, to events which are not strictly-speaking, *physical*, such as losing a loved one, to caring for a sick and elderly parent — all of these events are mediated through persons possessing bodies with remarkably similar effects. Whilst these experiences

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<sup>11</sup> See for example the purely psychological damage claims, formerly known as ‘nervous shock’, ranging from the recognition of primary victims in cases such as *Page v Smith* [1996] AC 155, through to the more restrictive category of secondary victims as demonstrated in *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310. See further, Kirsty Horsey and Erika Rackley, *Tort Law* (Oxford University Press, 2<sup>nd</sup> ed, 2011); Harvey Teff, *Causing Psychiatric and Emotional Harm: Reshaping the Boundaries of Legal Liability* (Hart Publishing, 2009).

<sup>12</sup> Conaghan and Mansell, above n 1, 35.

<sup>13</sup> *Ibid.*

<sup>14</sup> Myriam Winance, ‘Pain, Disability and Rehabilitation Practices: A Phenomenological Perspective’ (2006) 28 *Disability and Rehabilitation* 1109, 1110.

continue they can prove to be psychologically and socially corrosive in their impact. They relate to our emotional being in the world, and our connections with, and responsibilities to others. They possess physical and emotional dimensions in so far as they can result in declines in physical and mental health, but often imperceptibly and gradually; they often entail hard work, both physically and emotionally in supporting others. Many of these can be regarded as chosen situations, but structurally they will feel unavoidable. These kinds of experiences may be part of the package of life, but for as long as they endure they keep us standing in the same spot. They can disable us. It is in this important sense that these experiences fail to differ from the experience of injuring oneself skiing in terms of the impact on our lives and interference with the things we most value. If one considers the effects of dealing with that broken leg — that one suffers pain, has to reorganise how to get around, cannot play football for the time being and must endure the hassle of frequent hospital visits, we start to see how the assumption that physical harms are different in nature from other kinds of harms, looks rather artificial indeed. On this analysis at least, if we think about the precise way that any of these events might interfere with our lives, our hopes and aspirations, when destabilising events are the product of negligence, there seems to be no sound theoretical basis for calling one set of experiences ‘life’, and another ‘injury’.

For some, however, the events which harm them may quickly be deemed ‘life’ by virtue of the line drawn between physical and psycho-social harms. For example, too often the harms that women sustain as women, have fallen into the ‘vicissitudes’ or ‘life’ category as is demonstrated by the slow recognition of mental disturbance as a legally cognisable harm, or through the scaling back of meaningful compensation for parents of unwanted children born as a result of negligence in family planning procedures.<sup>15</sup> That tort fails to ‘see’ many of the injuries that women sustain as women — of reproductivity, pregnancy, childbirth and the emotional and life capital lost through caring for a child that one had planned not to have — is deeply embedded within the analytical categories that control liability and remedies. These categories are not objective but require ‘substantive choices to be made about which claimed injuries it will remedy’.<sup>16</sup> As such, because categories such as damage reflect a choice as to which aspects of human social life should be treated as injurious, we need to be watchful as to which, and more particularly, whose social experiences it picks up. As Conaghan comments,

injury has a social as well as an individual dimension: people suffer harm not just because they are individuals but also because they are part of a particular class, group, race or gender. Moreover, their membership of that particular class, group, race or gender can significantly shape the nature and degree of the harm they sustain. The problem with law then is its failure to recognise

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<sup>15</sup> See, eg, *McFarlane v Tayside Health Board* [2000] 2 AC 59. See also Nicolette Priaulx, *The Harm Paradox: Tort Law and the Unwanted Child in an Era of Choice* (Routledge-Cavendish, 2007).

<sup>16</sup> Jethro K Lieberman, ‘The Relativity of Injury’ (1977) 7 *Philosophy and Public Affairs* 60, 63.

that social dimension. Consequently, and in the context of gendered harms, it fails to offer proper redress.<sup>17</sup>

In all of these respects then the preference for physical harm over harms of a psycho-social nature not only serves to draw lines between kinds of harm, but entire categories of victim whose biographies express harm in ways that fail to fit the dominant dialogue of negligence law. Under such circumstances, tort will behave as if the experiences which harm and injure us are simply part of the normal (rather than injured) life course. For example, it is only since the late 1970s that sexual harassment has been transformed from behaviour widely regarded as a 'harmless' part of normal human engagement to behaviour constituting sex discrimination, deserving of a legal response.<sup>18</sup> And it is important here to recognise how these analytical categories can march on for decades whilst failing to speak to the innumerable experiences of classes and populations of people to whom they officially purport to apply. In the context of emotional harms, as Chamallas and Wriggins argue, while the traditional justification was that the law was directed at protecting material interests and physical integrity, leaving emotions and relationships beyond legal protection, this 'basic demarcation line had important gender implications for compensation'<sup>19</sup> where:

losses typically suffered by men were often associated with the more highly-valued physical realm, whilst losses typically suffered by women were relegated to the lower-valued realm of the emotional or relational.<sup>20</sup>

And that privileging of physical harm over emotional harm 'persists to this day'.<sup>21</sup> As a vast body of feminist literature powerfully illustrates in making visible the manner by which law has excluded those experiences and risks which either exclusively, or more frequently pertain to the biographical experience of being a woman,<sup>22</sup> the concern for negligence law to reflect psycho-social harms is more than a wish for inclusive symbolism. The question of the kinds of harms picked up has serious repercussions in relation to which injuries, and indeed very often, *whose* injuries are addressed by tort.

