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Delictual Liability and the Loss of Opportunity of Fatherhood: *Holdich v Lothian Health Board*

Elsbeth Reid

A. *HOLDICH AND THE SHADOW OF YEARWORTH*

While still in his early twenties Mr Holdich had deposited sperm samples in a cryogenic storage facility prior to receiving treatment for testicular cancer. He recovered from the cancer, but the treatment left him infertile. When nearly a decade later he sought to retrieve the samples in order that he and his wife could attempt to conceive a child by *in vitro* fertilisation he was advised of the possibility that a malfunction in the storage vessel had damaged the samples and that they were unsafe to use. In consequence, the couple did not proceed with IVF. Mr Holdich raised an action against the Health Board as provider of the storage facility, claiming compensation for distress, depression and loss of the chance of fatherhood. His claim was presented primarily as one for mental injury consequential on property damage in breach of contract. *Et separatim*, he argued that he had suffered ‘pure’ mental injury for which delictual damages were due, or alternatively that the damage to the samples gave rise to a ‘*sui generis*’ type of claim based upon common-law fault for which damages were payable.¹ The case came before Lord Stewart for debate on whether the pleadings disclosed a relevant cause of action. At the time of writing the proof has not yet taken place.

The shadow of an analogous English case hung close over the pleadings in *Holdich*. In *Yearworth v North Bristol NHS Trust*² six cancer patients had similarly taken up the offer to store sperm samples prior to receiving chemotherapy, but the samples perished due to the defendants’ failure to maintain a sufficiently low temperature in the storage vessels. When the patients claimed damages for the mental distress and psychiatric injury suffered in consequence, the health authority admitted negligence but disputed liability, arguing that the

¹ 2014 SLT 495 [4], as narrated by Lord Stewart.

² [2010] QB 1. For discussion see N. Prialux, ‘Managing novel reproductive injuries in the law of tort: the curious case of destroyed sperm’ (2010) 17 *European Journal of Health Law* 81; S. Harmon and G. Laurie, ‘*Yearworth v North Bristol NHS Trust*: property, principles, precedents and paradigms’ (2010) 69 *Cambridge Law Journal* 476.

damage to the samples was neither damage to the claimants' property, nor was it a personal injury. The claim was rejected at first instance but upheld in the Court of Appeal. The main basis for the latter decision was that the claimants were to be regarded as the owners of the samples,³ and therefore compensation could be claimed for the destruction of the material in the defendants' storage facility in breach of bailment. It was not therefore necessary to give extended scrutiny to the claimants' arguments drawn from the law of tort. Following on from this decision, the parties in *Holdich* appeared to have concentrated upon the property-law, rather than the delictual, aspects of their case. Lord Stewart took the view that, while bailment was not a contract as such, and therefore not directly comparable with the Scots contract of deposit, the availability of this remedy in English law was 'at least mildly persuasive' in the question of whether the property-contract case should be allowed to go to proof. Moreover, since the delictual case was to be permitted to proceed there was 'an argument in expediency' in the property-contract case going forward also, but he signalled that he found the latter more persuasive than the former.⁴

Detailed examination elsewhere of the property arguments suggests that these present a convincing basis for taking proceedings forward.⁵ Following on from this, the next section will assess the case for imposing delictual liability in relation to psychiatric injury deriving from damage to the sperm when regarded as the patient's property. At the same time, this chapter will point to the problems inherent in presenting the loss suffered as a personal injury (a possibility put forward by Lord Stewart), or as an invasion of the patient's autonomy.

B. PSYCHIATRIC INJURY DERIVING FROM DAMAGE TO PROPERTY

The plaintiffs in *Yearworth* had argued that if they were regarded as owners of the samples, they were entitled to compensation for psychiatric injury triggered by learning of their destruction. The authority relied upon was *Attia v British Gas plc*, in which the Court of Appeal refused to strike out a claim for the shock suffered by the plaintiff on witnessing her

³ [2010] QB 1 [45] (Lord Judge CJ). The concept of ownership over sperm samples was recognised in two subsequent Australian cases: *Bazley v Wesley Monash IVF Pty Ltd* [2010] QSC 118; *Re Edwards* [2011] NSWSC 478. See also *Lam v University of British Columbia* 2013 BCSC 2094.

⁴ 2014 SLT 495 [76].

⁵ See K. Reid, 'Body Parts and Property', [Edinburgh Law School Working Paper Series](#), 2015/25 (SSRN, 2015).

house burn down as a result of negligence by central heating engineers.⁶ The Court of Appeal in *Yearworth* did not venture a final judgment on this point, since a remedy would lie in any event for breach of bailment. However, it cast doubt on the relevance of *Attia*, noting that the *Yearworth* claimants had been informed at second hand of the spoiling of the samples but, unlike Mrs Attia at the fire scene, had not witnessed it themselves. Although this distinction was ‘controversial’, the court seemed to regard it as valid because it ‘replicated’ that which was ‘drawn in relation to the so-called secondary victim who foreseeably suffers psychiatric injury as a result of *personal* injury which the primary victim suffers... as a result of the defendant's negligence’.⁷ Reference was made to *Alcock v Chief Constable of South Yorkshire Police*,⁸ which post-dated *Attia* but provides the modern framework for psychiatric injury claims, setting out the control mechanisms that limit duty of care in respect of ‘secondary’, as distinct from ‘primary’, victims.

