IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2017] SGCA 20

Civil Appeal No 17 of 2015

Between

ACB

… Appellant

And

(1) THOMSON MEDICAL PTE LTD
(2) THOMSON FERTILITY CENTRE PTE LTD
(3) ELEANOR QUAH
(4) CHIA CHOY MAY

… Respondents

In the matter of Suit No 467 of 2012

Between

ACB

… Plaintiff

And

(1) THOMSON MEDICAL PTE LTD
(2) THOMSON FERTILITY CENTRE PTE LTD
(3) ELEANOR QUAH
(4) CHIA CHOY MAY

… Defendants

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JUDGMENT

[Tort] — [Negligence] — [Damages]

[Tort] — [Negligence] — [Damages]

[Damages] — [Punitive damages]

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ACB
v
Thomson Medical Pte Ltd and others

[2017] SGCA 20

Court of Appeal — Civil Appeal No 17 of 2015
Sundaresh Menon CJ, Chao Hick Tin JA, Andrew Phang Boon Leong JA, Tay Yong Kwang JA and Steven Chong J
19 August 2015; 6 October 2016

22 March 2017 Judgment reserved.

Andrew Phang Boon Leong JA (delivering the judgment of the court):

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Introduction

1 In this appeal, we are concerned with the proper limits of civil liability. As Griffiths LJ (as he then was) aptly observed, "[e]very system of law must set some bounds to the consequences for which a wrongdoer must make reparation … In any state of society it is ultimately a question of policy to decide the limits of liability" (see the English Court of Appeal decision of *McLoughlin v O'Brian and others* [1981] 2 WLR 1014 at 1036G–H, reversed in *McLoughlin v O'Brian and others* [1983] 1 AC 410 ("*McLoughlin (HL)*"), although not on this particular point). The law sets these limits not only because of concerns over the adverse effects that the imposition of liability might have on the legal system or on public welfare more generally but also, more positively, for reasons of "public benefit and convenience" (see the decision of the Court of the King's Bench in *Lawton v Lawton* (1743) 3 Atk 13 at 16 *per* Lord Hardwicke LC). These boundaries are set in various ways. The different means employed include the doctrines of causation, remoteness, and – most pertinently in this case – through the refusal to recognise particular types of damages as heads of recoverable loss.

2 Of course, the converse is possible and the law may expand, rather than limit, the boundaries of liability. This is true both of tort and of contract. The tort of negligence emerged in its modern form as a cause of action for physical injury directly caused by the positive act of a negligent stranger. However, it expanded to embrace, in the classic House of Lords decision of *M'Alister (Or Donoghue) (Pauper) v Stevenson* [1932] AC 562 ("*Donoghue v Stevenson*"), injury caused by the negligent manufacture of goods. Since then it has grown to include other forms of injury such as pure economic loss arising from a negligent misstatement (see, in particular, the decision of the House of Lords in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC

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465) as well as psychiatric harm arising from a recognised psychiatric illness (see, in particular, the House of Lords decision in *McLoughlin (HL)*). Likewise, the law of contract has expanded beyond the realm of commerce to afford recovery not only for lost economic value, but also for the loss of amenity arising from frustrated contractual expectations (see, for example, the more recent House of Lords decision of *Ruxley Electronics and Construction Ltd v Forsyth and another appeal* [1996] AC 344). The list of legally cognisable injuries has evolved with time because the world has changed, and the law must, as Lord Macmillan said in *Donoghue v Stevenson*, "adapt itself to the changing circumstances of life" (at 619). This is perhaps clearest in the area of medical science, where scientific advancement has made it possible for us to do things today which would previously have been unimaginable a few decades ago. This has brought untold prosperity to many, and hope to those who previously had none; but it has also given us greater capacity for harm. The facts of this appeal throw this into sharp relief.

3 The Appellant and her husband sought to conceive a child through in-vitro fertilisation ("IVF"). The Appellant underwent IVF treatment and delivered a daughter, whom we shall refer to as "Baby P". After the birth of Baby P, it was discovered that a terrible mistake had been made: the Appellant's ovum had been fertilised using sperm from an unknown third party instead of sperm from the Appellant's husband. The Appellant sued the Respondents in the tort of negligence and for breach for contract and sought damages for, among other things, the expenses she would incur in raising Baby P ("upkeep costs"). The Respondents conceded liability but argued that the Appellant should not be allowed to recover upkeep costs. They argued that the child is a blessing, and that there was something distasteful, if not morally offensive, in treating the birth of a normal, healthy child as a matter for

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compensation. The High Court Judge ("the Judge") agreed. In the penultimate paragraph of his judgment he added, "[w]ere the [Appellant] to succeed in her upkeep claim, whether in tort or in contract every cent spent in the upbringing of Baby P will remind her that it was money from compensation for a mistake. Baby P should not ever have to grow up thinking that her very existence was a mistake" (see *ACB v Thomson Medical Pte Ltd and others* [2015] 2 SLR 218 at [16] ("the Judgment")).