The litany of problems attending the preference for physical bodily harm in negligence is not, of course, *news*. What is perhaps most surprising is that negligence *continues* to operate in this way despite long-standing and wide-spread cognisance of the serious problems attending the kinds of harms that negligence addresses and those that it does not. Judges have long recognised that harms of

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<sup>17</sup> Conaghan, above n 4, 408.

<sup>18</sup> Joanne Conaghan, 'Law, Harm and Redress: A Feminist Perspective' (2002) 22 *Legal Studies* 319.

<sup>19</sup> Martha Chamallas and Jennifer Wriggins, *The Measure of Injury: Race, Gender and Tort Law* (New York University Press, 2010) 37–8.

<sup>20</sup> *Ibid.*

<sup>21</sup> *Ibid.* 38.

<sup>22</sup> See, eg, Joanne Conaghan, above n 4; Graycar and Morgan, above n 2; Robin West, *Caring for Justice* (New York University Press, 1997).

a psycho-social nature ‘may be far more debilitating than physical harm’,<sup>23</sup> yet remain prepared to continue restricting recovery for purely psychological harm. However, an emerging genus of case, the ‘damage hybrid’, seems set to pose the most serious challenge to established boundaries of the damage concept. Such cases make even more transparent the serious shortcomings of the operation of the damage concept, and in the wake of such claims, it will be correspondingly even more difficult for the judiciary to restrict recovery in a principled way.

Arguably, claims for purely psychological damage via ‘nervous shock’ constituted the first serious assault on the damage concept in easing negligence toward admitting harms of a purely psycho-social nature. These cases demanded explicit consideration as to the limits of negligence and its receptiveness to different kinds of harms. While these cases now receive some level of recognition and have required the courts to address the assumptions underpinning the dichotomy between physical injury and harms of a psycho-social nature, these claims continue to be treated restrictively. However, what could be termed ‘damage hybrid’ cases or what Horsey and Rackley refer to as claims for ‘messed up lives’,<sup>24</sup> might well constitute the second assault. Holding strong psycho-social and practical dimensions, these hybrid claims sit somewhere in between two recognised forms of damage in negligence law: firstly, the conventional personal injury case which involves an unproblematic form of physical bodily injury, and secondly, that of the purely psychological damage via ‘nervous shock’ situation, in particular where a primary victim sustains psychiatric trauma as a result of narrowly escaping physical injury.<sup>25</sup> As the next section explores, though meeting with varying levels of success, the ‘hybrid damage’ cases have very clearly revealed the arbitrariness of and lack of principle attending the damage concept because these cases look *so much* like the conventional personal injury case in all but the specific kind of damage sustained. Moreover, and quite critically, what is particularly striking is that the courts have shown an increased willingness to depart from the idea that strictly physical bodily harm is necessary to satisfy damage. Whilst greater acceptance of such claims will be welcomed by some in starting to address the weighty criticism attending the narrow interpretation of the damage concept, for others, this will be one incremental step too far.

### III ON THE LIMITS OF LEGAL INCREMENTALISM

Under the pressure of such non-traditional claims, the views have crystallised in foreign common law jurisdictions that the negligence principle is one that requires tight and effective doctrinal control, and that society simply cannot and should not require the tort system to provide monetary compensation for every harm resulting from carelessness, not even every physical harm.<sup>26</sup>

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<sup>23</sup> *White v Chief Constable of South Yorkshire Police* [1999] 2 AC 455, 492 (Lord Steyn).

<sup>24</sup> Horsey and Rackley, above n 11, 160.

<sup>25</sup> See, eg, *Page v Smith* [1996] AC 155.

<sup>26</sup> Jane Stapleton, ‘Legal Cause: Cause-in-Fact and the Scope of Liability for Consequences’ (2001) 54 *Vanderbilt Law Review* 941, 946.