In *Holdich* Lord Stewart took up *Yearworth*'s limited discussion on this point, but queried whether it had been appropriate to distinguish *Attia* in such a way as to bracket the owners of the samples with the secondary victims in *Alcock*. His Lordship's misgivings on this question seem entirely justified. In this connection it should be noted that the Court of Appeal has itself expressed doubts as to whether the distinction between primary and secondary victims is helpful in contexts other than road accidents and other sudden trauma to the person,⁹ and one commentator has queried whether it is ‘intelligible at all’ in the context of property damage.¹⁰ The primary/secondary victim categorisation is relevant only where the immediate casualty of the defender's negligence is the interests of a person other than the pursuer; it has no bearing where the alleged wrong has been done directly to the pursuer's own interests. In other words, the claim of the owner of damaged property cannot be denied in the same terms as that of a witness of another's physical injury. As Mullany and Handford commented upon *Attia*, ‘The plaintiff in this case cannot possibly be regarded as a secondary victim (unless the house be regarded as the primary victim, which would be sheer

⁶ [1988] QB 304 (on the basis that causation and reasonable foreseeability would require to be established).

⁷ [2010] QB 1 [55] (Lord Judge CJ).

⁸ [1992] 1 AC 310.

⁹ *Leach v Chief Constable of Gloucestershire* [1999] 1 WLR 1421 at 1429 (Pill LJ).

¹⁰ H. Teff, *Causing Psychiatric and Emotional Harm: Reshaping the Boundaries of Legal Liability* (Oxford, 2009) 125, note 184.

nonsense)'.¹¹ If the claimants in *Yearworth* were acknowledged as the owners of the samples, the *Alcock* criteria, required of 'secondary victims' witnessing injury to others, were not in point, and it is therefore hard to see any justification for 'replicating' the requirement that shock should be suffered by direct perception of the consequences of the defender's negligence. In *Holdich*, similarly, if the pursuer is regarded as the owner of the samples, the Health Board's liability to compensate him for psychiatric harm suffered on their destruction turns not upon the *Alcock* criteria but upon whether such harm was foreseeable and whether causation is established.¹²

The discussion so far has assumed the pursuer's ownership of the samples. If, however, it were ultimately to be determined that the pursuer did *not* own them (and that the physical damage to them did not constitute personal injury to Mr Holdich¹³), it is difficult to see how duty might be established in relation to a claim for 'pure' psychiatric injury. Perhaps rather surprisingly, Lord Stewart indicated that authority of sorts might be drawn from *Goorkani v Tayside Health Board*,¹⁴ but the circumstances of that case were not directly comparable. In *Goorkani*, the pursuer had become infertile after treatment for an eye condition. Infertility was a known side-effect of the particular drug prescribed to him and there was no allegation of negligence in the way that treatment had been administered; nor was it established that the pursuer would *not* have gone ahead with the treatment had he known of the risk. Instead, the pursuer claimed, and the court accepted, that the doctor failed to exercise due care in providing information about the treatment, so that, some time after the treatment, the patient experienced shock and anger on discovering the reason why he and his wife had not conceived a child. In other words the negligence in that case lay not in any act which caused infertility but in the mode of communicating, or failing to communicate, the likelihood of infertility. Unlike *Holdich*, therefore, *Goorkani* could not fairly be said to be a case of 'negligently caused sterility'.¹⁵

¹¹ *Tort Liability for Psychiatric Damage* 2nd edn. (Sydney, 2006) para 5.600.

¹² *Attia v British Gas plc* [1988] QB 304.

¹³ See section D below.

¹⁴ 1991 SLT 94..

¹⁵ As Lord Stewart seemed to suggest in 2014 SLT 495 at [100]. Further English authorities supporting, if rather tenuously, the existence of a duty of care in relation to the provision of information were noted in *Holdich* but appear not to have been directly in point where what was at issue was the negligence of the Health Board in storing the sample, not in informing him of the consequences of its spoilage (*AB v Tameside and Glossop*

C. PERSONAL INJURY?

The Court of Appeal in *Yearworth* categorically rejected the claimants' argument that damage to a substance generated by a person's body could constitute a personal injury to him. For the court 'personal injury' meant a specific 'impairment' to the person's physical or mental condition.¹⁶ The notion that damage to biomatter taken from the claimants might satisfy this traditional requirement for 'demonstrable physical injury'¹⁷ was therefore a 'fiction' that would 'generate paradoxes, and yield ramifications, productive of substantial uncertainty, expensive debate and nice distinctions.'¹⁸ Perhaps because of the clear steer given on this point by the English court, the pursuer in *Holdich* conceded that in Scots law also the destruction of sperm samples did not constitute a personal injury. But Lord Stewart was less sure and pondered whether these issues merited fuller consideration than had been accorded to them in *Yearworth*:¹⁹

'Would it be unreasonable to extend the concept of injury to damage to viable biomatter produced or removed for the purpose of the living subject's own reproduction or medical treatment? Clearly there is such a thing as out of body treatment, for example high dose radiation of cancerous organs removed to protect surrounding tissue. Thinking of autologous grafts, transplants and transfusions, would it be far fetched to deal with viable biomatter outside the body as part of the subject's person? Would it do violence to the law? Would it run counter to current norms of medical practice? Would it be inconsistent with the regulatory regimes? Would it offend morality?'

In both *Holdich* and in *Yearworth*, German authority was briefly considered in this connection, in the form of a decision of the *Bundesgerichtshof* in 1993,²⁰ to the effect that the

Health Authority [1997] 8 Med LR 91; *Farrell v Avon Health Authority* [2001] Lloyd's Rep Med 458; *W v Essex County Council* [2001] 2 AC 592).