4 We now stand at the crossroads. The question which was presented to us for determination was whether the Appellant was entitled to bring a claim for upkeep costs. The horns of the dilemma would appear to be these. On the one hand, if we refuse the award of upkeep costs, the Appellant would receive a comparatively modest award for (in the main) pain and suffering. This would appear to undercompensate the Appellant for the wrong which has been done to her – after all, the only reason why she elected to conceive *via* IVF was because she desired a child *with her husband*, but, because of the Respondents' mistake, she finds herself the mother of a child fathered by a *complete stranger*. On the other hand, the award of upkeep costs, it was argued, denigrates the worth of Baby P because it necessarily entails viewing her existence as a *continuing* source of loss to the Appellant, such that every dollar spent on raising her from the day of her birth until she reaches the age of majority sounds in damages.

5 There can be no doubt that this is a "hard case" (in both the colloquial and jurisprudential senses of the word) but if anything this calls for greater analytical clarity and rigour in order to avoid the reproach that hard cases make bad law (see the House of Lords decision of *Fairchild v Glenhaven Funeral Services Ltd and others* [2002] 3 WLR 89 at [36], *per* Lord Nicholls of Birkenhead). Before we turn to the substance of our decision, however, we

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pause to emphasise a general point of the first importance. ***Nothing we say in this judgment should – or, indeed (as will be evident from the analysis that follows), could − be taken as a reflection of this court's view of the worth of Baby P. This is because that is not the issue before this court nor can it ever be. The life of every person carries with it its own inestimable value and dignity and the worth of a person can neither be enlarged nor its importance abridged by any pronouncement of this court.*** With this in mind, we turn to the task at hand, beginning first with a more detailed recitation of the relevant facts.

Background

6 The Appellant is a Singaporean Chinese woman who is married to a German man of Caucasian descent ("Husband"). The first Respondent, Thomson Medical Pte Ltd, is a company which has the management and control of a private hospital known as Thomson Medical Centre. The first Respondent is licensed to provide assisted reproduction as a special care service under the Private Hospitals and Medical Clinics Act (Cap 248, 1999 Rev Ed) ("the Private Hospitals Act"). The second Respondent is a company which is fully owned by the first Respondent and it operates a fertility clinic which is located at Thomson Medical Centre where it provides, among other things, IVF treatment. The third and fourth Respondents were, respectively, a senior embryologist and the chief embryologist employed by the second Respondent at the material time.

7 Wanting to start a family, the Appellant and her Husband sought advice from a consultant obstetrician in 2006 and he advised them to attempt IVF. Taking up this suggestion, the Appellant underwent an IVF procedure sometime in 2006. As a result, the Appellant conceived and gave birth to a son

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in 2007. Desiring to have more children, the Appellant signed an agreement with the second Respondent for another round of IVF services in 2010. The salient terms of the agreement (as pleaded) were that: (a) the second Respondent would "provide reasonably good medical, scientific and laboratory services to the Appellant in connection with the fertility treatment" and (b) that the "[Appellant's] egg will be fertilized by the sperm of the [Husband] and that the embryos would be kept safely for the sole use of the [Appellant]".

8 The second round of IVF was carried out. Shortly afterwards, the Appellant conceived and gave birth to a daughter, Baby P, sometime in October 2010. The Appellant and her Husband noticed that Baby P's skin tone and hair colour were different from their own, and were also markedly different from those of their first child, who had also been conceived through IVF. A blood test was performed and it showed that Baby P had a blood type which did not match either of theirs. Worrying that Baby P might be suffering from jaundice or a genetic disorder, the Appellant and her Husband insisted that further tests be performed. The results of these further tests came as a shock. The Appellant and her Husband were told that Baby P possessed a blood type that could not have been the result of the combination of their genetic material and further investigations confirmed that the Appellant's egg had been fertilised with the sperm of an unknown male Indian donor instead of that of the Husband's.

9 On 20 June 2011, the first Respondent pleaded guilty to a single charge under s 5(1) of the Private Hospitals Act for breaching the terms of its licence to provide assisted reproduction services and was fined a sum of $20,000, the maximum permitted at that time. In the statement of facts ("SOF") accompanying the charge, the following was recorded:

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> 10 By processing two semen specimens inside one laminar hood at the same time and failing to ensure that the staff at the [Assisted Reproduction] Centre discarded the disposable pipettes that had been used after each step of processing, the [first Respondent] had failed to ensure that suitable practices were used in carrying out [assisted reproduction] activities.
>
> 11 These lapses in procedure on 23 January 2010 had contributed to the occurrence of a human error, which resulted in an IVF mix-up. This had resulted in a baby being born on 1 October 2010, whose DNA did not match [her] father's.

