COMPENSATING INJURY TO AUTONOMY IN ENGLISH NEGLIGENCE LAW: INCONSISTENT RECOGNITION

TSACHI KEREN-PAZ

Professor of Private Law, Keele Law School

t.keren-paz@keele.ac.uk

ABSTRACT

Recently in *Shaw v Kovac,* the Court of Appeal seemed to have rejected a standalone injury to autonomy (ITA) as actionable in negligence, in an informed consent case. In this article, I argue that *Shaw* can be explained away, and that English law recognizes ITA as actionable in a series of cases, some of which – *Bhamra*, *Tracey* and *Yearworth* – were not hitherto understood to do so. However, the under-theorization in the cases leads to inconsistencies. Like cases (*Rees*/*Yearworth*; *Chester*/*Tracey*) are not treated alike; ITA is misunderstood to be about 'religious offence' (*Bhamra*) and property loss (*Yearworth*) and worse still, the more serious type 2 ITA (*Rees*) gives rise to a weaker remedy (of exceptional nature aside) than the less serious type 1 injury (*Chester*). A better understanding of the different manifestations of ITA will lead to results which are both more consistent and more justified on the merit.

Key words: actionable damage, autonomy, informed consent, negligence, reproductive autonomy

I. INTRODUCTION

This article explores the protection of injury to autonomy (ITA) in English negligence law. As it happens, all but one of the main cases I shall discuss arose in two medical law contexts – informed consent and reproductive autonomy – so while the topic has broad ramifications to tort law and indeed private law, it is of special interest to health care lawyers. The article combines two major strands of my research interests: autonomy as actionable damage in negligence, contract and consumer protection;[1] and tort responses to gendered harms.[2] I make two main claims: first, (in Part II) that English negligence law does compensate ITA. I hope to demonstrate that the received wisdom viewing *Rees v Darlington Memorial Hospital NHS Trust*[3] and perhaps *Chester v Afshar*[4] as the only main cases remedying ITA[5] is incorrect. Rather, three other appellate cases recognize ITA in the proper sense (defined below) as actionable: *Tracey v Cambridge University Hospitals NHS Foundation Trust*;[6] *Yearworth v*

[1]T. Keren-Paz, 'Compensating Injury to Autonomy: A Conceptual and Normative Analysis' in K Barker, K Fairweather and R Grantham (eds), Private Law in the 21st Century (Hart 2017) 411; 'Compensating Injury to Autonomy: Normative Evaluation, Recent Developments and Future Tendencies' (2007) 22 Colman L Rev 187.

[2] T. Keren-Paz, Sex Trafficking: A Private Law Response (Routledge 2013); Torts, Egalitarianism and Distributive Justice (Ashgate 2007); Leverhulme Fellowship RF-2016-358\8 'Privacy law, gender justice and end-users' liability: "revenge porn" and beyond'.

[3] [2003] UKHL 52.

[4] [2004] UKHL 41.

[5] Discussions in the literature focus on whether: this recognition of autonomy is justified, eg, T Clark and D Nolan, **'**A Critique of *Chester v Afshar*' (2014) 34 OJLS 659; consistent with principles of tort law and the law of remedies, eg, Craig Purshouse, 'Liability for Lost Autonomy in Negligence: Undermining the Coherence of Tort Law?' (2015) 22 TLJ 226; D Nolan, 'New Forms of Damage in Negligence' (2007) 70 MLR 59; and whether the decisions are justified on merit eg, A Morris, 'Another Fine Mess: The Aftermath of McFarlane and the Decision in *Rees v Darlington Memorial Hospital NHS Trust*' (2004) 20 PN 2; N Priaulx, *The Harm Paradox: Tort Law and an Unwanted Child in an Era of Choice* (Routledge-Cavendish 2007) 73–76.

[6] [2014] EWCA Civ 822.

North Bristol NHS Trust;[7] and *Bhamra v Dubb*.[8] In particular, neither *Bhamra* nor *Tracey* were ever understood in the relevant literature for what they are – cases that view ITA as actionable in negligence. Accordingly, we can identify three categories of case in which ITA is actionable in England: breaches of informed consent in the medical context (*Chester* and *Tracey*), intervention in reproductive autonomy (*Rees* and *Yearworth*) and undermining ethical or religious food consumption choices (*Bharma*). In identifying the cases as involving ITA, I draw on a distinction, explained below, between three types of ITA, with some comparative lessons from Israel, a common tort law jurisdiction affording exceptionally robust protection of ITA. The claim that English law recognizes ITA is seemingly irredeemably undermined by the recent Court of Appeal's decision in *Shaw v Kovac*.[9] In Part III, I briefly explain why this is not the case.

My second major claim (in Part IV) is that the relevant English jurisprudence is marred by a conceptual deficiency leading to an unsatisfying state of affairs of partial and inconsistent protection. Courts' rhetoric about 'autonomy', and consequently the main bulk of the literature, gloss over the crucial distinction between the three types of ITA: Type 1, being deprived merely of the opportunity to consent to being moved from one state of affairs to another; Type 2, being moved without consent to a subjectively inferior state of affairs; and Type 3, autonomy loss consequent upon violation of a previously protected interest. This under-theorization leads to inconsistent levels of protection both across and within categories, and to an inverse hierarchy according to which more serious violations of ITA lead to lower damages awards and vice versa. Other authors, notably Nicky Priaulx,[10] have drawn attention to some of these inconsistencies, but the analysis here does so more systematically and with

[7] [2009] EWCA Civ 37.
[8] [2010] EWCA Civ 13.
[9] [2017] EWCA Civ 1028.
[10] N Priaulx, 'Reproducing the Properties of Harms that Matter: The Normative Life of the Damage Concept in Negligence' (2016) 5 JMLE 17. See also P Cane, 'Another Failed Sterilisation' (2004) 120 LQR 89.

reference to an expanded dataset of relevant cases. Beyond conceptual under-theorization, there is another force at work contributing to the unsatisfactory level of protection, which is manifested mainly in reproductive torts cases: obliviousness to the nature of reproductive autonomy as a gendered harm. I leave the defending of this claim to another day.

Before delving into the analysis, three related preliminary comments are in order: firstly, about the meaning of autonomy; secondly, the normative desirability of remedying ITA; and thirdly, the cogency of the descriptive claim advanced in this article. The starting point for my analysis is the understanding of personal autonomy as self-authorship. This account, most forcefully developed by Joseph Raz, (and others[11]), is both normatively attractive, and influential in case law[12] and legal scholarship.[13] According to Raz, 'the ideal of autonomy is that people should make their own lives' and the 'autonomous person is a (part) author of his own life … the vision of people controlling, to some degree, their own destiny, fashioning it through successive decisions throughout their lives'.[14] The standard, liberal account of autonomy, at least as applied to tort law, focuses on the ability to make choices *simpliciter*.[15] However, it is debated whether the ideal of self-authorship can be invoked to trigger a private law remedy for any setback to one's choices and desires. To use Diana Meyers' terminology, it is unclear whether we ought to remedy violations of episodic autonomy, as opposed to programmatic autonomy.[16] Arguably, Raz's own conception of

[11] See, eg, R Lindley, *Autonomy* (Macmillan 1986).

[12] *Coleman v Attridge Law (A Firm)* (C-303/06) [2008] All ER (EC) 1105 [9]; CA 10064/02 *Migdal v Abu Hannah*, PD 60(3) 13 (Supreme Court, ISr, 2005) [33].

[13] Clark and Nolan (n5) 677; H Dagan, 'Autonomy, Pluralism, and Contract Law Theory' (2013) 76 LCP 19.

[14] J Raz, 'Autonomy, Toleration, and the Harm Principle' in S Mendus (ed), *Justifying Toleration* (CUP 1988) 155–56.

[15] See, eg, P Cane, *The Anatomy of Tort Law* (Hart Publishing 1997) 234. *cf* M Dan-Cohen, *Harmful Thoughts* (Princeton University Press 2002) 125.

[16] D Meyers, 'Personal Autonomy and the Paradox of Feminine Socialization' (1987) 84 JPhil 619, 624–25. A person is programmatically autonomous when she is carrying out a life plan (how do I want to live my life?) that embodies her own answers to a particular type of question (what kind of

autonomy as self-authorship could be understood as programmatic rather than episodic (choice-centred). Remedying ITAs that undermine deeply held values – in which the choices undermined are positioned on the continuum somewhere between episodic autonomy, reflecting 'thoughtless desire',[17] and programmatic autonomy – protects the core of self-governance,[18] so that 'people can freely make up their own minds about what to believe and how to live, and can then act accordingly'.[19] Similarly, if the effects of the thwarted choice are significant or lasting, they are more likely to affect programmatic, rather than episodic, autonomy.

The liberal notion of autonomy has been criticized from communitarian, feminist and critical quarters as ontologically and normatively deficient;[20] alternative understandings of 'relational' and 'embodied' autonomy have thus been offered.[21] At first glance, such a critique might query the desirability of remedying ITA in negligence, and raises the question of the threshold for injuries that ought to be compensated. I have recently normatively defended remedying ITA in negligence and would not repeat the argument here.[22] Here I would make four points. First, even in feminist and critical quarters, the implications of the

---

work do I want to do; do I want children? etc). In contrast, episodic autonomy entails being able to ask 'what do I really want to do now?' in a given situation.

[17] See H Frankfurt, 'Freedom of the Will and the Concept of a Person' (1971) 68 JPhil 5.

[18] See V Chico, *Genomic Negligence* (Routledge 2011) 66, based on the influential accounts of Gerald Dworkin and Harry Frankfurt.

[19] A Voorhoeve, 'The Limits of Autonomy' (2009) 46 *The Philosophers' Magazine* 78.