¹⁶ At [18] (Lord Judge CJ), looking in particular at its definition in the English Limitation Act 1980, s 38(1),

¹⁷ *Rothwell v Chemical & Insulating Co Ltd* [2008] 1 AC 281 [47] (Lord Hope).

¹⁸ [2010] QB 1 [23] (Lord Judge CJ).

¹⁹ 2014 SLT 495 [6].

²⁰ BGHZ, 124, 52 (9 November 1993). English translation available at

http://www.utexas.edu/law/academics/centers/transnational/work_new/german/case.php?id=830.

negligent storage of sperm samples caused a personal injury to the patient in terms of § 823(1) of the German Civil Code. The German approach was that the sperm samples formed a ‘functional unity’ with the patient’s body so that their destruction could be considered as a personal injury to him.²¹ By the same token (if biomatter also included ovarian tissue intended for reimplantation in assisted reproduction), Lord Stewart thought it ‘plausible’²² to treat gametes, male or female, as part of the subject’s body, although the pursuer’s concession on this point meant that it was not developed further.

German authority aside, however, the objection to a claim framed under this head is that the gist of personal injury is normally taken to entail ‘disease and...impairment of a person's physical or mental condition’.²³ This is difficult to square with the primary harm here, namely deprivation of the opportunity of procreation due to destruction of a substance stored remotely from the pursuer’s person. If separately-held biomatter is to be recognised as part of the person and thus susceptible of injury, the potentially open-ended possibilities for delictual liability would require to be circumscribed. Without such restriction, there is no obvious answer to the anomalies which the court in *Yearworth* thought would follow from treating sperm damage as personal injury:²⁴

‘(a) had one of the men died prior to the loss of the sperm, the suggested personal injury would have been inflicted upon all of the men save him; (b) had the loss of the sperm occurred after the men, to their knowledge, had recovered their natural fertility and so had no further interest in its preservation, the suggested personal injury would nevertheless have been inflicted on all

²¹ As noted in *Yearworth* and in *Holdich*, the German court’s characterisation of sperm damage as personal injury may well have been driven by the fact that at that time ‘intangible damage’ (‘immaterielle Schaden’) was recoverable only as a delictual claim (in terms of § 847(now repealed), part of the section of the German Civil Code on delictual liability). This created difficulties in relation to medical malpractice suits, which are often argued as breach of contract under German law. Revisions to the German Civil Code in 2002 opened up liability in relation to other heads of liability, with a new § 253 in the Code’s general section on the law of obligations. This means that immaterial damage can in principle now be claimed in relation to *contractual* medical negligence claims. Consequently it is now unnecessary to categorise such damage as personal injury, as there is no longer any absolute necessity to frame the claim within the law of delict.

²² 2014 SLT 495 [7].

²³ See, e.g., Prescription and Limitation (Scotland) Act 1973, s 22(1).

²⁴ [2010] QB 1 [23] (Lord Judge CJ) (leaving aside the potential for criminal liability, and the non-availability of the property remedy of vindication: see K Reid, ‘Body Parts and Property’ 000 at 000).

of them albeit that, as damage would be absent, it would not have been actionable; and (c) had the loss of the sperm occurred by intentional destruction following preservation for ten years as required by law, the suggested personal injury would again have been inflicted on all of them, albeit that, again, it would not have been actionable.’

To the extent that there is an ‘impairment’ here, it is not to the pursuer’s person as such but to his future prospects of procreation. However, it is by no means obvious that the case for compensation can be more cogently argued in relation to injury characterised as loss of reproductive autonomy.

D. LOSS OF AUTONOMY AS INFRINGEMENT OF A PERSONALITY RIGHT?

In *Holdich* the claim based upon loss of autonomy was permitted to go forward to proof, on the basis that autonomy in this context ‘seemed’ to be a ‘personality right’.²⁵ Lord Stewart was not, however, entirely persuaded that it would succeed as thus framed. In particular he expressed concern that there was little authority to support loss of autonomy as an independent head of damages. But while it is no doubt correct that the law of negligence has in the past normally protected autonomy only as ancillary to other forms of harm, this is by no means the first time that the question of appropriate recognition for loss of autonomy has come to the fore.²⁶

1) Reproductive autonomy as a personality right: the developing jurisprudence

Although the European Convention on Human Rights makes no express provision in this regard,²⁷ a concern for patient autonomy, as the ‘cornerstone of modern medical

²⁵ 2014 SLT 495 [102].

²⁶ See D. Nolan, ‘New forms of damage in negligence’ (2007) 70 *Modern Law Review* 59 at 87.

²⁷ At the same time, the jurisprudence of the European Court of Human Rights has shifted in recent years towards recognition of patient rights. See *Pretty v United Kingdom* (2002) 35 EHRR 1 at [61]: ‘the concept of ‘private life’ is a broad term not susceptible to exhaustive definition... Though no previous case has established as such any right to self-determination as being contained in Article 8 of the [ECHR], the Court considers that the notion of personal autonomy is an important principle underlying the interpretation of its guarantees.’

jurisprudence in the United Kingdom',²⁸ has more and more informed not only the legal textbooks but the ethics guidance for the medical profession itself.²⁹ It is now uncontroversial that medical personnel are under a duty to give due protection to their patients' 'right of autonomy' by providing appropriate information prior to treatment, and that reparation is due for harm suffered in procedures to which the patient has not given this level of informed consent.³⁰

The more specific concept of 'reproductive autonomy' has recently come into focus, arising in the context of choices on fertility, initially in regard to abortion³¹ but thereafter in relation to access to contraception and appropriate pre-natal testing for foetal abnormality and discontinuation of pregnancy. As medical science has evolved, reproductive autonomy is now talked of also in regard to assisted reproduction.³² But although the rhetoric of 'autonomy' has increasingly been found attractive, the courts have struggled to determine what this actually entails, and to translate the correlative obligations into the law of delict or tort.