Incrementalism, where categories like damage grow in order to encompass a broader range of situations and harms which had not previously been actionable, is part and parcel of the legal enterprise. With a few peaks and troughs en route, the tort of negligence itself has emerged literally out of a case involving alleged snail remains in a bottle of ginger beer<sup>27</sup> into the ‘super-size’ tort that it is today to cover a broad range of liability situations which a century ago would have been unthinkable.<sup>28</sup> For some palates, its super-size nature is too much to stomach. Patrick Atiyah for example, complained that concepts of fault, causation and harm, the ‘very concept of negligence’, have been stretched out of all recognition in the ‘favour of injured accident victims’,<sup>29</sup> with the effect that ‘the whole system is shot through with absurdity and unreality’.<sup>30</sup> Central to Atiyah’s concern was the increased recognition of harms within negligence. He lamented that, ‘at one time damages for injury, especially personal injury, were almost entirely confined to cases where the victim suffered a plain and obvious physical injury’.<sup>31</sup> Also concerned with such expansionist tendencies is Tony Weir, who comments that, ‘it is undeniable that the progressive socialisation of harm diminishes the responsibility, indeed the autonomy, of the individual’.<sup>32</sup> For those on the other side of the fence, this talk of stretching is problematic for defending the status quo, which amounts to being content with a system of redress that treats like harms *unlike* and operates to systematically disadvantage individuals whose experiences of harm fail to fit under-socialised legal categories. As Conaghan comments,

from a feminist perspective it is difficult to see how the autonomy of women is diminished by developments which facilitate legal redress in the contexts of acts of sexual violence and abuse, raising a question as to whose autonomy Weir perceives to be threatened.<sup>33</sup>

Crudely speaking, these two sides of the debate typify the arguments around the kinds of harms that the concept of damage in negligence should accommodate and the direction that law should take. As the historical development of negligence shows in relation to the poor recognition of non-physical harms, the law would appear to reflect a strong conservative pull, but challenging times lie ahead. While it is true to say that the damage concept has been typified as the subject-matter of ‘academic neglect’,<sup>34</sup> as an analytical category, far greater interest can now be discerned in the question as to the boundaries of this concept by both academics

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<sup>27</sup> *Donoghue v Stevenson* [1932] AC 562.

<sup>28</sup> For engaging accounts of the development of negligence, see further Tony Weir, *Tort Law* (Oxford University Press, 2002); David Ibbetson, *A Historical Introduction to the Law of Obligations* (Oxford University Press, 1999).

<sup>29</sup> Atiyah, above n 6, 32.

<sup>30</sup> *Ibid* 94.

<sup>31</sup> *Ibid* 52.

<sup>32</sup> Tony Weir, *Casebook on Tort* (Sweet and Maxwell, 2000).

<sup>33</sup> Joanne Conaghan, ‘Tort Law and Feminist Critique’ (2003) 56 *Current Legal Problems* 175, 186.

<sup>34</sup> Donal Nolan, ‘New Forms of Damage in Negligence’ (2007) 70 *Modern Law Review* 59, 60.

and *critically*, lawyers. This ‘incremental urge’, notably, to expand categories of negligence in the name of equality and fairness, or indeed to line the pockets of lawyers, seems highly attractive.

The ‘damage hybrid’ looms large here. Suits for wrongful conception,<sup>35</sup> and claims for the careless destruction of sperm samples,<sup>36</sup> are certainly recent and 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,<sup>37</sup> were later accepted as claims for personal injury ‘in a post-Cartesian World’.<sup>38</sup> 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.<sup>39</sup> In so far as the present author saw this more as a consolation prize in the face of denying a proper remedy,<sup>40</sup> others see the award as representing ‘a significant departure from previous categories of recognised harm’ towards a more ‘rights-based’ conception of damage.<sup>41</sup> 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 privileging interests capable of precision in monetary terms over those which are not, such as the intangible harms,<sup>42</sup> that kind of conclusion seems slightly over-cooked. Nevertheless, these developments undeniably constitute a quite significant shift away from a strict conception of damage as physical bodily harm, and towards a broader 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, considerable intellectual challenges potentially lie before

<sup>35</sup> See *McFarlane v Tayside Health Board* [2000] 2 AC 59 (*McFarlane*); *Rees v Darlington Memorial Hospital NHS Trust* [2004] 1 AC 309 (*Rees*). See also *Cattanach v Melchior* (2003) 215 CLR 1 (*Cattanach*) decided in the High Court of Australia. Of note, there is a strong dialogue between the British and Australian treatment of these claims, which also illustrates particular differences in the jurisdictional treatment of the tort of negligence in conceptualising the harm of wrongful conception; note in particular judicial discussion of *McFarlane* in *Cattanach*, and discussion of *Cattanach* in *Rees*.

<sup>36</sup> *Yearworth v North Bristol NHS Trust* [2010] QB 1 (*Yearworth*).

<sup>37</sup> *Phelps v London Borough of Hillingdon* [2001] 2 AC 619 (*Phelps*).

<sup>38</sup> *Adams v Bracknell* [2005] 1 AC 76, 81 [10] (Lord Hoffman).

<sup>39</sup> [2004] 1 AC 309.

<sup>40</sup> Priaulx, above n 15.

<sup>41</sup> Nolan, above n 34, 71.