10 On 4 June 2012, the Appellant commenced Suit No 467 of 2012, suing all the Respondents in the tort of negligence and additionally bringing suit against the second Respondent for breach of contract. The Appellant was not able to identify the particular negligent act which led to the mistaken insemination, but relied on the doctrine of *res ipsa loquitur*. In the amended Statement of Claim ("SOC"), the Appellant alleged that the mix-up had taken place due to the absence of proper safeguards to prevent the mishandling of specimens, repeating the specific allegations which were contained in the SOF. The Appellant's case against each of the Respondents was as follows:

(a) The first and second Respondents were alleged to be liable in the tort of negligence, both for their personal failures to institute proper control measures to ensure that there would be no accidental or mistaken combination of genetic material as well as on account of their vicarious liability for the negligence of the third and fourth Respondents.

(b) The second Respondent was sued both in the tort of negligence as well as for breach of contract. The two pleaded breaches of contract were: (i) failing to fertilise the Appellant's egg with the Husband's

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sperm and instead fertilising it with the sperm of another person; and (ii) failing to provide reasonably good medical services.

(c) The third Respondent was alleged to be liable in tort for negligently handling more than one semen specimen at a time and for failing to ensure that there was no cross-contamination of genetic material between semen samples.

(d) The fourth Respondent was alleged to be liable in negligence for failing to put in place proper control measures in the fertility clinic, failing to properly verify that the sperm which she was injecting into the egg was that of the Husband, and for inadequately supervising the work of the third Respondent (who was under her charge).

11 For the breaches detailed in the previous paragraph, the Appellant put forward two principal heads of claim. The first was for pain and suffering relating to the pregnancy as well as damages for mental distress. The second was for upkeep costs and it included, among other things, the cost of enrolling Baby P in an international school in Beijing where the Appellant and her Husband presently reside, the cost of tertiary education in Germany, travelling expenses, medical expenses, and the cost of feeding and caring for Baby P until she is financially self-reliant. For ease of reference, we shall refer to the second head of claim as the "upkeep claim". Additionally, the Appellant also filed a claim for provisional damages by which she sought to hold the Respondents liable for damages (until such time as Baby P reaches 35 years of age) arising from any genetic condition or disease that Baby P might have inherited that might be attributable to the donor's genes.

12 On 16 July 2012, the Respondents filed a joint defence. While clarifying that they did not admit to all the assertions in the SOC, the

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Respondents admitted that they were liable in damages to the Appellant. However, they expressly clarified that their admission was not to be construed as an admission of the Appellant's entitlement to claim damages for upkeep costs. They also denied liability in respect of the claim for provisional damages.

13 On 8 October 2012, the Respondents applied to strike out the portion of the SOC which pertained to the upkeep claim and the claim for provisional damages. This was allowed at first instance by an assistant registrar. The Appellant only appealed against the decision in respect of the upkeep claim and the matter came before the Judge, who reversed the decision of the assistant registrar and ordered that the matter proceed to trial (see *ACB v Thomson Medical Pte Ltd and others* [2014] 2 SLR 990 ("the Striking Out Decision")). After the Judge handed down his decision, the Appellant amended her SOC to remove her claim for provisional damages. This paved the way for interlocutory judgment to be entered against the Respondents on 14 August 2014, with damages to be assessed. Shortly thereafter, the Respondents applied to have determined, as a preliminary issue before the hearing on the assessment of damages, the question whether the Appellant was entitled to claim upkeep costs. This application was filed pursuant to O 33 r 2 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("the Rules"), and it also came before the Judge, who answered the question in the negative.

The decision below

14 The Judge first began by considering the Appellant's argument that the Respondents should be liable for upkeep costs because they had failed to detect and therefore inform her of the mix-up ahead of time, thereby denying her of the opportunity to seek an abortion. This argument was summarily

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rejected as being a "mere afterthought". The Judge noted that the Appellant had neither pleaded this in her SOC nor deposed in any of her affidavits that she would have terminated her pregnancy if she had been told of the mix-up earlier. The Judge also held that even if this argument had been properly pleaded, he would still have rejected it on the ground that there was no authority to support the proposition that damages could be claimed in respect of a lost opportunity for an abortion (see the Judgment at [14]).