2) Reproductive autonomy and assertion of the right *not* to have a child

a) The reasoning in McFarlane v Tayside Health Board

Holdich was not unique, even in Scotland, in considering appropriate legal recognition for 'reproductive' autonomy, but the case law so far has largely concerned assertion of the right

²⁸ J.K. Mason and G. Laurie, *Mason and McCall Smith's Law and Medical Ethics* (9th edn., Oxford, 2013) para 9.02.

²⁹ See e.g. General Medical Council, *Good Medical Practice* (2013, available at http://www.gmc-uk.org/guidance/good_medical_practice.asp).

³⁰ See *Montgomery v Lanarkshire Health Board* 2015 SLT 189 [68] (Lord Kerr and Lord Reed), [108] (Baroness Hale). See also *Chester v Afshar* [2005] 1 AC 134, [24] (Lord Steyn), [92] (Lord Walker), in which a 'modest departure from traditional causation principles' was permitted so as to compensate harm sustained in a procedure to which this level of consent had not been given). See also E.C. Reid, *Personality, Confidentiality and Privacy in Scots Law* (Edinburgh, 2010) paras 3.10-3.21.

³¹ J.A. Robertson, 'Procreative liberty and the control of conception, pregnancy, and childbirth' (1983) 69 *Virginia Law Review* 405.

³² E. Nelson, *Law, policy and reproductive autonomy* (Oxford, 2013) 5; see also N. Prialux, 'Managing novel reproductive injuries in the law of tort: the curious case of destroyed sperm' (2010) 17 *European Journal of Health Law* 81

not to have a child, in relation to ‘wrongful pregnancy’ (where the defenders have allegedly been negligent in the provision of contraceptive or sterilisation services) or ‘wrongful birth’ (where the defenders have negligently failed to advise the parents appropriately of the risk that a child would be born with a congenital abnormality). The starting point for this line of cases was the troubled decision in *McFarlane v Tayside Health Board*,³³ in which the defenders negligently misadvised a married couple that the husband’s vasectomy had been successful, with the result that a healthy child – their fifth – was born shortly afterwards. In that case the mother’s claim for the physical discomfort of pregnancy and childbirth, and both parents’ claim for the financial costs of bringing up the child, were dismissed at first instance, then unanimously allowed on appeal to the Inner House. On further appeal the House of Lords allowed recovery for physical discomfort but not for the child’s maintenance costs. The reasoning of the Inner House is worth revisiting, however, since it attempted to plot the claim on the map of ‘well established principles of the law relating to reparation’.³⁴ The court reasoned that the provision of erroneous advice was a wrongdoing that constituted an *iniuria*, causing the pursuers to suffer a *damnum* when the child was conceived. The concept of *damnum* ‘does not require injury in the ordinary sense of physical or personal injury; all that it requires is a material prejudice to an interest (whether it is of a patrimonial character or not) which the law allows a person to vindicate.’³⁵ And ‘when there is concurrence of *iniuria* and *damnum* the person whose legal right has been invaded with resultant loss to him has a right to seek to recover money reparation for that loss from the wrongdoer.’³⁶ The right materially prejudiced here was the couple’s right ‘not to have a child at a time and in circumstances when they had made a deliberate choice not to have a child’.³⁷ Since this was a right which the court deemed worthy of protection, reparation was due for the two forms of loss deriving

³³ 2000 SC (HL) 1. For background see K. McK. Norrie, ‘Bringing up Catherine: *McFarlane v Tayside Health Board*’, in J.P. Grant and E.E. Sutherland (eds), *Scots Law Tales* (Dundee, 2010) 65.

³⁴ 1998 SC 389 at 393 (LJC Cullen). See also *Allan v Greater Glasgow Health Board* 1998 SLT 580 in which negligence was not proved, but which accepted that a relevant claim might otherwise have been made for the physical pain of pregnancy and birth, as well as the costs incurred as a result of the birth, according to the ‘ordinary principles of law in Scotland pertaining to assessment of damages’, at 585 (Lord Cameron).

³⁵ 1998 SC 389 at 402 (Lord McCluskey).

³⁶ 1998 SC 389 at 398 (Lord McCluskey).