[20] See eg, Alasdair MacIntyre, *After Virtue: A Study in Moral Theory* (2nd edn, University of Notre Dame Press 1984) 30, 205; Sarah Hoagland, *Lesbian Ethics: Toward New Value* (Institute of Lesbian Studies 1988) 144; Louis Althusser, *Essays in Self-Criticism* (Grahame Lock tr, New Left Books 1976), 205; Tom O'Shea, 'Critics of Autonomy', Essex Autonomy Project (2012) available at https://autonomy.essex.ac.uk/resources/critics-of-autonomy/.

[21] J Christman, 'Relational Autonomy, Liberal Individualism, and the Social Constitution of Selves' (2004) 117 Phil Studies, 143; M Oshana *Personal Autonomy in Society* (Ashgate Publishing 2006); S Cowan, 'Choosing Freely: Theoretically Reframing the Concept of Consent' in R Hunter and S Cowan *Choice and Consent: Feminist Engagements with Law and Subjectivity* (Routledge 2007) 91.

[22] Keren-Paz, 'Conceptual Analysis' (n1).

critique of the liberal conception of autonomy for consent and choice are unclear.[23] In particular, the notion of embodied autonomy developed mainly in the critique of rape law[24] seems to be quite apt in wrongful conception cases, which are a major category of reproductive autonomy cases (and arguably, albeit less so, also to ethically motivated diet). Put differently, whether one adopts a classic, thin, liberal conception of choice, a thicker one (which I support) protecting significant choices, or relational or embodied concepts of autonomy, the pattern of decisions analysed below remains inconsistent and hard to justify. Second, the thicker notion of autonomy I adopt – protecting choices that are informed by one's personal beliefs, ethics, values, attitudes and world view, or which have a significant bearing on the way one leads one's life – is immune to much of the critique uttered against the narrow liberal conception and is likely to assuage fears from the negative practical and expressive ramifications of compensating individuals in negligence for thwarted choices. Third, especially since courts' liberal commitment is with us to stay, we should develop the jurisprudence in a way that is not androcentric and discriminatory. Finally, even on its own terms of a liberal, thin conception of choice, the pattern of decisions does not make sense (although the decision to view ITA as actionable negligence does); hence the focus in Part IV on the internal inconsistency of the decisions.

A few words are in order about the cogency of the descriptive claim made here and its intellectual underpinning. The following questions should be distinguished: Whether a legal system a) ought to protect ITAs 1 and 2 (ITA 3 is protected as a matter of course and is uncontroversial); b) does so c) is self-aware that it does so; and d) does so consistently. In Israel, for example, the recognition of ITA is self-aware,[25] yet inconsistent.[26] I argue here that

[23] R Hunter and S Cowan 'Introduction' in Hunter and Cowan (n21) 2–3; Jennifer Nedelsky, 'Reconceiving Autonomy: Sources, Thoughts and Possibilities' (1989) 1 Yale JLF 21.
[24] See, eg, Cowan (n21).
[25] *Daaka v Carmel Hospital* 53(4) PD 526 (Supreme Court, Israel, 1999).
[26] Keren-Paz, 'Normative Evaluation' (n1) 431-2.

the recognition in England both lacks self-awareness— namely that a 'best light' reading of certain appellate cases is that they are concerned with protecting ITA 1 and 2, even if this is not always accompanied by the correct rhetoric and even if this is obscured by using other heads of damages - and consistency. Intellectually, the exercise conducted here is influenced by rational reconstructivism; similar to Dworkin, I attempt to present in Part II the decisions implicating autonomy interests in their best light.[27] So for example, while I am clear, as a matter of prediction, that Davies LJ (writing the main opinion in *Shaw v Kovac*) would reject ITA 1 and 2 as actionable in an appropriate case, I insist that *Shaw*'s *ratio* leaves open this possibility, and that read as a whole, the five cases discussed are best interpreted as remedying ITA 1 and 2.

At the same time, normatively, I am loath to prioritize unbridled commitment to coherence and consistency over attainment of substantive justice.[28] Descriptively, I find much cogency in Critical Legal Studies' (CLS) critique of the possibility of legal determinacy, including of Dworkinian efforts to the rescue.[29] But even if CLSers are correct that we can never achieve a totally coherent body of judicial decisions (and as Part IV demonstrates, English law is incoherent at the moment), this does not mean that rational reconstruction is impossible or futile. Indeed, the Part II claim that the five appellate cases are best understood as judicial attempts to remedy ITA types 1 or 2 is consistent with the Part IV claim that this is done inconsistently, and could be done better.

The descriptive thesis I advance is faithful to the institutional limitations of adjudication in a common law system,[30] and also, to Dworkin's requirement (additional to his

[27] Ronald Dowrkin, *Law's Empire* (London: Fontana 1986) 53.
[28] Keren-Paz, 'Conceptual Analysis' (n1) 431-2.
[29] Duncan Kennedy, 'Form and Substance in Private Law Adjudication' (1976) 89 Harv LR 1685; and 'The Critique of Rights in Critical Legal Studies', in Brown and Halley, eds., *Left Legalism/Left Critique* (Duke University Press 2002).
[30] Hanoch Dagan, 'The Realist Conception of Law' (2007) 57 *U. Toronto L.J*. 607.

'best light' justification) that the theory would fit the practice.[31] Central to this is an evolutionary understanding of norms, in the sense that some solutions, which are ideally preferable, are ruled out due to path dependence (precedence, or Dworkin's chain novel metaphor[32] in the legal field, and contingency in the biological field[33]). As is demonstrated below, even when the remedy was shoehorned into existing heads of damages, as was controversially done in *Chester* and *Yearworth*, the underlying concern was,[34] or at least is better understood as, protecting meaningful choice, rather than bodily integrity or property. Moreover, the failure to theorize ITA 1 and 2 as actionable—an available option for evolutionary development—and to properly distinguish between them, led to results which are both inconsistent and unjust.

II. RECOGNITION OF ITA IN THE FIVE CASES

My analytical framework uses the tripartite ITA typology, types 1, 2 and 3, as described in the Introduction.[35] An example of type 1 ITA is *Chester*, in which the claimant conceded she would have undergone the procedure after further consultation if she had been warned of the risk.[36] An example of type 2 ITA is *Rees*, since the claimant preferred having no child over having one. An example of type 3 ITA would be a patient losing her eyesight as a result of a

[31] (n27) 52.
[32] Id. 229.
[33] See Stephen J Gould, *Wonderful Life* (Norton: NY, 1989) Ch 5. By contingency Gould refers to a process by which historical outcomes arise from an unpredictable sequence of antecedent states, where any change in the sequence alters the final result.
[34] This conclusion is based on careful reading of the judges' own reasoning (see eg., text to nn 51, 57-59) rather than on my own interpretive liberties.
[35] For further discussion of the categories and borderlines see Keren-Paz, 'Conceptual Analysis' (n1) 413–21.
[36] (n4) [7].

procedure to which she gave informed consent, but which was conducted negligently. Such patient suffers an autonomy loss consequent on the personal injury: loss of vision.[37]

The tort of negligence requires actionable damage as a condition for liability and does not compensate for mere distress, inconvenience or discomfort that does not result in bodily or psychiatric illness.[38] Seemingly, types 1 and 2 ITAs are mere distress and therefore not actionable in negligence[39], but elsewhere I have argued that ITA is distinguishable from mere distress and ought to be compensated.[40] I will turn now to show that English law already recognizes ITA as actionable, albeit inconsistently.[41] I shall focus my attention on the following five cases: *Rees*, *Yearworth*, *Chester*, *Tracey* and *Bhamra*.

A. Reproductive Autonomy

[37] In the paradigm informed consent case of *Montgomery v Lanarkshire Health Board (Scotland)* [2015] UKSC 11, in which the claimant sustains physical injury as a result of an operation to which she did not give her informed consent, the claimant was deprived of a meaningful choice (type 2 injury, since if properly warned she would have chosen an alternative course of action) and suffered a type 3 injury consequent on the physical injury. While theoretically ITA 2 and 3 could accumulate, a reasonable policy decision could be that ITA 2 is 'swallowed' by ITA 3 damages.

[38] *Hunter v Canary Wharf Ltd* [1997] AC 655, 707–8 (per Lord Hoffman). See Nolan (n5).

[39] By definition, type 3 is protected by a hitherto recognized interest. Type 2 shares with type 1 the feature of being a stand-alone injury (eg., consuming food 'avoided' for ethical or religious beliefs), so is different from ordinary type 3 harms. While for type 3 ITA, 'autonomy' serves as an underlying value, for types 2 and 1 it serves as a stand-alone protected interest. Cf Lord Hoffman's similar distinction pertaining to 'privacy' in *Wainwright v Home Office* [2003] UKHL 53 [31] and Joel Feinberg's discussion of the relationship between harm interests and autonomy in *The Moral Limits of the Criminal Law: Harm to Others* (OUP, 1987).

[40] Keren-Paz, 'Conceptual Analysis' (n1) 435–37.

[41] Several English cases have recognized actionable damage not falling within what is permitted according to orthodoxy. Such is the damage from being falsely imprisoned, despite the fact that it does not involve physical, property or, at times, economic loss. *W v Home Office* [1997] Imm AR 302; Nolan (n5) 64–67 (discussing other cases). On one interpretation, the damage from being sexually assaulted is actionable in negligence without a traditional consequential physical injury. See *Maga v Archbishop of Birmingham* [2010] 1 WLR 1441, rev in part [2009] EWHC 780 (QB). *Maga* revolved around the question of whether there was vicarious liability for the abuse and for the negligent failure by the priest in charge to follow up previous allegations of abuse against the abuser. Jack J dealt with the issue of damages without heed to the question of whether all items are equally actionable under battery and negligence. The case, therefore, serves as a weak indication that: (1) damages for sexual assault would often be the same whether claimed under battery or negligence; and (2) being sexually abused is itself an actionable damage in negligence.