<sup>42</sup> *Ibid* 87.

the court where lawyers will seek to capitalise upon the shifting boundaries of damage. Hybrid claims deeply challenge these demarcation lines because unlike, for example the 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 as we have noted, seems impossible to do. This will be a major challenge for English law and the common law generally. 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’.<sup>43</sup> 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;<sup>44</sup> on compelling facts, the right to education might seem sensibly embraced within the damage concept where it is presented as only a small incremental step away from *Phelps*.<sup>45</sup> 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.<sup>46</sup> 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,<sup>47</sup> suggest that a broader conception of damage at least sends out a wider invitation to ‘have a go’. Meanwhile, the pressure for negligence law to adopt a more generous approach to the highly restricted purely psychological damage-via-shock cases, continues unabated.<sup>48</sup> 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.

What has been claimed to constitute a second assault on the damage principle, via these hybrid injuries, may turn out to be the most serious. It is questionable whether the courts have sufficient conceptual resources to cope with such cases. Their resemblance to the conventional personal injury case creates such a strong moral case for extending damage to embrace them, in revealing the arbitrariness

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<sup>43</sup> Ibid 63.

<sup>44</sup> Neville Harris, ‘Liability Under Education Law in the UK — How Much Further Can it Go?’ (2000) 4 *European Journal for Education Law and Policy* 131.

<sup>45</sup> [2001] 2 AC 619.

<sup>46</sup> [2010] QB 1.

<sup>47</sup> Dayna Nadine Scott, ‘Injuries without Remedies: Body Polluted: Questions of Scale, Gender and Remedy’ (2010) 44 *Loyola of Los Angeles Law Review* 121.

<sup>48</sup> Teff, above n 11.

of the lines currently drawn between physical and psycho-social harms. There is, arguably, no real difference that can be discerned as to the circumstances of the case, other than the (physical/non-physical) kind of the damage sustained. Yet to suggest that these individuals are *not* harmed, or that their suffering is less than that which would be sustained by virtue of a physical bodily injury seems absurd. The moment that the courts display 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.

At the same time, we should be reflective about the nature of the hybrid claim, about expansionism generally, and what this heralds for the law. 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 ‘endgame’ position here, for two reasons. First, while the courts are open to criticism for their heavy 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<sup>49</sup> — the hybrid claims nevertheless *do* seem to raise different considerations. The circumstances which shape them are amorphous, unlimited and could arise in virtually 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 seawall. Arguably, *arbitrariness* in determining which kinds of damage should be the subject matter of redress may be what sustains the negligence tort itself.

The second consideration as to ‘endgame’ is by far the most important; the real question is what might be gained by extending negligence to accommodate broader harms in the sense of what precisely that can do *for humanity*. A striking feature of the debates highlighted here 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’<sup>50</sup> — this really boils down to ‘equality’

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<sup>49</sup> Julio Alberto Diaz, *Non-Physical Damage: A Comparative Perspective* (PhD Thesis, The University of Canterbury, 2010).

<sup>50</sup> See, eg, Chamallas and Wriggins, above n 19, in which the authors explore the doctrinal, practical and structural obstacles to gender and race equality, and advocate

*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, as gains for those that come before the law. Beyond aspirations for equality *within* negligence, the overall social accomplishment will be a great deal harder to make out. 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, that many claims are settled and never reach court, and that our response to injury is financial compensation, equality gains start to look far less impressive *outside* of tort. And whatever benefits torts can deliver decline further once we heap on the other known limitations of torts which Patrick Atiyah and others have so ably alerted us to through engagements with how the system works in *practice*.<sup>51</sup>

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. For those committed to using the legal project as an instrument for achieving equality this poses a sizeable dilemma. Extending the damage principle to humanise tort and 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 — with money.<sup>52</sup> Hybrid claims 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 policymakers to cap or abolish such awards,<sup>53</sup> 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 a genuine account for the losses victims do sustain.

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

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reforms that will extend tort law's protection to disadvantaged categories of person.

<sup>51</sup> See, eg, Richard Lewis, 'The Politics and Economics of Tort Law: Judicially Imposed Periodical Payments of Damages' (2006) 69 *Modern Law Review* 418.

<sup>52</sup> See further, Donna Benedek, 'Non-Pecuniary Damages: Defined, Assessed and Capped' (1998) 3 *La Revue Juridique Thémis* 67; Joseph H King, 'Pain and Suffering, Noneconomic Damages and the Goals of Tort Law' (2004) 57 *SMU Law Review* 163.

<sup>53</sup> Rachel M Janutis, 'Struggle over Tort Reform and the Overlooked Legacy of the Progressives' (2006) 39 *Akron Law Review* 943.

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: notably checking to see whether the foundations upon which we build are solid. This should of course compel an analysis of the broader problems ailing the negligence system, but here I wish to concentrate on one specific issue which strikes me as critical in assessing both the boundaries of the damage concept and the efficacy of negligence as a system of redress for human harm and injury: the foundational assumptions attending physical harm. Insofar as a concern has been raised here as to what we are ‘building’ upon, the taken-for-granted nature of physical injuries as being *especially* harmful, is one that tends to get overlooked.