³⁷ 1998 SC 389 at 399 (Lord McCluskey), speaking also of the father’s ‘right not to receive advice that... was materially inaccurate and misleading’, which was ‘very closely bound up with his related right not to impregnate his wife if he chose not to do so’, and of the mother’s ‘right not to be made pregnant by her husband without her knowing consent’.

directly from that *damnum*: i) the invasion of Mrs McFarlane's bodily integrity entailed in pregnancy and childbirth; and ii) the impact upon the pecuniary interests of both parties in maintaining the child.³⁸

On appeal, the majority in the House of Lords acknowledged that the Inner House's judgment reflected the 'traditional view of delictual liability' but felt constrained by considerations of fairness, justice and reasonableness to set this textbook reasoning aside.³⁹ The speeches reached this conclusion by varying routes, so that Lord Steyn, for example, directed himself to the requirements of 'distributive justice', concluding with a rather surprising reference to the criterion of how 'commuters on the Underground' would respond if asked if the McFarlanes should receive compensation. In the absence of empirical evidence as to the likely outcome of this improbable opinion poll, his Lordship's own 'firm' expectation of a negative response was conclusive.⁴⁰ A common thread running through the speeches, however, was concern for the dignity of the unborn child if a value were to be placed upon her non-existence, and the disproportionality of the full costs of maintaining the child in relation to the defenders' negligence. As it happens, their Lordships made extensive reference to an article written by Lord Stewart while he was still at the Bar,⁴¹ providing a comparative survey of case law on damages for the birth of a child. The article concluded that wrongful birth/pregnancy cases in reality comprised 'two claims—one for personal injury and one for economic loss', although this had hitherto been 'but dimly perceived by the courts'.⁴² It also argued for application of the 'limited damages' rule as found in certain US states, whereby damages might be awarded for the discomfort suffered in pregnancy and childbirth, but not for the costs of maintaining the child. Taking up these suggestions, the House of Lords in *McFarlane* departed from 'traditional' reasoning to conclude that, although a single

³⁸ 1998 SC 389 at 393 (LJC Cullen).

³⁹ 2000 SC (HL) 1 at 19 (Lord Hope). To this effect see also *Rees v Darlington Memorial Hospital NHS Trust* [2004] 1 AC 309 [4] (Lord Bingham), commenting that 'orthodox application of familiar and conventional principles of the law of tort [sic]' would ordinarily have permitted recovery of the costs of maintaining the McFarlane child; J. M. Thomson, 'Abandoning the law of delict?' 2000 SLT (News) 43.

⁴⁰ 2000 SC (HL) 1 at 16.

⁴¹ A. Stewart, 'Damages for the Birth of a Child' (1995) 40 JLSS 298.

⁴² At 301.

damnum occurred at conception, two separate claims were presented by this case.⁴³ The first, concerning the physical consequences of conception in terms of the pain of childbirth, was allowable; the second, concerning the economic consequences of conception in terms of child maintenance costs, was classified as pure economic loss and therefore rejected.⁴⁴ For the majority in the House of Lords, therefore, the personal injury suffered by Mrs McFarlane was the only form of compensable harm. Only Lord Millett made the suggestion, rejected by the majority, that denial of autonomy was in itself reparable:⁴⁵

‘[The parents] have suffered both injury and loss. They have lost the freedom to limit the size of their family. They have been denied an important aspect of their personal autonomy. Their decision to have no more children is one the law should respect and protect. They are entitled to general damages to reflect the true nature of the wrong done to them.’

b) After McFarlane

The reasoning applied in *McFarlane* has been subjected to detailed critique elsewhere,⁴⁶ and will not be considered further here. It was not ‘easy to assign to the traditional categories of duty, breach and damage, given that all agreed that there was some duty in the case and that, if that duty had been broken, some recoverable damage had resulted.’⁴⁷ Nonetheless, *McFarlane* remains the leading authority in wrongful pregnancy and wrongful birth cases,

⁴³ Although Lord Clyde pointed out at 33-34 that ‘Once the obligation to make reparation for some loss is predicated, it seems to me difficult to analyse the claim for maintenance of the child as a particular, and so separate, obligation.’ However, he too rejected the maintenance cost element of the McFarlanes’ claim as exceeding the requirement for reasonable restitution (at 37).

⁴⁴ Contrast on this point the approach of the South African Supreme Court of Appeal in *Mukheiber v Raath* 1999 3 SA 1065 (SCA) in which a gynaecologist misinformed a couple that he had sterilised the wife. The SCA considered that a ‘special duty’ had been assumed by the doctor providing advice upon which his patients had relied, so that the economic costs of raising the child born thereafter was therefore recoverable (although the issue of nonpatrimonial loss was not raised). This notion of assumption of responsibility for economic loss was rejected in *McFarlane* without citation of *Mukheiber*, although the South African judgment had been issued only a few months previously.

⁴⁵ 2000 SC (HL) 1 at 44-45.

⁴⁶ See in particular J.K. Mason, *The Troubled Pregnancy: Legal Wrongs and Rights in Reproduction* (Cambridge, 2006) 113ff. See also *Rees v Darlington Memorial Hospital NHS Trust* [2004] 1 AC 309, [6] (Lord Bingham), noting the ‘different approaches’ and ‘different reasons’ of all judges in *McFarlane*.

⁴⁷ *Parkinson v St James and Seacroft University Hospital NHS Trust* [2002] QB 266, [79] (Lady Justice Hale).

although its innovation on first principle has sometimes left the courts – in Scotland and in England – with an uncertain foundation for dealing with more complex fact patterns. This was demonstrated a short while later in *Parkinson v St James and Seacroft University Hospital NHS Trust*,⁴⁸ brought by a mother whose sterilisation procedure had failed and who had subsequently given birth to a disabled child. Under reference to *McFarlane*, the Court of Appeal denied recovery of the basic costs of maintenance that would also have applied in relation to a healthy child, but nonetheless awarded compensation for the extra costs of providing for the child's special needs deriving from the disability. This was said to be justified by 'distributive justice', and because 'ordinary people would consider that it would be fair for the law to make an award in such a case, provided that it is limited to the extra expenses associated with the child's disability'.⁴⁹ In effect, therefore, reference to imagined popular consensus justified further modification of traditional principle, not only to partition the claims relating to the non-patrimonial and patrimonial elements, but also to subdivide the latter.