1. Rees v Darlington Memorial Hospital NHS Trust

In *Rees*[42] the claimant wished not to have children (mainly due to the fact that she had a genetic condition that rendered her practically blind). She underwent a sterilization operation, which was conducted negligently, so unbeknown to her had failed. She eventually became pregnant and gave birth to a son. The House of Lords awarded £15,000 as a conventional award to compensate the claimant for her loss of reproductive autonomy not to become a parent. This amount was over and above the mother's right (settled in earlier case law) to damages for her physical injury due to the involuntary pregnancy and the consequent income loss.[43] The negligent imprisonment cases[44] as well as the conventional award in *Rees* for negligent interference with reproductive autonomy reveal that a loss of autonomy – at least when the interest in autonomy is capable of being translated into a narrow, recognized interest[45] – are actionable damages.

The award in *Rees* is for a type 2 injury – by definition Rees preferred 'no child' over 'having a child'; after all, that was the purpose of the procedure she undertook. Therefore, she found herself in a subjectively inferior state of affairs due to the defendant's negligence. There are two peculiar aspects of the decision. First and foremost, the House of Lords deviated from the principle of full compensation – the well-entrenched individual assessment of damages – for a flat amount. All claimants whose reproductive autonomy has been undermined should receive the same amount. The decision is also conspicuous for the paltry

[42] (n3).

[43] *Rees* (n3) at [8] (Lord Bingham); [17] (Lord Nicholls). In *Greenfield v Irwin* [2001] 1 WLR 1279 the Court of Appeal applied *McFarlane v Tayside Health Board Appellants* [2000] 2 AC 59 to rule that loss of the mother's earning capacity resulting from the mother reducing her participation in the paid labour market due to the birth of the unwanted child is not compensable. This point was left undecided by the *McFarlane* majority (Lord Slynn at [74], [84]; Lord Hope at [89]; contra Lord Clyde at [104], [106]). To be consistent with this holding, after *Greenfield*, only lost income which is consequential on the birth (or pregnancy) rather than on having a child could be compensated; *cf* Baxton and May LJJ in *Greenfield* at [29], [42].

[44] (n41).

[45] Nolan (n5), 64, 78–80.

amount given as compensation (or vindication). I will elaborate on these issues in Part IV below.

2. *Yearworth v North Bristol NHS Trust*

Yearworth v North Bristol NHS Trust[46] is another example of remedying a type 2 injury; similar to *Rees*, the context is reproductive autonomy, but here the protection is more tortuous. Damages for mental distress were held to be available (subject to proof of factual causation) as a consequence of learning that the claimants' sperm had been negligently destroyed by the defendant, which had undertaken to look after the claimants' sperm with all possible care. The court based this conclusion on two factors: (1) characterizing the relationship between the claimants and defendant as gratuitous bailment;[47] and (2) the applicability to bailment of contractual damages for mental distress in cases where an object of the contract was to provide peace of mind.[48]

Much about the way *Yearworth* was argued and litigated could have led to its classification as a type 3 injury; however, type 2 is the more accurate classification. In ITA 2, the undermining of one's autonomy itself (in the sense of being moved without consent to a subjectively inferior state of affairs) is the actionable damage, rather than autonomy being protected indirectly by compensating a recognized protected interest such as property or bodily integrity. As long as one focuses on the characterization of the sperm as property, one could see the damages for psychiatric injury, but also even the claim for distress, as damages for consequential loss flowing from interference with the claimants' property rights. But the

[46] (n7).

[47] While the claimants' right to damages was ultimately ingrained in bailment, most of the court's analysis was done within a tort framework, including a reference for the open question of whether psychiatric injury consequent on negligent destruction of property is compensable; *Yearworth* (n7) [55]. For this reason, I include *Yearworth* in this section, dealing with protection of autonomy through the tort of negligence.

[48] *ibid* [49], [56]–[58].

nub of the claimants' complaint was not about the destruction of property, commonly understood.[49] The nub of the litigation was the lost chance to become a father (and the fear resulting from that loss, even if the claimant subsequently regained fertility), which is clearly a type 2 injury related to one's reproductive autonomy.[50] Indeed, the court itself understood the claim in this way, by noting that the purpose of the arrangement was 'the provision to the men *of non-pecuniary personal or family benefits*. Any award of damages should reflect the realities behind these arrangements and their intended purpose'.[51]

B. Informed Consent

1. *Chester v Afshar*

A somewhat hidden liberalization of actionable damage is evident from *Chester v Afshar*,[52] at least if one accepts, as I do, that the decision cannot be explained based on traditional factual and legal causation principles. Afshar negligently failed to warn Chester of a small inherent risk in the procedure she undertook and the risk materialized. There was no negligence in the way the procedure was undertaken and, had Chester been warned, she would have delayed

[49] Indeed, the proposition (which I support) that the claimants have property in the sperm is novel and controversial, and the failed attempt to classify the destruction of the sperm as personal injury only goes to prove the point.

[50] Had the Trust negligently failed to inform the claimants about the risk of infertility, or to offer storage of the sperm, there would have been no issue of ownership. The issue then might have been framed as one of personal injury: the inability to father a child, a consequence of the treatment, would have been avoided had there not been a breach of duty. Still, the real issue was the interference with the choice of becoming a father. The complaint in such a case is not that the treatment itself eliminated the claimant's fertility. Rather, it is that the defendant did not take reasonable care to preserve the claimant's ability to procreate, notwithstanding the non-wrongful, medical consequence of the treatment – the reduced fertility itself. This is a complaint about undermining the claimant's reproductive autonomy, which is a type 2 injury.

[51] *ibid* [57] (my emphasis). The care the court took to analyse the Human Fertilisation and Embryology Act 1990 also supports this conclusion. But for current purposes, not much hangs on accepting as correct my claim that the court itself viewed the claim in *Yearworth* as based on ITA 2. What matters is that the case ought to be understood as protecting reproductive autonomy, and hence be condemned for the ensuing inconsistencies with *Rees*.

[52] (n4).

her consent but eventually would have undergone the procedure.[53] I happen to belong to the minority believing that the breach in *Chester* was not even the factual cause of the injury.[54] In any event, it is conceded by almost all[55] that the failure to inform Chester of the risk did not increase the chance that the injury would materialize.[56] Fully compensating Chester for the consequent physical injury is a way to vindicate the claimant's interest in autonomy. Damages are given for depriving Chester of the option to agree to the procedure after being fully informed – the right to 'make an informed choice', to 'be informed' or 'know'.[57] Absence of remedy 'would render the duty useless' and 'hollow'.[58] For this reason, I view *Chester* as a case whose purpose is to compensate for ITA *simpliciter* (a type 1 case), rather than a case aiming to remedy a negligent infliction of personal injury with the collateral effect of protecting autonomy (a type 3 case). It follows that in *Chester*, while the measure of recovery is the physical injury, its *raison d'être* is the breach of the patient's autonomy, not traditional notions of responsibility based on decisional causation between the breach and the physical injury.[59]

---

[53] *ibid* [7].

[54] If the inherent risk in the procedure is tied up with the decision to undergo the procedure (ie with the claimant) rather than with the date when the procedure took place (as the majority believed), there is not even a factual causation between the breach of duty and the physical injury. This was Lord Bingham's view, in dissent at [8].

[55] A notable exception is J Stapleton, 'Occam's Razor Reveals an Orthodox Basis for *Chester v Afshar*' (2006) 122 LQR 426. Critics include Clark and Nolan (n5) 670–73; R Stevens, *Torts and Rights* (OUP 2007) 52–53; C Miller, 'Negligent Failure to Warn: Why is it so Difficult?' (2012) 28 *PN* 266, 271–72; D Hamer, '"Factual Causation" and "Scope of Liability": What's the Difference?' (2014) 77 MLR 155, 182–87; T Keren-Paz, 'Liability for Consequences, Duty of Care and the Limited Relevance of Specific Reliance: New Insights on Bhamra v Dubb' (2016) 32 *PN* 48, 61–62.

[56] *Chester* (n4) [18] (Lord Steyn); [31] (Lord Hoffman dissenting); [55]–[56], [81] (Lord Hope); [98] (Lord Walker); Clark and Nolan (n5) 666–67.

[57] *Chester* (n4) [86] (Lord Walker); [16] (Lord Steyn); [22] (Lord Steyn); [55] (Lord Hope).

[58] *ibid* [87] (Lord Hope); *cf* Lords Steyn at [24] and Walker at [101].

[59] *cf* J Murphy and C Witting, *Street on Torts* (13th edn, OUP 2013) 159. For further support of the view that the real damage in *Chester* is the interference in her autonomy, see the sources mentioned in Purshouse (n5) 231. Purshouse himself argues that autonomy should not be protected in negligence. Jenny Steele has rightly commented on *Chester* that it 'is poised awkwardly between the torts of battery and negligence, because the *wrong* is denial of self determination, rather than exposure to risk;

Once the relevant interest (autonomy, as distinct from freedom from physical injury) has been identified properly, one can debate what the appropriate response is.[60] Of importance is the fact that *Chester*, properly understood, is the highest authority for interference with the claimant's autonomy (rather than causing physical injury) as actionable damage in negligence.