15 Turning to the substance of the Appellant's arguments, the Judge concluded that the upkeep claim must fail for the simple reason that the Appellant "had wanted a second child all along" (at [15]). He noted that the authorities which were cited to him all concerned claims for upkeep costs arising out of the birth of children who had been conceived after the plaintiff-mothers had been negligently advised that sterilisation procedures they underwent were complete and that no contraception was required. These cases, which he noted were referred to variously as "wrongful birth", "unwanted birth" or "unwanted pregnancy" cases, were readily distinguishable as the plaintiffs there *did not wish to conceive*. By contrast, he observed, the Appellant *wanted* to have a second child and was prepared to expend money bringing up a second child (albeit one that she conceived with her Husband's sperm). This, he held, was "an important distinction", as it meant that it could "not be said that the [Appellant] and her husband were not contemplating having to expend money to bring up a child" (at [15]). On this basis alone, he held that the Appellant was not entitled to claim damages for upkeep costs in either contract or tort (at [17]).

16 Nevertheless, the Judge proceeded to express the view, albeit by way of *obiter dicta*, that there were "cogent policy considerations against finding liability for upkeep" (at [16]). Chief among his reasons was the sense that

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there was, in the words of Lord Millett in the House of Lords decision of *McFarlane and another v Tayside Health Board* [1999] 3 WLR 1301 ("*McFarlane*") at 1345D which the Judge cited at [16] of the Judgment, "something distasteful, if not morally offensive, in treating the birth of a normal, healthy child as a matter for compensation". To this, he added two more specific concerns. The first was the detrimental impact that an award of damages might have on Baby P's well-being; the second was his view any such award would be antithetical to the essence of a parent-child relationship (at [16]).

The structure of this judgment

17 Owing to the novelty and the complexity of the matters which were raised, we invited Assoc Prof Goh Yihan ("Prof Goh") to assist the court as *amicus curiae*. We wish to state from the outset our deep appreciation for the submissions he put forward, which were comprehensive, elegantly expressed, and lucidly organised. We derived tremendous assistance from them, as well as from the submissions put forward by counsel for the parties: Mr N Sreenivasan SC ("Mr Sreenivasan") for the Appellant, and Mr Lok Vi Ming SC ("Mr Lok") for the Respondents. We do not propose to summarise the submissions made by the parties at this juncture and will instead address the relevant submissions in the course of our reasoning and analysis.

18 Initially, the sole issue which was placed before us was simply whether the upkeep claim was legally sustainable. However, as we observed during the hearing this is, as a statement of the consequences of parenthood, strikingly inadequate. It has the effect of selecting – out of the myriad of legally, morally, and socially significant obligations that attend the institution of parenthood – only the financial costs of raising a child and focusing on that as

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the subject of the upkeep claim. This is a problem which is not confined only to this case but generally afflicts the case-law in this area. During the oral hearing, we expressed these misgivings and invited further submissions on the other possible claims that might be advanced in a case such as this. After receiving these further submissions, and hearing further oral arguments from the parties, it became clear to us that the remit of the inquiry could and should be broadened to include two other matters which formed the focus of the parties' further submissions, namely, a claim for loss of autonomy and a claim for punitive damages. We will deal with the claims in this order: (a) upkeep costs; (b) a potential award for the loss of autonomy; and (c) a potential award of punitive damages.

Two preliminary objections

19 Before we turn to our detailed analysis, we will first deal with two preliminary objections which were raised by the parties.

(a) The first is an argument raised by the Appellant. Mr Sreenivasan initially submitted that the Respondents were absolutely precluded from resisting the upkeep claim. The argument was that if the viability of the upkeep claim were adjudicated as an issue relating to liability (as was submitted to be the case) then it would not be open to the Respondents to resist the upkeep claim since they had already admitted to liability in damages and consented to having judgment entered against them.

(b) The second is an argument raised by the Respondents. Mr Lok contended that since the specific question submitted by his clients for determination – and the only question addressed by the Judge – was whether the upkeep claim was legally sustainable, we did not have the

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jurisdiction to consider either the issue of a loss of autonomy or that of punitive damages (even though the Respondents tendered submissions on both issues). He also pointed out that neither claim (either that for loss of autonomy or punitive damages) had been pleaded.

20 We reject both arguments. The Appellant's preliminary objection can be dealt with briefly. The short answer to this point is simply that the Respondents have expressly reserved their position on their liability for upkeep costs. For convenience, we reproduce para 2 of their Defence in full:

> Without admitting to all the assertions at paragraphs 11 to 72 of the Statement of Claim, the 1st to 4th [Respondents] will admit liability in damages to the [Appellant], with such reasonable damages to be assessed. For the avoidance of doubt, this admission of liability does not constitute nor is it to be construed as an admission of the [Appellant's] claim or entitlement to claim for the maintenance and upkeep of Baby P and/or the [Appellant's] claim or entitlement to claim for provisional damages for Baby P, whether as set out in paragraphs 73, 74(f), 75 and 76, or otherwise.