McFarlane has never been overruled, and the costs of maintaining a healthy child remain irrecoverable, but subsequent case law has seen a partial return to the Inner House's 'traditional view of delictual liability' and its analysis of *damnum*. The effect of disability upon the *McFarlane* reasoning came under further scrutiny in *Rees v Darlington Memorial Hospital NHS Trust*,⁵⁰ in which the mother, not the child, was disabled and had requested sterilisation. That procedure was negligently performed, but the child born thereafter was unimpaired. On the basis of *McFarlane* it was uncontroversial that the mother should be compensated for the pain of pregnancy and childbirth, but not for the ordinary costs of maintaining the child. However, in an apparent return to basics, it was also conceded that 'the parent of a child born following a negligently performed vasectomy or sterilisation, or

⁴⁸ [2002] QB 266. For commentary see J.K. Mason, 'Wrongful pregnancy, wrongful birth and wrongful terminology' (2002) 6 *EdinLR* 46; J.K. Mason, *The Troubled Pregnancy* (note 46 above) 153-163.

⁴⁹ [2002] QB 266, [50] (Brooke LJ), although, as a matter of principle, or indeed of perceptions of 'fairness', it is not clear why the 'disabled' element of the claim should be regarded stemming from the infringement of a legally recognised right, but not the 'non-disabled'. As Van Heerden JA remarked in the South African case of *Administrator of Natal v Edouard* 1990 3 SA 581 (A) at 590, 'The doctor who negligently or in breach of contract performed an unsuccessful sterilization operation may be blamed for causing the birth of an unwanted child, but hardly for the fact that the child was born with some abnormality.'

⁵⁰ [2004] 1 AC 309.

negligent advice on the effect of such a procedure, is the victim of a legal wrong',⁵¹ and that the 'real loss suffered' was where 'a parent, particularly (even today) the mother, has been denied, through the negligence of another, the opportunity to live her life in the way that she wished and planned'; compensation only for the pregnancy and birth did not give 'adequate recognition of or [do] justice to that loss.'⁵² An additional amount was therefore awarded to Ms Rees, which was intended, not as 'compensatory', but as a 'measure of recognition of the wrong done'.⁵³ Payment of a 'modest' conventional sum⁵⁴ acknowledged this loss of opportunity – or as Lord Millett expressed it, denial of her 'personal autonomy' – and thus vindicated 'an important aspect of human dignity'.⁵⁵ Lord Bingham indicated that this conventional award should be made in all such cases, not only those in which the mother was disabled.⁵⁶

Admittedly, the only Scottish judge in *Rees*, Lord Hope, thought that the court was travelling into 'uncharted waters', and found little 'coherent' basis for the conventional award proposed.⁵⁷ Moreover, in supporting the conventional award to Ms Rees the majority⁵⁸ relied upon doubtful authority in invoking Lord Millett's statement in *McFarlane* on the importance of personal autonomy⁵⁹ (given that the majority in *McFarlane* had disagreed with him on this point). Nevertheless, the recognition of the importance of personal autonomy in these terms

⁵¹ [2004] 1 AC 309 [8] (Lord Bingham).

⁵² [2004] 1 AC 309 [8] (Lord Bingham).

⁵³ [2004] 1 AC 309, [8] (Lord Bingham), [17] (Lord Nicholls).

⁵⁴ £15,000 was the figure apparently plucked from the air for this purpose. Lord Hope pointed out, at [72]-[73], that this was equivalent to the non-patrimonial 'loss of society' award made to the relatives of a deceased person under the Damages (Scotland) Act 1976, s 1(4) (now superseded by the Damages (Scotland) Act 2011, s 4(3)(b). (Although he had not dissented in *McFarlane* on that basis, he also pointed out the flaw inherent in reasoning since *McFarlane* : 'The splitting up of a claim of damages into these two parts in order to allow recovery of one part and deny recovery of the other part is a novel concept and it seems to me, with respect, to be contrary to principle.')

⁵⁵ [2004] 1 AC 309, [123] (Lord Millett).

⁵⁶ [2004] 1 AC 309, [8].

⁵⁷ [2004] 1 AC 309, [74]-[75] (dissenting).

⁵⁸ Lord Bingham at [8], and Lord Millett himself at [123]-[124].

⁵⁹ Cited above, text to note 45.

been acknowledged as achieving a ‘fair solution to an intense moral and legal dilemma’.⁶⁰ In doing so it recalls the reasoning of the Inner House in *McFarlane*, and its analysis that the *damnum* in such cases was invasion of the couple’s right ‘not to have a child at a time and in circumstances when they had made a deliberate choice not to have a child’.⁶¹ Moreover, such recognition is consistent with the modern development of protection for personality rights.

c) Reproductive autonomy as an aspect of protection for liberty

For obvious reasons, protection for autonomy in this sense has not hitherto figured in traditional accounts, but it can be accommodated without distortion in the law of delict’s fundamental rights-based framework. As is well-known, the personality rights enjoyed by the individual, infringement of which triggers delictual liability, are the right to life, limb and health, liberty, fame, reputation and honour.⁶² That listing of personality rights has its origins in Institutional writings⁶³ and has in its essentials been replicated many times over the years in Scots,⁶⁴ and indeed comparative,⁶⁵ sources. But nothing, of course, remains entirely the same. Protection of these ‘absolute rights of the individual’,⁶⁶ previously thought of chiefly as the preserve of the intentional wrongs, has gradually been ceded to the law of negligence.⁶⁷ More to the point, the scope of the traditional non-patrimonial rights in protecting *corpus*,

⁶⁰ J.K. Mason and G. Laurie, *Mason and McCall Smith’s Law and Medical Ethics* (9th edn., Oxford, 2013) para 10.37.