2. *Tracey v Cambridge University Hospitals NHS Foundation Trust*

Still in the medical context, the Court of Appeal in *Tracey* seems to have assumed that a patient denied information and a right to seek a second opinion on a Do Not Attempt Resuscitation (DNAR) decision made by the medical staff had a common law cause of action (and not only an Article 8 of the European Convention on Human Rights (ECHR) right based on the private nature of end-of-life decisions) against the defendant.[61] Given the following three facts, the obiter in *Tracey* seems to support the actionability of ITA in negligence: (1) the engagement of Article 8's right to private life in *Tracey* is undisputedly based on autonomy[62] (which also featured heavily in the opinions in *Tracey*[63]); (2) Longmore LJ seemed to have in mind the tort of negligence when he mentioned the availability of a

---

but the *harm* is personal injury "by accident"'. J Steele, *Tort Law, Text Cases and Materials* (OUP 2007) 63. Subjecting someone to treatment without her consent is an affront to autonomy and dignity – values that were traditionally protected by battery.

[60] The options are: no protection at all (as Lord Hoffman held); a solatium for the type 1 ITA (as the Israeli Supreme Court held in *Daaka* (n25) and as supported by Clark and Nolan (n5) 688–89 who ultimately prefer a *sui generis* statutory cause of action (*ibid* 689–91)); a conventional award as in *Rees;* or full compensation for the physical injury as the majority of the House of Lords held in *Chester*.

[61] (n6) [89] (per Longmore LJ), [94] (per Ryder LJ).

[62] See *R (on the application of Catt) (Respondent) v Commissioner of Police of the Metropolis* [2015] UKSC 9 [4].

[63] (n6) [32], [39], [64].

common law duty;[64] and (3) on the facts of *Tracey*, had the duty not been breached, the decision not to resuscitate would have remained the same.[65]

This makes *Tracey*, if anything, a type 1 injury although the correct classification is somewhat tricky. If, typically, a patient would prefer to be resuscitated, seemingly the breach of duty moved the patient to an inferior state of affairs (from a chance of being resuscitated, had the duty not been breached, to a DNAR status). The complicating factor is that a patient does not have a right to receive treatment deemed futile, or not in the patient's best interest.[66] Since Tracey was eventually returned to a DNAR status after being properly informed, the breach of duty merely deprived her of an important procedural right, but did not cause her to be moved to the inferior (DNAR) state of affairs. However, it is far from obvious that denying a claimant a right to be heard in circumstances where the hearing would not have changed the decision is a violation of one's autonomy.[67]

ITA as a stand-alone actionable damage (as distinct from protecting autonomy indirectly in type 3 ITA) exists only when the claimant is deprived of a real choice to which

[64] This could be discerned by the reference in *Tracey* (n6) at [89] to *R (Burke) v GMC* [2006] QB 273, [50]–[55], which in turn discusses the duty in the context of providing sufficient information to the patient.

[65] *Tracey* (n6) [4]–[5] (the first notice was revoked when the patient's daughter found out about the status but, following the process involving the patient and her family, a second notice was added to the patient's file).

[66] *R (Burke)* (n64).

[67] Further complications exist where the patient is incapacitated and family members (in the example below, the mother) are not consulted in the DNAR decision, contrary to S 4(7) of the MCA 2005. See *Winspear v City Hospitals Sunderland NHS Foundation Trust* [2015] EWHC 3250. In that case, the court (Mr Justice Black) gave a declaration that the breach of s. 4(7) amounted to a procedural breach of the procedural duty under Art 8(2) ECHR protecting the patient's right to private life. No damages were awarded. The decision (at [63]) that the mother cannot sue in her personal capacity raises interesting questions about whose autonomy is undermined in such cases, and the usefulness of relational autonomy in answering these questions. The decision (at [64]) that declaration is a sufficient remedy (but no damages to the mother in her personal representative capacity) reflects the doubts in the text, of whether a violation of a procedural right amounts to a deprivation of a significant choice. Two or three of the five factors mentioned in support of not awarding damages are likely endemic to such cases: the clinician's good faith clinical judgment, that the notice had not impacted on the treatment (which makes it a type 1, rather than 3 ITA), and perhaps also the fact that the DNAR notice subsisted for only 9-10 hours. The two other factors were fact specific, so leave room to award damages in appropriate cases: that the decision was made before the clarification of the law in *Tracey*, and that consultation was always foreseen as part of the treatment plan.

he has the right,[68] and which he is capable of exercising. In many of the cases in which a protected interest was undermined, no such choice existed. Think of a patient who gave his consent to treatment, but was injured due to clinical negligence. Such a patient suffers a setback to an important interest, and the physical injury entails a type 3 loss of autonomy. However, the breach of duty did not deprive him of any meaningful choice, so no remedy for ITA should exist.[69] Similarly, a person receiving urgent treatment while unconscious cannot complain of ITA (unless, a valid advance directive refusing treatment is at place), since she was not capable of exercising any choice.[70]

For this reason, the Israeli Supreme Court erred in *Avnaal v State of Israel*[71] in compensating a company[72] for ITA in the following non-medical circumstances. The company was denied a hearing and was given a misleading reason for not having its import permit renewed. Crucially, the refusal to renew the permit was valid, and the decision would not have changed had a correct reasoning and a hearing been given. This result is mistaken since the company was not deprived of any meaningful choice, as it was subject to the administrative power to withhold the permit. If it was deprived of any protected interest, it was not an interest in its autonomy.[73]

---

[68] For special complications in the context of sexual autonomy, see Keren-Paz, 'Conceptual Analysis' (n1) note 61.

[69] *cf* the discussion in the text to nn 36–37 in the paradigm breach of informed consent cases.

[70] Absence of meaningful choice also explains why cases like *Phelps v London Borough of Hillingdon* [2001] 2 A.C. 619 do not involve type 2 ITA, despite being what Priaulx (n10) terms damage hybrids. These cases are essentially negligent diagnostic cases (such as *Gregg v Scott* [2005] 2 WLR 268) in which the complaint is of harm suffered (psychological, economic, other) as a result of the delayed diagnosis (of having dyslexia, or similar conditions). In negligence diagnosis cases (unlike in *Rees* and *Bhamra*), it is hard to argue that the claimant lost a *genuine* or *meaningful* choice, at least as long as a dominant prognostic course of action exists. Rather, the claimant suffers harm (similar to run-of-the-mill personal injury cases) that undermines her autonomy. Moreover, even if a meaningful choice did exist (or is artificially constructed), the ITA is type 3 since it is also, and perhaps principally, manifested in a more traditional form of damage (psychological or economic).

[71] CA 1081/00 *Avnaal v State of Israel*, Pad-or 2005(1) 85. For a critique, see Keren-Paz, 'Normative Evaluation' (n1) 210–13.

[72] It is not evidently desirable to allow companies to sue for infringements of their autonomy.

[73] Indeed, the holding (by majority) in *Lumba v Secretary of State for the Home Department* [2011] UKSC 12 is consistent with the critique of *Avnaal*, offered in the text. In *Lumba*, claimants who were

To be clear, while I have doubts whether the remedy in *Avnaal* is warranted, I have no doubts that a remedy in *Tracey* is (although the justification might be ingrained in dignity or deterrence, not necessarily autonomy). The interest infringed in *Tracey* – the right to be informed of a decision affecting the claimant's life expectancy (and quality of life) – is quite different from the commercial interest in *Avnaal*. Moreover, the *knowledge* about the DNAR status is important both in itself (telling of the severity of the claimant's condition) and in preparation for the impending end of life, in a way that the knowledge about the true reason to deny the renewal of an import permission is not.

C. Food Consumption: Bhamra v Dubb

Whether ITA is actionable has been litigated elsewhere in the very different context of food consumption, mainly where due to the defendant's negligence the claimant consumed food she would rather avoid on ethical or religious grounds.[74] In England, the issue was raised in *Bhamra v Dubb*. Bhamra attended a Sikh wedding in a Sikh temple, at which food was served by the caterer Dubb, a Sikh himself. Observant Sikhs do not eat food containing eggs. Bhamra was aware that he had an egg allergy. Some of the *ras malai* that was served contained eggs, probably because the defendant purchased *ras malai* during the wedding from an outside source (the number of guests having exceeded expectation). Bhamra had an allergic reaction, was taken to hospital and eventually died. The trial court dismissed Bhamra's widow's personal injury claim, which was based on a breach of contract, but found in favour of her claim in negligence. On appeal, only the negligence claim was litigated, so

---

falsely imprisoned based on unlawful policy recovered only nominal damages, since they could have been detained lawfully according to the published policy. For a different view, see A Twerski and N Cohen, 'Informed Decision Making and The Law of Torts: The Myth of Justiciable Causation' (1988) U Ill L Rev 607 (making an analogy between ITA and the remedy for violation of the constitutional right to due process); cf CA 1303/09 *Kadosh v Bikur Holim Hospital* (Supreme Court, Israel, 5.3.2012) [43] (Rivlin J).

[74] See articles in n1 and text to nn 88–91 for discussion of relevant cases.

the court felt a discussion of the correctness of the dismissal of the contractual claim was unnecessary. Liability in negligence was affirmed.[75]

Stripped to its essence, the court's analysis seems to make two propositions. The first is that the defendant owed Bhamra a duty of care not to offend his religious beliefs by negligently serving food containing eggs, despite the fact 'that a restaurateur or caterer who is providing food for people who, as far as he is aware, are of no more than ordinary susceptibility does not owe them a duty to take reasonable care to prevent their suffering harm through eating egg'.[76] This is so since 'it was important to avoid the use of eggs for purely religious reasons'.[77] 'In those circumstances he was certainly under a duty to take reasonable care not to serve dishes containing egg in order to avoid offending against Sikh religious principles'.[78] The court's second proposition is that this duty could be extended under the circumstances to avoid Bhamra's personal injury resulting from his egg allergy.[79] For current purposes, the first proposition is of importance. While Bhamra sued only for the personal injury,[80] the court's proposition, if correct, should allow all observing guests (including, potentially, the deceased[81]) to receive compensation for the religious offence suffered from consuming 'avoided' food.