Properly construed, therefore, the Respondents were saying that they conceded liability in respect of all the heads of claim except for those which related to the upkeep of Baby P. In our judgment, it is perfectly open for them to contest the upkeep claim at this juncture.

21 As for the Respondents' preliminary objection, we consider that it rests on a fundamental misapprehension of the nature and purpose of O 33 r 2 of the Rules, under which the present application was brought. O 33 r 2 provides that:

> *The Court* may order any question or issue *arising in a cause or matter*, whether of fact or law or partly of fact and partly of law, *and whether raised by the pleadings or otherwise,* to be tried before, at or after the trial of the cause or matter, and may give directions as to the manner in which the question or issue shall be stated. [emphasis added]

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22 There are three important points to note here. First, this is a power- and not a jurisdiction-conferring provision: the section plainly assumes that the court is already seised of *jurisdiction* in respect of the underlying "cause or matter" and its purpose is to confer upon the court the *power* to order "any question or issue arising in a cause or matter" to be determined preliminarily. This disposes of Mr Lok's jurisdictional objection. The short point is that we have the jurisdiction to consider the further issues canvassed because we are already seised of the underlying dispute. The only question is whether this *power* should be exercised, and on this question, it is well-settled that it ought to be exercised if it would save substantial time and expenditure (see, for example, the decision of this court in *Federal Insurance Co v Nakano Singapore (Pte) Ltd* [1991] 2 SLR(R) 982 at [25]). In our judgment, this is an appropriate case for us to exercise our power to enlarge the remit of the inquiry. As will be clear during the course of our analysis, this will allow fuller treatment of the issues and allow for a more just outcome. Secondly, O 33 r 2 of the Rules expressly provides that this power may be exercised in respect of any matters which arise from the dispute, even matters which are *not pleaded*. This deals with Mr Lok's objection that the additional issues relate to heads of claim which were not pleaded. Thirdly, it is *the court* which is in control of this process. This is critical here because it means that it was within the power of the High Court to decide on the ambit of the preliminary question. This is a power which this court retains on appeal because of s 37(5) of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed), which provides that the Court of Appeal may "give any judgment, and make any order which ought to have been given" in the court below.

23 It does not matter that the Appellant did not appeal against the Judge's decision not to broaden the ambit of the question, because O 57 r 13(4)(*a*) of

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the Rules specifies that the powers of the Court of Appeal may be exercised notwithstanding that no notice of appeal had been given in respect of a particular part of the decision of the Court below. It also does not matter that the questions were raised by this court of its own initiative (see, for example, the decision of this court in *Townsing Henry George v Jenton Overseas Investment Pte Ltd* [2007] 2 SLR(R) 597 at [80]). What is critical is that this court must have all the facts bearing on the new contention and the Respondents must have been given an adequate opportunity to address us on it. We are satisfied that this is the case in the present appeal. The additional questions posed to the parties are pure questions of law in respect of which the Respondents have been given ample opportunity to address us on, both orally and in writing.

Summary of our conclusions

24 After careful consideration of the arguments which were presented, we have come to the view that the upkeep claim should not be allowed. In our judgment, this is a head of damages which is contrary to public policy and should not be recognised in Singapore. However, we are prepared to recognise that, in the circumstances of this case, the Respondents' negligence has caused the Appellant to suffer a loss of "genetic affinity", and that this should be an actionable head of damage. Finally, while we are prepared to recognise that punitive damages can, in principle, be awarded for a claim in negligence, we cannot conclude that such an award is available on these facts. We now proceed to elaborate on each of our conclusions in more detail.

The upkeep claim

25 The basic question which is before this court can be framed as follows: Are the expenses which arise in relation to the unplanned birth of a healthy

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child who was born as a result of the negligence of a medical professional a compensable head of damage? The difficulty, as eloquently stated by Lax J in the decision of the General Division of the Ontario Court of *Kealey v Berezowski* (1996) 136 DLR (4th) 708 at 731*a–d*, is that:

> … A claim for child-rearing costs juxtaposes the private world of tort law with a world that is imbued with personal and public views of morality. It asks whether tort law is bold enough or foolish enough to embrace as a harm that which we so clearly regard as a good. It demands that we examine whether tort theory is compromised or validated depending on the approach which is chosen. The claim raises questions about the nature of injury, the limits of the doctrine of foreseeability and the congruence of this doctrine with the assessment of damages. Courts have struggled with the novel question at issue in this case because, in the absence of legislative guidelines for assessing damages of this kind, they are driven back on standard principles of negligence law or on public policy. Both may be inadequate for the task.

26 Although this statement was made in the context of a claim in negligence, we think that it applies with equal force to claims brought in contract. Courts in different jurisdictions have arrived at differing conclusions, based principally on their views of what public policy requires in this context. We will come to those arguments presently, but before that we will first examine the basis upon which the Judge denied recovery in this case.