#### IV PHYSICAL HARMS AND SERIOUS EFFECTS

[A] feature of the step-by-step process of common law development is the way in which each case is often felt to be morally indistinguishable from an earlier one; hence the argument for like treatment is overpowering if one moves one step at a time. But eventually it becomes clearer that the last step leads to a result which is quite different from the first step.<sup>54</sup>

Debate around the question of whether psycho-social harms should be recognised as a form of damage has been typically polarised. If one gets drawn into this debate (which is easy to do), the decision is between these positions, or marginal variants lying in between. However, the moment that one endeavours to stand outside of them, one starts to see that the difficulty with the arguments on *both* sides is that they end up reaffirming what negligence is *already* doing. If we consider what is unquestioned throughout, physical harm stands as the assumed common denominator: one restricts damage to that, or *adds* to it. For those seeking to *extend* damage to accommodate psycho-social harm, the argument is typically grounded by showing how *similar* psycho-social injuries are in their effects to physical ones — and that those effects are *just as serious*. It is a perfect analogical argument which makes incremental shifts difficult to resist: if ‘B’ looks like ‘A’, and ‘A’ is well-accepted and established, the law should treat like cases alike by allowing ‘B’ also.

For the time being we will focus on well-established ‘A’ rather than getting bogged down in the question of whether the law should expand to accommodate type ‘B’. The idea that negligence ought to prioritise injuries which result in the *most serious* consequences goes to the heart of all the issues explored thus far. From the perspective of justice to tortfeasors and indeed, claimants, it offers the strongest philosophical and conceptual basis for establishing which negligently-caused injuries the law recognises (those which go beyond what everyone is expected to tolerate in daily life), and those it does not. Both Abraham Maslow and Joel Feinberg, for example, offered lengthy analyses vindicating the notion that physical harms were ones which were the most invasive of our human needs and as such one might surmise that they are deserving of the most vigorous legal

<sup>54</sup> P S Atiyah, *Law and Modern Society* (Oxford University Press, 1983) 117.

protection.<sup>55</sup> To a large degree this would appear to be in line with the law. While the conceptual basis for why the damage concept privileges physical bodily harms is unclear, one may infer that this is based on assumptions that, either these are the *most serious*, and/or are objectively safe determinants of serious effects. We should start reviewing some of these assumptions.

### *A Physical Harm and Hedonic Adaptation*

Though not focused on law, the assumed relationship between injuries and their effects has been the subject of analysis in hedonic psychology, or what to us lawyers might best be labelled ‘happiness studies’ insofar as the dominant measure used in a controversial theory called ‘hedonic adaption’ or more recently, ‘adaptive preferences’, is happiness. In the original theory, Brickman and Campbell proposed that while people react to good and bad events, in a short time they return to a position of neutrality.<sup>56</sup> The authors found that because people are goal-seeking in nature and constantly strive to be happy, happiness and unhappiness merely constituted temporary and short-lived reactions to such events. In what became a classic piece of research, Brickman and his colleagues sought to provide empirical backing to the theory and from this concluded that lottery winners were not happier than non-winners, and that people with paraplegia were not substantially less happy than those who can walk. As Diener et al comment, the appeal of the study lay in it not only offering an explanation ‘for the observation that people appear to be relatively stable in happiness despite changes in fortune’ but also in explaining why ‘people with substantial resources are sometimes no happier than those with few resources and that people with severe problems are sometimes quite happy’.<sup>57</sup>

At an intuitive level, the theory has appeal. If we consider all the good and bad events that have occurred in our lives, our joy at getting a new job, our heartache at the loss of a loved one, we will note that the raw impact of emotions felt at that time later wore off. For many of us, we do indeed get used to things, and they (hopefully) become the background in the context of the events that lie ahead. But to what extent can this observation be useful to law? Of interest here, Bagenstos and Schlanger sought to apply this theory directly to the law of damages.<sup>58</sup> What they claimed was that hedonic damages in the United States should not be awarded based on disability.<sup>59</sup> This head of damages broadly corresponds with aspects of

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<sup>55</sup> Abraham Maslow, *The Farther Reaches of Human Nature* (Viking Press, 1971); Joel Feinberg, *Harm to Others* (Oxford University Press, 1987).

<sup>56</sup> Philip Brickman and Donald T Campbell, ‘Hedonic Relativism and Planning the Good Society’ in Mortimer H Appley (ed), *Adaptation Level Theory: A Symposium* (Academic Press, 1971) 287.

<sup>57</sup> Ed Diener, Richard E Lucas and Christie Napa Schollon, ‘Beyond the Hedonic Treadmill: Revising the Adaption Theory of Well-Being’ (2006) 61 *American Psychologist* 305, 306.

<sup>58</sup> Samuel Bagenstos and Margo Schlanger, ‘Hedonic Damages, Hedonic Adaptation and Disability’ (2007) 60 *Vanderbilt Law Review* 745.