While I support this proposition, it needs one correction and one clarification. The correction is that the injury should be conceived as ITA (type 2), not as religious offence *per se*. What matters is that the three constitutive elements of ITA are met – meaningful choice,

[75] *Bhamra* (n8) [2], [10], [12], [25], [29].
[76] *ibid* [19].
[77] *ibid.*
[78] *ibid* [25].
[79] *ibid.*
[80] Such a claim raises questions about the scope of liability for consequences, discussed in Keren-Paz (n55).
[81] Bhamra consumed eggs which he wished to avoid on religious grounds and to which he was allergic. In principle, the claims are separated but the effect of death on the ITA claim (by the estate or a dependent) raises complications which will only be alluded to in Part III below.

reliance interest and irreversible harm[82] – and that the interference undermined both the guests' control over their bodies (what to eat) and their freedom of conscience. These manifestations of autonomy are at its core, so even though (or even if) only the undermining of programmatic autonomy, or of deeply held values should be remedied,[83] *Bhamra* clearly merits remedy. In terms of the constitutive elements: the guests were deprived of a meaningful choice whether to consume eggs (contrary to their religious belief); this undermined their reliance interest since the post-intervention state of affairs – having consumed eggs – is inferior to the pre-intervention state of affairs (of not having consumed eggs); the injury is irreversible since they were not just put at risk of consuming them, but actually consumed them. In contrast to ITA, 'religious offence' is a contested protected interest. On the one hand, it is hard to distinguish it from distress, which is not a protected interested in the law of negligence.[84] On the other hand, religious offence might be used to *undermine* third parties' autonomy (eg calls not to publish caricatures that offend devout Muslims). Overlooking autonomy as a distinct and worthy protected interest, and presumably mischaracterizing it as a case of distress, led Janet O'Sullivan (mistakenly, in my view) to describe the court's proposition as 'preposterous'.[85]

While I support the court's proposition, it is in my opinion an obiter. First, if it were part of the holding in *Bhamra*, any other observant guest should have received an award for this injury. After all, the breach and causation issues that were established for the physical injury are equally established for the ITA. This was not litigated, since Ms Bhamra, quite understandably, did not seek such compensation. The proposition is an obiter for another

[82] See Keren-Paz, 'Conceptual Analysis' (n1) 421–25.
[83] *ibid* 426–27.
[84] See n38.
[85] J O'Sullivan, 'From Snail to Egg: Duty of Care, Fault and Food Allergies' (2010) 69 CLJ 435, 437.

reason: as I explain elsewhere,[86] there was no need to base the duty of care to Bhamra with respect to his physical injury on the duty not to offend religious feelings.[87]

From a comparative perspective, *Bhamra*-like cases are litigated quite successfully, and in considerable volume in Isreal, albeit as consumer class actions (whose basis is a statutory tort, not negligence). A recent successful certification is *Barzilaay v Prinir Ltd*, [88] which comes as close as possible to *Bhamra*. Primir sold products as 'Kosher for Passover', despite a known concern raised by regional rabbinical authority that the products might *not* be kosher for Passover. Claimants who consumed the product before discovering the doubts about the product's Kosher credentials could sue for ITA and for the price paid. Claimants who bought the food but discovered the doubt before consuming it could sue only for the price but not for ITA.

In fact, Israeli courts went further by suggesting in the seminal *Tnuva* litigation that even ITA type 1 is actionable by consumers,[89] although ultimately, only a type 2 was compensated for.[90] Tnuva, the leading Israeli milk distributor, added silicone to its long-life milk in order to avoid frothing, without disclosing this on the product's label (and later on, falsely denied in an advertisement that silicone was added) despite being aware that silicone is a prohibited chemical. *Tnuva 1* certified the claim for purposes of class action; *Tnuva 2* imposed liability for the misrepresentation.[91]

The duty to respect ethical or religious choices recognized in *Bhamra* could apply to medical contexts. A type 2 injury would involve a vegan patient submitting to a test

[86] Keren-Paz (n55).

[87] What matters is that Bhamra had good reason to rely on the (implicit) misrepresentation that no eggs would be served, and was injured as a result. If a non-observant guest with a known egg allergy had attended the wedding, relying on eggs not being served, he would have been owed a duty too.

[88] CA 8037/06 *Barzilaay v Prinir Ltd* (Supreme Court, Israel, 4.9.2014).

[89] CA 10085/08 *Tnuva v Raabi* (no 2) (Supreme Court, 4.12.2011) ('Tnuva 2') [33]–[40]; CA 1338/97 *Tnuva v Raabi (no 1),* PD 57(4) 673 (Supreme Court, 2003) ('Tnuva 1') 681–84.

[90] *Tnuva 2* ibid [43].

[91] (n89).

containing animal products contrary to reassurances that it does not.[92] In addition to refusal to receive treatment on religious or ethical grounds (think of Jehovah's Witnesses[93]), protecting ITA 2 in a medical context could arise in non-clinical contexts. In *Ahsan v University Hospitals Leicester NHS Trust*,[94] the decision to allow the more expensive home care costs (of an incapacitated claimant) was based on the non-clinical spiritual preferences of the family members (and presumably the patient), mainly the advantage of the patient being present while her family members pray for her, and avoiding the risk (which materialised in an institutional care setting) that intimate care would be given by men.[95] *Ahsan* involves few complications which I will not address here – including the relevance of incapacity, the difference between negative and positive religious fiats, and the accommodation of religious preferences which might be deemed controversial. It is also noteworthy that the choice involved (whether it was the patient's hypothetical choice or the relatives' actual choice) pertains to post-accident care and not to pre-accident precaution. The lesson from *Ahsan* remains that the appropriateness of the care is not determined solely based on clinical considerations but includes also broader social aspects, a familiar point in the MCA best interest jurisprudence.[96] So a patient subjected, unbeknown to her, to a form of treatment which ought to be known as offending her religious or ethical beliefs – say the use of cream containing animal products where an alternative exists and the patient's wishes are known,

[92] Cf *Friedman v Merck & Co* 107 Cal App 4th 454 (2003), where the claimant, a strict ethical vegan, was required, as a condition of the offered employment, to undergo a TB test. The claim against the distributors failed, despite that defendants negligently misrepresented, upon inquiry, that the test did not contain animal products and was 'Vegan 'safe' and 'Vegan 'friendly.' Based on *Bhamra*, liability should inhere.

[93] *Camden LBC v R (A Minor) (Blood Transfusion) FD 8 Jun 1993*. As discussed in Keren-Paz, 'Conceptual Analysis' (n1) 426, courts, by denying the patient's capacity regarding a refusal to receive urgent medical care, employ a more objective test for autonomy than their rhetoric suggests.

[94] [2006] EWHC 2624 (QB).

[95] Id. [44, 48-9, 51]

[96] However, Helen Taylor recently documented how in practice 'best interests' may be conflated with the clinician's evaluation of 'best *medical* interests' 'What are 'Best Interests'? A Critical evaluation of 'Best Interests' Decision-Making in Clinical Practice' (2016) 24 Med. LR 176.

could lead according to *Bhamra* to liability, even though, clinically speaking, no harm was done.[97]

D. Conclusion on the legal recognition of ITA

English negligence law does protect ITA types 1 and 2. The most explicit recognition was in *Rees*, where the negligent interference with reproductive autonomy – type 2 ITA – led to a £15,000 conventional award. Less explicitly, *Yearworth* also protects reproductive autonomy. While the 'peg' for the award of damages was the distress (or the psychiatric injury) stemming from the destruction of property, it is clear that the *raison d'être* of the award is protecting the claimants' reproductive autonomy. The real injury was the loss of the option to become a father and the consequential distress, rather than the destruction of the sperm as property *per se*. Type 2 injury in the context of consuming food was recognized in obiter in *Bhamra* as giving rise to a duty of care (and implicitly as actionable damage). Type 1 ITA was recognized as actionable in *Chester* and in obiter in *Tracey*. As discussed, the better reading of *Chester* is that it is only the interference with the claimant's autonomy that could justify the award of damages (for the personal injury) despite the fact that the breach did not increase the risk that the injury would occur, and as such did not satisfy the traditional legal causation test. The court's reasoning is clearly based on the need to vindicate the claimant's autonomy, despite the fact that her decision would not have changed had she been properly informed. In *Tracey* too, the breach of the obligation to inform the patient of her DNAR status gives rise to a remedy in negligence, despite the fact that the decision was not changed after the patient was informed.

III. EXPLAINING AWAY *SHAW V KOVAC*

[97] Those uncomfortable with such a conclusion should reflect, that, technically speaking, such treatment is a battery, if the cream is applied by a nurse, and the consent deemed to be invalid.

Shaw is a recent Court of Appeal breach of informed consent decision in which a claim for a separate head of damages for 'loss of personal autonomy' was rejected. The court held, inter alia that 'the appellant can derive no real assistance from the decisions in *Chester* or in *Montgomery* in order to justify the additional head of loss now being proposed'[98] or 'from legal principle either… the present claimed head of loss is contrary to principle'.[99] While *Shaw* clearly represents an inimical (and misguided) approach to generally (or in the context of informed consent) compensating ITA2 in negligence, I argue that its *ratio decidendi* is limited to its facts which make the recognition of ITA indeed more contested: where type 3 damages are already available, and where a type 2 award is given post mortem and with the purpose and effect of circumventing the provisions of S1 of the Administration of Justice Act 1982 which restricts the recovery of post mortem damages. The persuasive potential of the broader inimical approach to ITA as a new head of damages is limited, both because, as the court mentions, the point was not well or fully argued,[100] and because the court did not consider at all *Tracey* (whose facts are most similar to *Shaw*), *Bhamra*, and *Yearworth*, misinterpreted the holding in, and relevance of *Chester* and *Rees*, and overly relied on *Montgomery* which has (indeed) limited relevance for gleaning a right to damages for ITA.