The landscape of reproductive wrongs

27 As the Judge rightly noted, this case is unlike most cases in which upkeep costs are sought. The premise of the Appellant's case is not that she did not want to conceive. Rather, it is quite the opposite – the Appellant actively desired to have a child and was fully willing to bear the costs of raising one, although she *only planned* to have a child that was conceived using *her Husband's sperm*. On this basis alone, the Judge held that the upkeep claim had to fail. With respect to the Judge, we do not think that this is

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correct. In order to properly analyse his decision, it is necessary for us to begin with a broad overview of the decided cases in this area.

Three categories of reproductive wrongs: wrongful life, wrongful birth, wrongful conception

28 The cases which were cited to us (and to the Judge) all concern claims for what we shall, for ease of exposition, term "reproductive wrongs". We will clarify immediately that what we have in our contemplation are not the full breadth of claims that may arise out of surgical or medical procedures which relate to reproductive medicine, but *only* those where the damage or loss relates to the unplanned birth of a child. In broad terms, the relevant cases in this area all possess the following four features (see Stephen Todd, "Wrongful Conception, Wrongful Birth and Wrongful Life (2005) 27 Sydney Law Review 525 ("*Todd*"): (a) there is an allegation of wrongful conduct on the part of a healthcare professional (whether a doctor or a nurse or otherwise) in relation to the treatment of a patient or the patient's partner; (b) by reason of this, a child has been born; (c) if proper care had been taken, the child would not have been born; and (d) by reason of the birth either the parents or the child has suffered damage which consists of, among other things, upkeep costs.

29 These cases are all acutely difficult because they raise the question of whether, and if so, to what extent, "the expense associated with the unplanned … existence of a human being ought to be recognised in law as amounting to damage of a kind which can found an action" (see *Todd* at 526). In general terms, the cases in this area can be divided into three broad categories falling under the following headings: "wrongful life", "wrongful birth", and "wrongful conception". We note that the use of these terms is not without controversy, as they appear to carry with them a negative evaluation of the life

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which is brought into being (see *Todd* at 525). We clarify that is not our intention to espouse any such view, and we use these terms for the sake of exposition only.

(a) Wrongful life claims are actions brought by the children themselves (that is to say, the children who are born as a result of the allegedly wrongful act of a healthcare professional) in circumstances when the children suffer from some disability or disadvantage. In bringing such claims, the children argue, in essence, that they would have been better off not being born at all and that the very fact of their birth is an injury for which they should be compensated.

(b) Wrongful birth claims are brought by the parents of children who are born in circumstances where the healthcare professional had either failed to (i) inform them that the mother was pregnant; or (ii) to advise them, while the child was *in utero*, that the foetus would be born disabled. The essence of such a claim is that the mother would have terminated the pregnancy had she been informed timeously that she was pregnant or that the foetus which she was carrying would be born disabled. In broad terms, the healthcare professional is being held liable for the wrongful prolongation of a pregnancy – whether it be a pregnancy that was unwanted from the start or an initially wanted pregnancy that the mother subsequently wished to terminate.

(c) Wrongful conception claims almost always arise in the context of sterilisation operations. They are brought by the parents for the failure of a healthcare professional to perform a sterilisation operation properly or to properly advise on the efficacy of the procedure (*eg*, by advising the parents that the procedure was successful when it was

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> not). The essence of such a claim is that the parents never planned to have children – hence, it is the "conception" that is unwanted – and, concomitantly, never planned to undertake the commitments of parenthood. Wrongful conception cases may be distinguished from wrongful birth cases because the act which is complained of (that is to say, the negligent sterilisation or the negligent advice) takes place *pre*-conception; whereas in wrongful birth cases, the tortfeasor's wrongful act takes place *post*-conception.

30 It is immediately apparent that the present case does not fit neatly into any of the aforementioned categories. The wrongful life cases are plainly not relevant because the plaintiff in this case is the mother and not the child. Wrongful life cases involve acutely difficult questions of morality (whether a life is worth living) and philosophy (whether it is possible to compare a state of existence with one of non-existence). In the only local reported decision on the subject, recovery was denied on the ground of public policy (see the Singapore High Court decision of *JU and another v See Tho Kai Yin* [2005] 4 SLR(R) 96). In our assessment, the wrongful birth cases are also not material because, as the Judge noted, the Appellant neither pleaded nor did she ever aver that she would have terminated the pregnancy if she had been informed of the mix-up ahead of time (this is the gist of a wrongful birth claim). The Appellant has not disputed the correctness of the Judge's decision on this point on appeal, and for our part, we think that the Judge was right to reject such an argument.

31 This leaves the wrongful conception cases. The present case resembles the wrongful conception cases in the sense that the Appellant's core argument is that if the Respondents had not been negligent, Baby P would not have been born and the Appellant would not now be put to the expense of raising Baby P.