⁶¹ Text at note 37 above.

⁶² See E.C. Reid, *Personality, Confidentiality and Privacy in Scots Law* (Edinburgh, 2010), ch 1.

⁶³ Stair, *Institutions* 1.9.4.

⁶⁴ E.g., Bell, *Principles* §§ 2027-2057; J. Guthrie Smith, *The Law of Reparation* (Edinburgh, 1864) 2.

⁶⁵ E.g., see German Civil Code § 823 (general clause on liability in damages in delict) listing life, body, health, freedom, and property, as well as ‘other rights’; European Group on Tort Law, *Principles of European Tort Law* (Vienna, 2005), Art 2:102 (Protected Interests). See also R. Pound, ‘Interests of personality’ (1915) 28 *Harvard Law Review* 343.

⁶⁶ Bell, *Principles* § 2028.

⁶⁷ As noted by Tony Weir in his famous piece, ‘The staggering march of negligence’, in P. Cane and J. Stapleton (eds.), *The Law of Obligations* (Oxford, 1998) 97, although the ‘encroachment’ of negligence on other torts, and upon the intentional wrongs in particular, was observed decades earlier by Maurice Millner (*Negligence in Modern Law* (London, 1967) 169-226).

fama and *dignitas* has progressively required adjustment.⁶⁸ Thus the absence of discussion of autonomy from traditional accounts of the law of delict, and from more modern listings of the personality rights thereby protected, does not necessarily preclude its recognition.

The suppression of informed choice in regard to conception or the continuation of pregnancy cannot readily be bracketed with the right to physical integrity as traditionally conceptualised.⁶⁹ Frustration of the option not to have a child does not easily square with infliction of physical injury or disease,⁷⁰ nor with cases of physical constraint on movement. At the same time, it is argued that personal liberty must now be regarded as extending beyond the straightforward ‘right to free motion and locomotion’⁷¹ and as including ‘autonomy’ in the sense of the right ‘to make one's own choices about what will happen to one's own body’.⁷² In other words, if reproductive autonomy merits effective recognition as a ‘cornerstone’⁷³ of medical jurisprudence in this context, it should be given substance as a further dimension of the right to corpus.⁷⁴

⁶⁸ The right to reputation for example, previously thought of largely in terms of protection from false information and insults, has been reconfigured to deal with misuse of private information in the modern media and communications environment. As another example, with changing sexual mores the notion that seduction of the unmarried infringes their reputation and honour has lost its force (the last reported case citing the delict of seduction was *Macleod v MacAskill* 1920 SC 72), but at the same time the age-old concern to protect the vulnerable against exploitation in sexual relationships has led to recognition of ‘new’ delicts including that of ‘child abuse’ (*EA v GN* [2013] CSOH 161; 2014 SCLR 225) and ‘sexual grooming’ of children (*Walsh v Byrne* [2015] IEHC 414).

⁶⁹ I.e. in terms of the right not to be subjected to bodily injury or harm and the right to bodily freedom: see, e.g. J Neethling et al., *Neethling's Law of Personality*, 2nd edn (Durban, 2005) paras 3.3.1-3.3.2.

⁷⁰ As noted by Van Heerden JA in *Administrator of Natal v Edouard* 1990 3 SA 581 (A) at [46]: ‘it is not self-evident that neglect leading to conception and a consequent birth can be equated with the infliction of a bodily injury.’

⁷¹ R. Pound, ‘Interests of personality’ (1915) 28 *Harvard Law Review* 343 at 355.

⁷² *Parkinson v St James and Seacroft University Hospital NHS Trust* [2002] QB 266 [56] (Lady Justice Hale); see also R. Steven, *Torts and Rights* (Oxford, 2007) 78.

⁷³ Text to note 28 above.

⁷⁴ On the argument in German law that thwarting the intention not to procreate is an injury to a personality right and therefore within the ambit of delictual liability under German Civil Code § 823(1), see M. Stauch, *The Law of Medical Negligence in England and Germany* (Oxford, 2008) 19-20. It may further be argued that violation of this right, as certain other personality rights, *in itself* merits vindication, even in the absence of loss or damage of other types. Such a development is not without precedent. A growing readiness to compensate non-