The claimant's father (aged 86) - the patient - received a treatment from which he died without receiving proper information about the risks involved. It was conceded that had the patient been given the relevant information he would have refused the operation. The Trail Judge (HHJ Platts) assessed damages at £15,591.83, including £5,500 for pain suffering and loss of amenity. The appeal was for allowing an additional £50,000 as loss for personal autonomy. On trial, the judge rejected the claim (which was not pleaded) that based on

[98] (n9) [66].
[99] *ibid.* [67].
[100] See *ibid* eg., [31], [33], [35], [47] ('arguments…unfocused'), [48], [57], [71] ('puzzlingly').

Chester and *Montgomery*, a claim for loss of personal autonomy is neither for damages for personal injury nor for loss of expectation of life so was not precluded by S 1 of Administration of Justice Act 1982. On appeal the court (with the main speech by Davies LJ) found that a claim for loss of autonomy is not a distinct cause of action, that, based on *Lumba*,[101] vindicatory damages are not available, that nominal damages are unavailable in a negligence claim and that compensatory damages cannot be supported by *Chester* and *Montgomery*. It further found that the right for personal autonomy 'has always been the foundation of and rationale for the existence of a duty of care on doctors to provide proper information' so 'the claimed additional award of compensatory damage as sought in the present case is in truth unnecessary and unjustified'.[102] Moreover, there is no 'principled approach' to assess such damages and no justification for the award to 'vary from one context to another'.[103] Furthermore, substantial additional damages were sought to compensate for the five lost years whose recovery was disallowed by the 1982 Act;[104] in addition, not recognizing ITA would not mean that the estate would be left without a remedy.[105] Finally, *Rees* cannot support a conventional award in this case in which a remedy is already available (S1 of the 1982 Act) due to floodgates concerns if *Rees* is extended to the current case.[106]

While the *Shaw* court might well doubt the general desirability of compensating ITA, the thrust of its reasoning, and I suggest, the *ratio*, is one of the following two propositions: (1) No award for ITA can be given in run of the mill breach of informed consent cases in which the patient who suffered personal injury would not have consented to the treatment had s/he been informed of the relevant risk. In such a case, while conceptually, ITA2 is separated from (and additional to) the physical injury (ITA3), policy considerations can support

[101] (n73).
[102] (n9) [69].
[103] *ibid* [72]. See Part IV(A) below for a discussion.
[104] *ibid* [73]
[105] *ibid* [74]
[106] *ibid* [81]-[82].

limiting the claimant to the run of the mill personal injury claim.[107] In most cases, the amount that should be awarded for ITA 2, would be negligible in comparison to what is awarded for the personal injury (with its entailed autonomy losses), so limiting claimants to type 3 injuries makes sense. In Israel, whether ITA2 can be awarded in addition to ITA3 personal injury damages is in dispute, but the dominant view seems to exclude them.[108] It is true that the *Shaw* court thought it was 'impossible … to see the justification for' awarding damages 'even if the operation performed on a patient was a complete success' or 'even if it were established that the patient still would have consented if he had been given the proper information'. [109] But these points, apparently, were not well argued, the justifications for such awards were not discussed, and in any event, the court's observation was obiter. The court did emphasize at several places the existence of remedy, and the fact that what was sought was an additional remedy (intended to bypass existing limitations besides) as the crucial element in rejecting the appeal.[110]

(2) No ITA2 or 1 award can survive death, or at least, ought not be awarded if its purpose or effect is to circumvent the no compensation for lost years enshrined in the 1982 Act. Note that this holding is more limited than (1). It leaves open the possibility to award ITA2 damages in cases in which the patient would have refused the treatment and suffered a personal injury (yet survived) for which s/he is being compensated. The strongest support for such interpretation of the holding in *Shaw* is the court's observation that:

---

[107] See n37.

[108] Authorities supporting accumulation include *Daaka* (n25) 589; CA 4576/08 *Ben-Zvi v Hiss* (7.7. 2011, Supreme Court) [51], [55]; and *Kadosh* (n73) [45] (per Rivlin J). Opposing authorities, which I view as the current dominant view, include *Tnuva 2* (n89) [40] (Hayut J); *Prinir* (n88) [39] (Melcer J); *Kadosh ibid* [74] (Amit J, individual opinion, who mentions that the court's practice denies awarding both type 2 and type 3 damages); *Hiss ibid* [25] (Amit J, dissenting).

[109] (n8) [71].

[110] (n9) [65] [66], [69], [79], [81]. At [63] the court distinguishes *Chester* which it views as merely modifying orthodox principles of causation: 'Those considerations do not apply here, where causation and loss were on any view made out and a right to damages in consequence also made out'.

> I formed the very decided impression, reinforced by it being so stated in the second written ground of appeal, that substantial damages, now claimed in the amount of £50,000, were in reality being sought because Mr Ewan lost, as it was said, some five years of his life. But that could not be so articulated, just because of the provisions of s.1 of the 1982 Act. It is true that it was also sought somehow to be argued that the present claim was not an 'action for damages for personal injuries'. But one only has to look at the Re-amended Particulars of Claim to see that this is precisely what it was. HHJ Platts was, in my view, obviously right to see it that way.[111]

Note that there are two separate issues here, and each could plausibly support denial of compensating ITA2 in *Shaw*. First, it is unclear whether infringement of the right to autonomy survives death and whether it should be considered as patrimonial. This also relates to the question whether it should be evaluated according to a mixed subjective-objective test revolving around the distress (or anger) that the breach caused the claimant, or a purely objective test viewing choice, or option, as having objective value irrespective of the claimant's subjective feelings, or indeed even awareness that they were deprived of a choice. These are important issues, and while I have written in the past on measurement issues relating to ITA1,[112] a fuller analysis of quantum in ITA2 awards is a task for another day. The point is that, denying a right by the *estate* for ITA2 or ITA1 award (let alone where ITA3 in the form of personal injury damages is available) does not necessitate denying compensating for ITA 2 or 1 in general.

Secondly, even if conceptually ITA2 is a stand-alone claim which ought to survive death, it might be justified not to recognize it as actionable if its purpose or effect is to

[111] *ibid* [73].
[112] Keren-Paz, 'Normative Evaluation' (n1).

circumvent an existing remedial limitation.[113] This point could be argued both ways, since, at times, the loss of coherence (or the legitimacy deficiency) might be more than compensated for by better attaining substantive justice.[114] But it is not obviously clear that curtailing damages for lost years is so problematic to justify a significant award of ITA2 to overcome such curtailment (although the low tag price on the life of the elderly is problematic in terms of distributive justice, symbolically, and potentially in terms of efficiency and deterrence). Be it as it may, in arguing for additional £50,000 for loss of autonomy where traditional damages were limited to c £15,000 (or £5,500 for pain, suffering and loss of amenity) the claimant's representative did the case for recognizing ITA a disservice, by conflating the questions whether a free standing head of damages should be recognized and the question of quantum. The high amount requested convinced the court that the purpose, or at least the effect of compensating ITA, would be to circumvent the Administration of Justice Act's limitation, which the court was loath to do, and this militated against recognizing ITA2 as actionable damage to the estate in negligence.

Shaw's holding, then, should not be understood as undermining this article's thesis that the five cases discussed in Part II amount to (inconsistent, partial) recognition of ITA in English case law. *Shaw* is limited either to awarding type 2 in addition to type 3 damages, or to awarding it to the estate. As for the broader propositions made in *Shaw*, the court did not discuss three of the five cases on which Part II's thesis is based, it mischaracterised *Chester* as dealing only with causation, failing to appreciate the significance of (over) compensating ITA in circumstances in which the personal injury was *not* caused by the failure to warn to recognizing ITA1 as actionable, and failed to distinguish cases such as *Lumba*, in which the claimant suffered no deprivation of real choice, with cases such as *Tracey* (and the patient in

[113] *cf* Purshouse (n5). My above conclusion bolsters my claim in 'Conceptual Analysis' (n1) that there is no justification to deny compensating ITA out of fear of undermining existing remedial limitations.
[114] 'Conceptual Analysis', *ibid* 431-2.

Shaw) in which the claimants arguably did.[115] The combination of absence of comprehensive argument and lack of engagement with the relevant literature[116] significantly hamper the persuasive authority of *Shaw*.

IV. UNDER-THEORIZATION AND INCONSISTENCIES

As discussed in Part I, 'autonomy' is a contested concept. As I shall show, the five autonomy cases present a number of inconsistencies, along with some open questions (which in turn are a source of further potential inconsistencies). A major reason for this unfortunate state of affairs is the absence of a clear analytical and conceptual framework. This causes difficulties in relation to both questions of whether ITA is actionable damage and how to quantify damages. Recently, I have presented a conceptual framework and argued normatively that ITA type 2 (and, at least in the informed consent context, also type 1) ought to be considered as actionable in negligence.[117] In this Part, I argue that the main building blocks of that conceptual framework – the distinctions between types 1, 2 and 3 ITA and meaningful choice, reliance interest and irreversibility as constitutive elements of a genuine ITA – will expose significant inconsistencies in the way ITA is protected in English negligence cases.[118] First, courts fail to distinguish between types 1 and 2; this failure has important ramifications when deciding whether to afford a remedy at all and how to quantify the loss. The use of 'injury to autonomy' hides the important distinction between types 1, 2 and 3 and the required nuanced policy analysis of whether, and if so how, to remedy each type. Secondly, the quantification of the ITA in these cases is often inadequate in itself. Finally, when examined against each other, the cases reveal considerable inconsistencies

[115] See n73.
[116] See nn 1,5.
[117] Keren-Paz, 'Conceptual Analysis' (n1).
[118] For an analysis of how Israeli courts were plagued by similar confusions see Keren-Paz, 'Normative Evaluation' (n1). Ten years later, some confusions persist while others were ameliorated.