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However, as the Judge observed, there is an important point of difference: The Appellant, unlike the plaintiffs in the wrongful conception cases, *did* want a child. The significance of this will be considered shortly.

Wrongful fertilisation

32 While cases of mix-ups in IVF procedures are, regrettably, not uncommon (see, generally, Leslie Bender, "'To Err is Human' ART Mix-Ups: A Labor-Based, Relational Proposal" (2006) 9 J Gender, Race & Just 443 for documented cases of such mix-ups), there are few reported cases on the subject in the law reports. *Leeds Teaching Hospitals NHS Trust v Mr A and others* [2003] EWHC 259 (QB) ("*Leeds*"), a decision of the English High Court, is one of the rare few. It was a case involving facts similar to the present. Two couples (referred to in the judgment as Mr and Mrs A and Mr and Mrs B, respectively) sought IVF treatment. Due to a mistake, Mr B's sperm was used to inseminate Mrs A's egg and the resultant embryo was implanted in her womb. Mrs A subsequently gave birth to twins and the mistake was discovered. When the matter came before the court, the issue was the legal parentage of the children. Thus, the judgment itself is of little relevance to this case. However, a pair of commentators broached the possibility that a claim for upkeep costs *could* have been mounted in such a situation (see Mary Ford and Derek Morgan, "Leeds Teaching Hospitals NHS Trust v A – Addressing a misconception" (2003) 15 Child & Fam L Q 199) and their article contains a succinct statement of the differences, but also the essential similarity, between that case and cases involving wrongful conception (at 203):

> … Any wrongful conception action by Mrs A would accordingly seek damages, not on the basis that a conception took place, but rather on the basis that *this* conception took place … [t]o use deliberately provocative language, the 'harm' would

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> consist not in the conception and subsequent birth of a child to the woman who did not wish to become a mother, but in the conception and birth of *these* children to a woman who wished to become a mother to *different* children. [emphasis in original]

33 To the best of our knowledge, there has only been one wrongful fertilisation case in which the subject of upkeep costs was considered by a court of law. This is the decision of the New York State Supreme Court in New York County in *Andrews v Keltz* 15 Misc 3d 940 (2007) ("*Andrews*"), where the mistake likewise consisted of the insemination of the plaintiff-mother's egg with the sperm of third party stranger. The plaintiff delivered a healthy child and subsequently brought a claim for upkeep costs. Her claim was dismissed on the basis that public policy precluded recovery for the ordinary costs of raising a healthy child. The court did not elaborate on the policy reasons in any great level of detail and merely held itself to be bound by the decision of the New York Court of Appeals in *O'Toole v Greenberg*, 477 NE 2d 445 (1985) and *Weintraub v Brown*, 98 AD 2d 339 (1983), both of which were cases involving wrongful conception.

34 *Leeds*, *Andrews*, and the present case may be labelled as ones involving "wrongful fertilisation" (see Ronald JJ Wong, "Upkeep claims for wrongful birth, wrongful conception or wrongful fertilisation? IVF mix-up in the Singapore High Court: ACB v Thomson Medical Pte Ltd [2015] SGHC 9" (2015) 23 Tort L Rev 172). Cases belonging in this category arise where assisted reproduction technology, usually IVF, is used and a claim is brought by the gestational mother (that is to say, the mother who bears the child to term) and/or her partner in circumstances where a healthcare professional uses the wrong gametes in the fertilisation procedure or where the "wrong" embryo is implanted in the womb of the gestational mother and carried to term. In so far as the claim is one for upkeep, the essence of the claim would be that the

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plaintiffs never planned to have *this child* (that is to say, the child who was born as a result of the use of the wrong genetic material) but instead planned for and desired to have a child with whom they would share genetic kinship.

"The [Appellant] wanted a second child all along"

35 At [15] of the Judgment, the Judge stated as follows:

> Second, ***the [Appellant] had wanted a second child all along***. The contest of legal authorities before me was the differing views between *McFarlane* ([10] *supra*) and *Cattanach* ([10] *supra*)._... But there is a crucial difference between those cases and the present application before me: in the present case, Baby P was not an unwanted birth in the sense that the [Appellant] mother did not want to have a baby at all. *The [Appellant] just wanted* ***a baby*** *conceived with her husband's sperm.* This is an important distinction. It ***cannot be said that the [Appellant] and her husband were not contemplating having to expend money to bring up a child***. On the contrary, *the* ***reason they engaged the [Respondents] was so that they could have a child***. [emphasis added in italics, bold italics, and underlined bold italics]