<sup>59</sup> *Ibid* 750.

intangible damages in the UK,<sup>60</sup> insofar as it compensates for the limitations on ‘the injured person’s ability to participate in and derive pleasure from the normal activities of daily life, or for the individual’s inability to pursue his talents, recreational interests, hobbies or vocations’.<sup>61</sup> In something of a double-pronged attack on the practice of awarding hedonic damages, the authors placed strong reliance upon hedonic psychology noting that ‘disability does not inherently limit enjoyment of life to the degree that these courts suggest. Rather, people who experience disabling injuries tend to adapt to their disabilities’.<sup>62</sup> Arguing that such damages and the processes of litigation might also be viewed as discriminatory, the authors claim that the legal process serves to reinforce stigma around disability in presenting disability as ‘a tragedy’.<sup>63</sup>

Of interest here is the promise and the limits of using insights from hedonic psychology to inform our analysis about the link between physical damage, effects and compensability. An important starting point is to note that the body of research around hedonic adaptation is very much work-in-progress and has produced contradictory results. Diametrically opposing findings as to the extent of adaptation can be found elsewhere.<sup>64</sup> Easterlin notes that ‘there is a demonstrable tendency in the psychological literature to overstate the extent of adaptation to life events’, and that the extent of adaptation to a disabling condition may ‘vary depending on the personality or other characteristics of the individual affected’,<sup>65</sup> while Diener, Lucas and Schollon have cautioned against putting adaptation theory into practice given the many questions that necessitate researchers’ attention.<sup>66</sup> For these main reasons, hedonic adaptation theory does not support the kinds of policy action that Bagenstos and Schlanger have proposed.<sup>67</sup> In particular the finding, which seems

<sup>60</sup> Note however, that this is only a broad correspondence, and in particular with lost amenity. The basis for awarding damages for pain, suffering and loss of amenity (‘PSLA’) has been identified as conceptually questionable (see A I Ogus, ‘Damages for Lost Amenities: Damages for a Foot, a Feeling or a Function?’ (1972) 35 *Modern Law Review* 1) and continues to be so. Nevertheless, while there is no explicit reference to ‘happiness’ in PSLA awards, the motivation for awarding such damages appears fairly similar if seeking to restore the intangible effects of injury.

<sup>61</sup> Bagenstos and Schlanger, above n 58, 748.

<sup>62</sup> Ibid 749.

<sup>63</sup> Ibid.

<sup>64</sup> See, eg, Sharanjit Uppal, ‘Impact of the Timing, Type and Severity of Disability on the Subjective Well-Being of Individuals with Disabilities’ (2006) 63 *Social Science and Medicine* 525; Marcus J Fuhrer et al, ‘Relationship of Life Satisfaction to Impairment, Disability and Handicap Among Persons with Spinal Cord Injury Living in the Community’ (1992) 73 *Archives of Physical Medicine and Rehabilitation* 552.

<sup>65</sup> Richard Easterlin, ‘Explaining Happiness’ (2003) 100 *Proceedings of the National Academy of Sciences of the United States of America* 11176, 11177.

<sup>66</sup> Diener, Lucas and Schollon, above n 57, 312.

<sup>67</sup> Problematically, the authors (who are lawyers, not psychologists) not only prove to be highly selective in the studies they include (those highlighting a high level of adaptation) but overlook all of the serious concerns attending hedonic psychology (from hedonic psychologists). See Bagenstos and Schlanger, above n 58, 747.



to be repeated throughout the literature subsequent to Brickman's study, is that the central assumption of the hedonic treadmill theory, notably that adaption to circumstances occurs in similar ways for all individuals, is false. As Diener, Lucas and Schollon found in their longitudinal studies, 'the size and even the direction of the change in life satisfaction varied considerably across individuals'.<sup>68</sup>

There is good reason to be open to some of the (provisional) insights that hedonic psychology can offer, although a more measured analysis of the theory underpinning Bagenstos and Schlanger's proposals actually supports quite a different conclusion to the one they arrived at. Rather than limiting one's attention to damages, they compel a far more extensive review of the assumptions underpinning *damage*. Even if there is no evidence that all people adapt to the experience of disability, there is evidence that some do, and that the extent of adaptation will be variable, depending on a potentially wide range of factors relating to an individual's social, psychological and economic situation. Moreover, given that we should be alert to what assumptions are being made about disability, for these appear troublingly to equate disability with the living of a tragic life — an image of impairment which disability rights activists have fought so hard to combat — so too should we be alert to the assumptions which are being made by the law. Overall, the analysis highlights some really fundamental questions: the extent to which the damage concept in negligence accepts physical injury as a universally and especially harmful event causative of serious loss, and quite critically, what it is about the human experience of injury that compels redress.

### B *The Seriousness Dilemma*

Our analysis so far has been premised on the basis of what look like serious physical injuries. Yet to what extent does this parody the kinds of injuries that negligence addresses? In so far as the hedonic adaptation literature typically relates to serious injuries that would amount to a disability, our concerns around the assumptions attending physical harm are amplified further when we consider that very often the kinds of injuries compensated for in negligence fall far short of that. As Bell notes, whiplash injuries constitute a major source of claim, generating around 200 000 claims for compensation per annum, and costing insurers over £750 million per year.<sup>69</sup> This is not to diminish the harmful impact of whiplash, but to note that not only do the majority of sufferers make very speedy recoveries, but it is 'rare for claimants to develop chronic symptoms or disability'.<sup>70</sup> As a general matter, 'the condition is one of temporary discomfort and the award is for the 'pain and suffering' of the claimant'.<sup>71</sup> Such factors, which point to a significant disparity between the 'theory' of torts and what actually occurs in practice, also drives a cutting critique by Lewis where he notes that

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<sup>68</sup> Diener, Lucas and Schollon, above n 57, 310.