A. Inversed Hierarchies (Better Protection for Type 1 ITA)

Type 2 ITA presents a more significant autonomy encroachment than type 1. After all, in type 2 the claimant would not have agreed to be moved from the pre-intervention to the post-intervention state of affairs, while so agreeing (had she been asked) in type 1. And yet, the case which afforded the strongest remedy of the five cases is *Chester*, a type 1 ITA. As a type 1 injury, damages should be on the lower side of the spectrum since the claimant would have conceded to undergo the procedure with the associated risk. This means that (1) there is no causation between the breach of duty to disclose the risk and the physical injury and (2) the ITA itself is less serious than in type 2 cases, in which the choice is more significant. Yet, since according to the House of Lords the claimant was entitled to be compensated for her physical injury, that measure of damages is likely to be much higher than that received in *Rees*, a type 2 injury. Secondly, and related to this, the physical injury is the wrong measure for the type 1 ITA[119] and, indeed, for type 2. Loss of autonomy consequent on physical injury is a type 3.[120] In principle, a type 1 (or 2) injury exists even where the risk does not materialize.[121] The fact that type 1 ITA is likely to be more significant where the patient suffered physical injury does not justify awarding the claimant damages for the physical injury. The physical injury is still not the legal result of the breach of duty, while the type 1 ITA is. In other words, the error in *Chester* is the award of type 3 damages for a type 1 injury.

The significance of this error becomes clear when *Chester* is compared with *Rees*, in which the House of Lords deviated from the principle of full compensation – the well-entrenched individual assessment of damages – for a flat amount. This in itself is inconsistent

[119] Hoffman in *Chester* (n5) and in Leonard Hoffmann, 'Causation' (2005) 121 LQR 592, 601–2; Clark and Nolan (n5) 674–77.
[120] See Part II above.
[121] Clark and Nolan (n5) 682, 685; Keren-Paz, 'Normative Evaluation'(n1) at 194–95; *Daaka* (n25) 574–75; *cf* Stevens (n55) 166.

with *Chester* (and of course with the rest of English remedy law). If at all, type 1 injury is more amenable to a conventional award, since claimants in this category complain only of the fact that they were deprived of the possibility to say yes, not of being subject to an inferior state of affairs, where harm will naturally vary from one claimant to another.

Leaving aside this inconsistency, one might still doubt whether the award to all 'unexpecting' mothers (in wrongful conception cases) should be standardized, ignoring important differences between them. For example, the intrusion into the reproductive autonomy of someone who does not wish to be a mother at all seems, on the face of it, to be more significant than one who felt she had enough children. Similarly, the motivation for not wishing to have a child might have a bearing on the significance of the intrusion.[122] And of course, individual circumstances will influence the 'opportunity cost' of having an unplanned child.[123] A conventional award does not accommodate any of these factors.[124]

Rees is also conspicuous for the paltry amount given as compensation (or vindication).[125] This is problematic, both in itself and in comparison to the decision in *Chester* (noted above). The injury in *Rees* ought to be considered at the higher end of violation of one's autonomy in terms of the context (reproductive autonomy) and its long-lasting and ever-present consequences. The idea that £15,000 is sufficient to either vindicate the claimant's choice not to become a parent, or to compensate her for the profound effects of this intrusion on her life, is shocking indeed.

---

[122] For example, thwarting a financially motivated decision seems less intrusive than thwarting a motivation to avoid the burden of raising children. See *Bevilacqua v Altenkirk* [2004] BCSC 945 in which the different parents' motivations led to an award of $30,000 to the mother and $20,000 to the father.

[123] For example, the effect of the caring responsibility on the mother's educational and career choices would differ (and depend also on her age, socio-demographic background and available support).

[124] A point lost on LJ Davies in *Shaw* (n9) [72].

[125] For critique see eg Priaulx (n5) 73–76; Morris (n5) 16. For an understanding of the award as vindication see V Wilcox, 'Vindicatory Damages: A Farewell?' (2012) 3(3) J Eur Tort L 390, 405; J Varuhas, 'The Concept of Vindication in the Law of Torts: Rights, Interests and Damages' (2014) 24 OJLS 253, 269–70.

The inconsistency with *Chester* is also puzzling. Following the litigation (which was limited to issues of liability), Chester probably received an amount much higher than £15,000 in circumstances where the choice had little importance (since Chester would have opted for the procedure if informed). Yet the same legal system gave only £15,000 for negligently undermining the choice the treatment was intended to advance – not to have a further child – in circumstances where the effect on the claimant was profound. *Chester* awarded type 3 damages for a type 1 injury, ie, *where the breach of duty did not cause the physical injury*. In contrast, *Rees* failed to award type 3 damages (upkeep costs and forgone income in the labour market as a result of caring responsibilities) and, in addition, failed to give full compensation for ITA type 2; note that for both types 2 and 3 ITA causation of such damage existed (by definition).[126] Of course, the fact that the amount awarded was inappropriate ought not lead to the conclusion that no award should be given. Neither is the critique of the award in *Rees* as unsatisfactory a critique *per se* of the flat amount method. A conventional award of a range of £150,000–£200,000 could have better reflected the profound undermining of such a fundamental aspect of one's autonomy. Whether examined in isolation or in comparison to *Chester*, the holding in *Rees* is problematic for both deviating from the principle of full compensation and awarding a derisory amount, failing to capture the real loss suffered by the claimant, and by this effectively and erroneously treating the ITA as type 1.

B. Treating Similar Cases Differently

A look at the two reproductive autonomy cases reveals a quite different treatment of ITA. A look at the two informed consent cases suggests that they might be inconsistent, if *Tracey* is treated as a type 1 remedy to a type 1 injury.

[126] Moreover, as discussed above, if a conventional award has a place at all, it should be awarded for a type 1 injury (*Chester*), not for a type 2 injury (*Rees*).

*1. **Reproductive autonomy***

The defendant's breach of duty in *Yearworth* obviously interfered with the reproductive autonomy of those claimants who did not regain their fertility. There is much to be said (on grounds of consistency) for the applicability of the conventional award in *Rees*, irrespective of the availability of damages in bailment for mental distress. Note that there are several issues here: (1) the nature of the claim in *Yearworth* as a standalone ITA (as opposed to type 3 psychiatric injury); (2) whether a remedy for the ITA should accumulate with damages for mental distress; (3) whether a standalone remedy should be a conventional award (to be consistent with *Rees*) or adhere to the principle of full compensation (given the critique offered above of that conventional award); (4) how, ideally, the quantum for ITA in *Yearworth* (foregone fatherhood) should compare with that of Rees (thrusted-upon motherhood); and (5) whether for some claimants in *Yearworth* the ITA is type 1, rather than type 2.

The first issue was discussed in Part II. If the protected interest is indeed reproductive autonomy rather than the destruction of property, it should be remedied directly as a type 2 ITA (as it was in *Rees*, albeit unsatisfactorily), rather than being remedied indirectly as a type 3.[127] Turning to the second issue, could claimants recover for both ITA and the psychiatric injury or the distress? It is useful to distinguish between three groups of claimants. Firstly, there are claimants who did not regain fertility, who ought to recover for ITA even if they did not suffer psychiatric injury (or even distress, if ITA is to be measured irrespective of the distress it causes[128]); otherwise, the type 3 award in *Yearworth* is under-inclusive. Secondly, claimants who suffered psychiatric injury ought to be compensated for that loss, which could

[127] As the analysis of the next issue reveals, remedying mental distress for the lost property (sperm) is potentially under-inclusive from the perspective of reproductive autonomy.

[128] Space constraints do not allow discussing this important point. An analogy to *Gulati v MGN Ltd* [2015] EWHC 1482; aff'd [2015] EWCA Civ 1291 (CA) might suggest a positive answer. Israeli courts are in disagreement. See also (in a type 1 context) Keren-Paz, 'Normative Evaluation' (n1) 198–200.

be conceived as either a consequence of the ITA or of the damage to their property. The former alternative is to be preferred, since (as I argued above) the gist of the injury in *Yearworth* is ITA, not property damage. Thirdly, this conclusion holds true also with respect to claimants who suffered psychiatric injury (from the belief they would not be able to father children) prior to regaining fertility, who therefore did not suffer *permanent* ITA. The injury to these claimants could be regarded as consequent on either property damage or *temporary* ITA.[129]

The third issue raises an important and general jurisprudential question on the relationship between coherence and justice. Both *Rees*- and *Yearworth*-like claimants should receive full compensation for the interference with their reproductive autonomy. To the extent that a standalone ITA award in *Yearworth* would have been set above £15,000 while the *Rees* limitation stands, I would see this as problematic both on the basis of inconsistency and feminist critique. Indeed, that the actual award the claimants in *Yearworth* are likely to receive far exceeds £15,000 is problematic in terms of gender equality. This relates to the fourth issue that, in applying *Rees* (and setting aside the questions of whether a conventional award and the amount given by the court are appropriate) one needs to decide whether interference with reproductive autonomy by preventing the claimant from becoming a parent is more, less or as serious as an interference making the claimant an unwanted parent. One also needs to decide whether these harms are gendered, and if so, whether this ought to be reflected in the size of the award.[130]

[129] Remedying temporary ITA is consistent with the requirement (Keren-Paz, 'Conceptual Analysis' (n1) 424) that the loss of autonomy be irreversible. When the psychiatric injury is suffered, the loss of autonomy – the loss of the option to father a child – has occurred. In any event, for those who regained fertility, the consequent psychiatric injury can outlast the period of infertility, and is in this sense irreversible. Both personal injury and loss of autonomy could be suffered in varying duration. While the fact that the injury was temporal is and ought to be taken into account as a matter of quantum, a permanent injury is not a condition for a remedial response.