2) Reproductive autonomy and damage to sperm samples

It is one thing, however, to recognise that autonomy is infringed by depriving parents of the opportunity *not* to procreate; it is another to find similar infringement where they have been deprived of the opportunity to attempt procreation by assisted reproduction. Admittedly, analysis of the latter scenario is not coloured by moral objections to recovery for the ‘blessing’ of a healthy child, nor by the difficulty of calculating its cost. Moreover, support for the notion that what was at stake here was a ‘personality right’⁷⁵ can be drawn from the German decision already cited above.⁷⁶ The German court did not only focus upon destruction of the sperm samples as injury to physical matter but also took expressly into consideration the impact of the loss of the sample on the patient’s ‘field of being and self-determination’.⁷⁷ Indeed a further source that is precisely relevant, but unnoticed in *Holdich*, is the commentary on Article VI.–2:201 of the *Draft Common Frame of Reference*.⁷⁸ This Article provides that that loss, whether economic or non-economic, is ‘legally relevant damage’ if it: (i) comes within a traditional category (such as personal injury etc); (ii) ‘results from a violation of a right otherwise conferred by the law’; or (iii) ‘results from a violation of an interest worthy of legal protection’. The commentary takes the *Holdich* fact pattern as an example and concedes that destruction of a sperm sample is not personal injury in the normal sense, nor an infringement of dignity, liberty and privacy, but states that it comes within the third residual category – violation of an interest worthy of legal protection. On that basis the facts of *Holdich* would trigger delictual liability, since, according to the commentary,

patrimonial loss has been observed in European legal systems, bringing with it reconsideration of those personal interests which may be the subjects of claims per se: see C. von Bar, ‘Damage without loss’, in W. Swadling and G.H. Jones (eds.), *The Search for Principle: Essays in Honour of Lord Goff of Chieveley* (Oxford, 1999) 23 at 35.

⁷⁵ 2014 SLT 495 [102] (Lord Stewart).

⁷⁶ Note 20 above.

⁷⁷ ‘...das Seins- und Bestimmungsfeld der Persönlichkeit’.

⁷⁸ C. von Bar and E. Clive (eds.), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR)* (Oxford, 2009) vol. 4, 3144.

infringement of this protected interest is in itself ‘legally relevant damage’ in terms of the DCFR.⁷⁹

The DCFR commentary, however, offers no explanation as to why the loss of sperm samples constitutes infringement of a protected interest in this sense.⁸⁰ A case can be made, as above, for reading the absolute and inalienable right to *corpus* as including the right to make informed choices about what will happen to one's own body, as in questions of contraception or termination of a problem pregnancy. It is far from clear, however, that such a right is at stake in issues of access to assisted reproduction. Many variables will affect the viability of that process, and, even assuming that it goes ahead to plan, the success rate for couples in their early 30s is still well short of 50%.⁸¹ It is therefore problematic to cast the rights of patients for whom sperm samples have been stored in terms of an absolute entitlement; there can be no unqualified ‘right’ to make a baby, nor even to gain access to assisted reproduction.

Even if the spoilage of the samples is somehow recognised as infringing a personality right, questions of causation arise, as briefly noted in *Yearworth* and in *Holdich*.⁸² In cases of wrongful pregnancy or wrongful birth the litigants can argue that, but for the defenders’ negligence, they would have exercised their choice not to conceive or not to continue a problem pregnancy, and in most cases there is likely to have been no impediment to that choice being fulfilled; in other words, there is a direct causal link between the *iniuria* (the doctor’s negligence), and the *damnum* (conception, or birth of the damaged child). Where sperm samples have been spoiled, the pursuer might argue that the *iniuria* was constituted by the defenders’ negligent storage of the samples. He might also argue that loss of potential for

⁷⁹ It must be conceded, however, that the commentary gives little detail on why the aspiration to preserve the possibility of procreation is considered to be an ‘interest worthy of legal protection’ as an aspect of patient autonomy, aside from the rather bland assertion that category (iii) ‘makes space’ for the further development of the law.

⁸⁰ The formulation in the DCFR is perhaps influenced by the wording of the German Civil Code § 823 in providing for injury to ‘injures the life, body, health, freedom, property *or another right*’.

⁸¹ The figures provided by the Human Fertilisation and Embryology Authority suggest that at best the success rate for IVF, even where the partner is still in her early 30s, is 32% (see <http://www.hfea.gov.uk/ivf-success-rate.html>).

⁸² 2014 SLT 495 [104] (Lord Stewart).

procreation constituted a *damnum*, in the sense of the ‘material prejudice to an interest... which the law allows [him] to vindicate.’⁸³ But even if the defenders had not been negligent, he might well have been visited with this *damnum* in any event. There are many further factors which might have had a decisive impact upon the successful use of the samples in a programme of IVF treatment.⁸⁴ At best the loss suffered is the loss of an opportunity, and it is doubtful whether the pursuer could show that he would have had more than a 50% chance of fathering a child had the samples not been spoiled by the defenders’ negligence. It is difficult to see therefore how the pursuer could circumvent the well-established rule that the lost opportunity of a favourable medical outcome is generally only actionable if the pursuer can show that, but for the defender’s negligence, there had been at least a 50% chance of a favourable outcome.⁸⁵

E. CONCLUSION

The possible grounds for a delictual claim against the operators of the storage facility present varying degrees of difficulty. If the samples are found to have been owned by Mr Holdich, and if he can establish that he suffered psychiatric injury as a result of their spoilage, a strong argument can be made for compensation. The restrictions which limit recovery for such injury in the case of ‘secondary’ victims have no relevance to a claim framed in this way. On the other hand, there is no obvious answer to the serious objections made against characterising damage to the samples as a personal injury in itself. Similarly, while the traditional framework of delictual protection for personality rights must now be regarded as capable of accommodating the right to patient autonomy, and even reproductive autonomy, as a further dimension of bodily integrity, the spoiling of the opportunity to use a sperm sample in IVF cannot readily be classified in equivalent terms.

⁸³ Recalling *McFarlane* 1998 SC 389 at 402 (Lord McCluskey).

⁸⁴ See note 81 above.

⁸⁵ *Gregg v Scott* [2005] 2 AC 176.