<sup>69</sup> Phil Bell, 'The Social Construction of Bodily Injury' (2006) 31 *The Geneva Papers* 340, 350.

<sup>70</sup> *Ibid* 350.

<sup>71</sup> *Ibid*.

the main function of the tort system is not to provide for the future loss of income and care needs of those seriously disabled by accident or disease. Such especially needy claimants are relatively rare. Instead the system overwhelmingly deals with small claims ... In these cases claimants suffer very little, if any, financial loss. They make a full recovery from their bodily injury and have no continuing ill effects. They make no claim for any social security benefit as a result of their accident. ... [I]n a few cases the damages claim, in effect, is being made only for the non-pecuniary loss. In settlements in general the largest component by far is the payment for pain and suffering. The stereotypical injury is the minor whiplash which follows a low speed car 'shunt'. It is these types of cases which account for the extraordinarily high costs of the system compared to the damages it pays out.<sup>72</sup>

From the perspective of 'seriousness' then, while some have suggested that 'much distress is the psychiatric equivalent of a cold or flu' and 'even when severe, much distress reflects threatening or discouraging circumstances that most individuals can resolve',<sup>73</sup> so too, it might seem, can the same kind of considerations apply to physical harm. While negligence affords priority to physical harm, which holds an unproblematic status in law, we find the same inherent variability with physical harms as has been argued as constituting a problem with psycho-social ones. Some physical harms as they are suffered do not look terribly serious, and we also find that something of a practice is developing so that these less deleterious effects are being taken seriously. This is *not* to say that negligence does not deal with serious injuries, but rather that the 'fairy tale' version of negligence (or at least one that would provide some justification *for* negligence) is that this is what happens all the time. And in line with the thesis running here, that variability in the experience of harm is precisely what we would expect to find. Whether we are addressing a physical injury or not, it is the psycho-social *effects* that harm us.

An alternative basis for determining actionability has been suggested by Harvey Teff in his analysis of liability for negligently caused psychiatric and emotional harms.<sup>74</sup> Amongst his suggestions of how to address the problem of where 'the law places its marker as representing damage deserving of compensation' he proposes that there should be a 'uniform monetary threshold that excludes minor, transient harm, whether physical, psychiatric or emotional'.<sup>75</sup> Noting that such a monetary threshold would 'admittedly introduce a new element of arbitrariness into the existing legal framework for mental harm', he comments that it would mean that the law could 'relinquish the many other arbitrary elements which have made that framework so unsatisfactory'.<sup>76</sup> While his proposals merit lengthier analysis than can be provided here, in so far as they appear to offer a fairer basis

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<sup>72</sup> Richard Lewis, 'Increasing the Price of Pain: Damages, The Law Commission and *Heil v Rankin*' (2001) 64 *Modern Law Review* 100, 103.

<sup>73</sup> John Mirowsky and Catherine E Ross, *Social Causes of Psychological Distress* (Aldine de Gruyter, 2003) 29.

<sup>74</sup> Teff, above n 11.

<sup>75</sup> *Ibid* 183–4.

<sup>76</sup> *Ibid* 184.

for compensating victims in relating to injurious effects rather than distinguishing between different kinds of damage, the key issue for our focus is on how precisely we evaluate seriousness.

If the assumption underlying the priority afforded to physical injuries is based on the notion that this constitutes the most objective evaluation of the kinds of injuries that are likely to result in serious effects, our analysis casts quite some doubt upon this. But what it also casts doubt upon is the process of evaluating seriousness too: who decides, and from whose perspective? If *fairness* is at issue, evaluations of seriousness cannot be made at an objective level, though arguably this is what the ‘damage’ concept was geared up to do. This is still what would be required under Teff’s proposals, for one still has to draw lines between compensable and non-compensable kinds of harm. Despite his remark that ‘there will always be hard cases at the margins’,<sup>77</sup> one has to suspect that enterprising lawyers will press hard against those margins. Moreover, we could expect to see a fresh form of arbitrariness emerging under such proposals. Two individuals can suffer the same event, yet manage the consequences in dramatically different ways. Beyond the trite remark that our personalities and managing capabilities are different, much of this will depend upon the social contexts in which we are embedded; a person of reasonable means with a supportive web of relations is probably better situated to cope with the effects of injury. In this sense, while the fairest means of establishing the effects of injury and its consequential psycho-social effects will be from the subjective perspective of the victim, and as such will be variable, this creates an enormous challenge for the law, jurisprudentially and practically.