[130] These questions have to be answered, even if the decisions in *Rees* and *Yearworth* are corrected, so that all types of interference with reproductive autonomy would be remedied according to the principle of full compensation.

I turn now to the fifth and last issue. Understanding *Yearworth* as based on interference with reproductive autonomy also casts doubt on the conclusion of the trial judge (not litigated on appeal) that the claimants were not entitled to damages for personal injury, other than in respect of any psychological injuries, unless there was more than an even chance that a child would have been conceived by use of the lost sperm.[131] Once the issue is framed as a matter of ITA, it should not be necessary to show on a balance of probabilities that the claimant would have had a child from the sperm but for the breach of duty. Rather, what matters is that any claimant who did not regain fertility lost a valuable choice whether to become a father. Losing this choice – the option to become a parent – is in itself an inferior state of affairs requiring a remedy. Options in the commercial context have a clear economic value. The option whether or not to become a parent is also valuable (although mainly from a non-economic perspective).[132] Plausibly, the quantum ought to be higher for a claimant who can show on a balance of probabilities that he would have fathered a child, but as a matter of entitlement, 'more than an even chance' ought not be considered a constitutive element of the claim.[133] Alternatively (but less appealing in my opinion), those who on the balance of probabilities would not have conceived a child could sue for a type 1 injury – since they were deprived of the option to become a father, even though they would not have used that option.

In both *Rees* and *Yearworth* reproductive autonomy was protected, but only to an extent. Like *Chester*, it seems that the claimants' autonomy interest was the driver behind the court's willingness in *Yearworth* to afford claimants a remedy, but that the measure of recovery was based on an injury to another interest: personal injury in *Chester* and mental distress (or psychiatric injury) in *Yearworth*. *Rees* is the strongest authority for directly

[131] *Yearworth* (n7) [16]. The analysis was based on the assumption (which was ultimately rejected) that damage to stored sperm could be considered personal injury.

[132] Interestingly, the social meaning of not being a parent also changes, whether it results from a decision by the would-be parent, or due to circumstances beyond their control.

[133] *cf* the discussion of 'meaningful choice' as a constitutive element of the claim in Part II(B)(2).

compensating the claimant for undermining her autonomy. *Yearworth* is more equivocal: on the one hand, it pins damages on mental distress, not on the ITA *per se*.[134] On the other hand, it affords compensation to those who eventually did not lose (at least not permanently) a valuable choice – those who suffered mental distress (or psychiatric injury) from the fear they had lost their chance to father a child, but then regained fertility. Neither *Rees* not *Yearworth* stands for the proposition that a claimant can obtain full compensation for the interference itself with their reproductive autonomy.

2. Informed consent

Since the court in *Tracey* did not substantively discuss the common law cause of action, it is difficult to make any observation about possible inconsistency with other cases. If Ms Tracey could have sued in negligence for the failure to inform her of her DNAR status, her damage could be one of the following (or both): either interference with her autonomy (or dignity) by failing to involve her in the process regardless of the fact that the decision would not have changed (ITA type 1); or her premature death due to the DNAR (personal injury, so ITA type 3). The logic of *Chester* (problematic as it is) might lead us to think that the latter should be allowed: if vindicating autonomy justified liability for personal injury, despite the fact that the breach did not increase the risk of its occurrence, why ought it not impose liability for the premature death even though the breach of duty did not increase that risk? After all, death is the ultimate loss of autonomy, so whatever the policy considerations justifying the majority decision in *Chester*, surely they apply to a greater extent in *Tracey*?

Those convinced that the decision in *Chester* is correct can still attempt to distinguish it. The most obvious reason is but-for causation: similar to the claimants in *Yearworth* who regained fertility, the ITA loss suffered by Ms Tracey was temporary, since the DNAR status

[134] In practice the former compensates for the latter, but does it do so adequately?

was reinstated after consultation with the patient and her family and before death. But this still leaves us with the question of whether wrongful death damages could have been awarded had Ms Tracey died before agreeing to the DNAR status and under the assumption that either she would have agreed to this status had she been informed, or that it would be lawful to retain her DNAR status despite her objection. Possibly, still, *Chester* could be distinguished. According to the perceived wisdom (which I doubt[135]), but-for causation existed in *Chester*, since the chances of the risk materializing in any single procedure were (considerably) below the balance of probabilities.[136] In contrast, both the chances that the event necessitating resuscitation would occur, and that DNAR would be ineffective (so death would follow even if resuscitation were attempted) seem to be more probable than not.[137] Alternatively, one might view Ms Tracey as less deserving of a remedy, since the breach did not affect her autonomy in the sense that she was ultimately subject to the clinical opinion not to resuscitate, as opposed to Chester, who had the right to refuse treatment.[138]

Assuming *Tracey* supports remedying the ITA type 1 itself, rather than the personal injury, it is a step in the right direction, despite the fact that, as explained above, it is arguably inconsistent with the award in *Chester*.

C. Conclusion

As the discussion has revealed, *Chester*, *Rees* and *Yearworth* are problematic both when looked upon in isolation and compared to each other. The protection afforded to ITA in these cases is patchy, inconsistent and under-theorized; the problems are both across

[135] Keren-Paz (n55).

[136] Clark and Nolan (n5) 662–63.

[137] In this sense, this variation on *Tracey* is similar to failure to warn an intermediary, where it is unclear whether the intermediary would have acted on the warning, therefore arguably severing the factual causation between the breach and the injury. For the learned intermediary 'defence' in the context of product liability see, eg, *Stewart v Janssen Pharmaceutical Inc* 780 S.W.2d 910, 912 (Tex. App.–El Paso 1989); *cf Bolitho v City and Hackney Health Authority* [1997] 4 All ER 771.

[138] See n68 above for the discussion of *Winspear*, a clear type 1 claim.

categories of case law (mainly *Chester* and *Rees*) and within (mainly *Rees* and *Yearworth*). Most troubling perhaps is the award of type 3 (hefty) damages for type 1 ITA in *Chester*, while at the same time awarding de facto type 1 damages for very significant types 2 and 3 ITA in *Rees*.[139] It is perhaps ironic that the two decisions – *Bhamra* and *Tracey* – in which the protection of types 2 and 1 autonomy in negligence was made in passing and as an obiter (and incidentally by a lower court than the decisions in *Chester* and *Rees*) are the soundest. If we take the decision in *Bhamra* at face value, remedying the injury to the guests' autonomy would pose none of the problems exposed in *Rees* and *Chester* (and to a lesser extent in *Yearworth*). The award would be based on the principle of full compensation, and not on the anomaly of a conventional award. It would compensate the claimants for the relevant and much lower (in *Bhamra*, not in *Rees*) type 2 loss (or for *Chester*, type 1 loss) rather than basing the award, as in *Chester*, on the physical injury, which is a type 3 loss not caused by the breach of duty. Nor would it be necessarily limited to compensating the claimants for their mental distress (or psychiatric illness) from the breach, as was the case in *Yearworth*. The approach in *Bhamra* has the potential for calibrating an award that is based on the relevant factors: a type 2 injury that relates to an important ethical or religious tenet, which has a bearing on both bodily integrity (what we eat) and freedom of conscience (which ethical rules we follow), which, unlike *Chester*, brought the claimant to an inferior state of affairs but which, unlike *Rees*, was limited in terms of duration and effect. If the obiter in *Tracey* refers (as it seems) to the ITA type 1, rather than to the personal injury, the same could also be said of *Tracey*.

V. CONCLUSION

[139] This illustrates the shortcomings involved in the absence of joined-up thinking about the damage concept in law (and in negligence in particular) and the casuistic stumbling from case to case, which is typical of wrongful conception cases. See Priaulx and Cane (both n10).

ITA is a standalone actionable damage in negligence where the claimant is deprived of a meaningful choice, there is no setback to another recognized interest and either the claimant is brought to a subjectively inferior state of affairs (type 2) or was deprived of the opportunity to agree to be moved to that state of affairs (type 1). English law recognizes such damage as actionable in a series of cases, some of which – *Bhamra*, *Tracey* and *Yearworth* – were not hitherto understood to do so. *Shaw* should be understood as denying actionability of ITA2 only where ITA3 award is available, or to the estate; the court's failure to address *Yearworth*, *Bhamra* and especially *Tracey* significantly undermines Shaw's persuasive authority. However, the under-theorization in the cases leads to inconsistencies. Like cases (*Rees*/*Yearworth*; *Chester*/*Tracey*) are not treated alike; ITA is misunderstood to be about 'religious offence' (*Bhamra*) and property loss (*Yearworth*) and worse still, the more serious type 2 ITA (*Rees*) gives rise to a weaker remedy (of exceptional nature aside) than the less serious type 1 injury (*Chester*). A better understanding of the different manifestations of ITA will lead to results which are consistent and more justified on the merit.

Acknowledgments

I would like to thank François du Bois, Michael Fay, Assaf Jacob, Marie-Andree Jacob, Nicky Priaulx, Max Weaver and the two anonymous reviewers for very helpful comments on a previous draft, TT Arvind, Gregory Keating, Phillip Morgan, Yossi Nehushtan, Sotirios Santatzoglou and Dania Thomas for helpful discussions and Hazel Beddows, Stella Coyle, Dominique Hibell, Marianne Oludhe and Jenni Taylor for their research assistance.