Assessing which injuries should be compensated based on the effects, removes a significant control mechanism of negligence where liability depends on the nature of the harm wrongfully caused. In its absence, however, because of the variability that would be inherent in determining actionable claims it is not so clear that the law would be well equipped to maintain the boundaries of negligence, or indeed which essential ingredients become key indicators of how we ‘treat like cases alike’.

## V CONCLUSION

Inescapably the state must sort out from the frenetic bustle of the world what amounts to a compensable or remediable injury and what does not. The dominant protective association cannot restrict itself to selecting the fairest rules — that is, those most calculated to be accurate — for the determination of who *committed* a complained of injury. The reason is easy to see. In a world of even minimal complexity, a client will come forward one day and complain that he has been injured in a new way — for example, “My neighbour wore her skirt above her ankles in plain sight of me and my family.” All concerned will agree that the neighbour really did do so, but there will be the bitterest dispute whether or not such a display of flesh was wrongful — that is, whether or not the action had unlawfully injurious consequences. (It is the unlawfulness of the injury that is at issue, not merely

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Ibid.

the injury. For we can hypothesise that the plaintiff really did suffer mental distress from observing the neighbourly limbs. The question is whether, nevertheless, the neighbour had a right to exhibit herself).<sup>78</sup>

For the time being then, we have quite a sizeable dilemma. An analysis of psycho-social harm suggests that there is no good reason for distinguishing between physical bodily injuries and other kinds of harm, at least if the seriousness of damage (which must surely lie in its effects) is at issue.<sup>79</sup> If seriousness is not at issue, this does not dispose of our critique, for then negligence is left without any justification for determining what is recognised as damage and what is not (and arguably, this might be *the* problem). All that remains is the argument that we need to maintain limits — yet that is a justification which fails as a justification. Yet an analysis of the same factors, and practical issues of how tort works, suggests that the current preference for physical harms in negligence is every bit as variable and unstable as harms of an intangible nature. What this tells us is that the *kind* of injury is an incredibly poor indicator for determinations of loss. Because loss is essentially felt at psycho-social level and this is highly variable, there will be no means of objectively determining seriousness. The manner and extent to which events prove harmful to us depend upon the biographical detail of our individual lives. So what this leaves us with is a choice: putting up with capricious lines which make fallacious assumptions about seriousness, harm and harming conditions, or of drawing no lines at all.

And it is a pretty stark choice. When we enquire about the extent to which negligence should reflect our human experience of injury we end up in what appears to be a no-win situation in attempting to establish a fair and inclusive means of providing redress for harm. The damage concept operates so as to be unfair, incoherent and serves to systematically exclude a range of claims that are every bit as deserving (often more so) as the majority of situations to which negligence affords priority, but here lies the rub: even if we make the damage concept *more* accommodating, these problems of unfairness, incoherence, and systematic exclusion simply do *not* go away. Not only would a failure to draw lines between different kinds of harm (as well as stipulating the other circumstances by which tortious liability will occur) result in there being ‘no realistic limit on the amount of liability that injurers would face’,<sup>80</sup> but more broadly, negligence would not then be negligence. This is a critical point. Any system which falls short of

<sup>78</sup> Lieberman, above n 16, 63.

<sup>79</sup> In relation to asymptomatic pleural plaques, discussions around the damage concept very clearly intimate that seriousness (at least for Lord Hope in that particular case) is at issue:

an injury which is without any symptoms at all because it cannot be seen or felt and which will not lead to some other event that is harmful has no consequences that will attract an award of damages. Damages are given for injuries that cause harm, not for injuries that are harmless.

*Rothwell v Chemical & Insulating Co Ltd* [2008] 1 AC 281, 299–300, [47] (Lord Hope).

<sup>80</sup> Kenneth S Abraham, ‘The Trouble with Negligence’ (2001) 54 *Vanderbilt Law Review* 1187, 1209.

universal application, insofar as it distributes in an exclusive way, will and must draw lines. As such this inevitably involves making arbitrary choices between cases where it would be splitting hairs to determine the difference.

What this analysis supports is the need to think about negligence in a far more foundational way, given that the problems attending the reparation of human harm seem inescapable. While critical engagements with the concept of negligence, and in particular ideas of personal injury and damage have strongly focused on the question of whether we should more broadly accommodate harms of a psycho-social nature, what this article has sought to encourage is a broader review of harm as an analytical and indeed, practical category. The concerns which have encouraged negligence to cautiously develop in relation to psycho-social ails, ironically seem to squarely apply to physical harm despite being taken-for-granted as an inevitably loss-generating category of harm. As such, the critique offered here arguably casts some measure of doubt on the availability of justifications for redress for *any* kind of injury. Indeed, what we find is that irrespective of the nature of the harm involved, negligence suffers from a striking absence of a clear and conceptually convincing basis for what harms we do include, why we include them and what we hope to do by responding to harm. But what is clear is that if the aim is fairness, and we wish to locate an equitable way of distributing the effects of harm and loss, negligence will not and cannot provide it.