36 From this passage, it would appear that the Judge regarded the fact that the Appellant wanted a child and was willing to assume the financial consequences of childrearing as being fatal to her claim for upkeep costs. The Judge did not elaborate on the reasons why, but regard may usefully be had to what he said in the Striking Out Decision. The narrow question before him then was simply whether the upkeep claim should be struck out on the basis that it was legally unsustainable. At that time, liability had yet to be determined and the Judge refused the application on the ground that the issues of liability and damages were so inextricably linked that the matter ought to proceed to trial (see the Striking Out Decision at [13]). Nevertheless, he went on to opine why he thought the upkeep claim had to fail in the following terms (at [15]):

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> … It is understandable that the [Appellant] and her [Husband] would be aggrieved by the [Respondents'] error, and they might be entitled to general damages for that distress. However, whether the [Respondents] were negligent or not and whether they were in breach of contract or not, *the [Appellant] and her [Husband] would have to expend money to bring up* ***the child conceived through IVF****. Expenses for the upkeep of* ***the child, whether it was Baby P or another****, cannot be considered damage or loss arising from the [Respondents'] conduct*. … [emphasis added in italics and bold italics]

37 From these two extracts, it appears that the point that the Judge was making was one about causation. What he was saying was that even if the Respondents had not been negligent, the Appellant and her Husband would still have spent the same amount of money raising *a* child anyway – thus, it had not been shown that "but for" the Respondents' negligence, the upkeep expenses would not have been incurred. Mr Lok puts the argument in the following way. He submits that there is no evidence that the Appellant had "suffered additional *upkeep costs* above and beyond what would ordinarily have been incurred for the upkeep of a healthy child" [emphasis in the original] because the Appellant wanted a child and did in fact receive a healthy child – Baby P – whom she would not spend any more raising than she would spend on a child who was biologically related to herself and her Husband. On this basis, he argues that the Appellant did not in fact suffer any recoverable loss. With respect, we cannot agree with these arguments.

38 The fundamental error in the Judge's analysis, in our respectful view, is that he ignores the ***purpose*** for which the expenses were (and would have been) incurred. The approach taken by the Judge is reminiscent of an argument which was taken in the wrongful birth case of *Salih and another v Enfield Health Authority* [1991] 3 All ER 400 ("*Salih*"). The plaintiffs in that case were the parents of three children, and they planned to have a fourth child. During the pregnancy, one of their daughters was diagnosed with

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rubella and they became concerned that the mother, too, might have contracted rubella with deleterious consequences for her as yet unborn child. They sought medical advice but were negligently informed that the mother was free from infection. The mother subsequently delivered a child, Ali, who suffered from congenital rubella syndrome and was born severely disabled as a result. As a consequence, the plaintiffs decided not to have any further children and in fact terminated a subsequent pregnancy which was unplanned. The plaintiffs then brought a wrongful birth claim for upkeep expenses on the ground that the mother would have terminated the pregnancy if she had been correctly diagnosed with rubella. At the time, the weight of authority was in favour of allowing the claim, so the argument which was taken on appeal was that the quantum of the award should be reduced to account for the costs that the plaintiffs *would otherwise have spent* raising a healthy child which they would have had. This argument was accepted by the English Court of Appeal.

39 Butler-Sloss LJ and Sir Christopher Slade both saw no issue of causation here, since the subject matter of the claim was the basic cost of ***maintaining Ali***, and this cost would never have been incurred had the defendants given proper advice since the pregnancy would have been terminated (at 404*d per* Butler-Sloss LJ; at 407*f–g per* Sir Christopher Slade). However, both of them thought the fact that the plaintiffs would have had another child but chose not to because of the birth of Ali was relevant to the *quantification* of their loss. Butler Sloss LJ explained the point as follows (at 405*a–b*):

> … It is said that the costs incurred as a result of the birth relate to this child and cannot be equated with equivalent costs in respect of another child. I do not agree. Unless a child is looked at in isolation without reference to the rest of the family, which I do not believe is the right approach, *the costs of a child have to be considered within the family unit.* It is not the action of the child with which we are concerned but the

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> action of the parents. In this case the termination of a later pregnancy points to the likelihood of further children being born to the wife and requiring financial support from the parents within the family. The fact is that the parents will now not incur the costs of further children. They have to that extent reduced their future expenditure. They are being compensated for the additional expenditure of Ali's special needs. … *The* ***contemplated cost in this case, however, would be spent on an identical purpose, in pari materia with the costs of Ali*** *and cannot be said to be merely collateral.* The decision of the parents not to have another child and the consequential saving of likely future expenditure is, in my judgment, a relevant consideration upon which the defendants were entitled to rely and the judge was in error in not taking it into account. *On the facts of this case it would extinguish this head of damages*. [emphasis added in italics and bold italics]

Mann LJ concurred in the ultimate result, but he thought that the issue was one of *causation (*at 406*h–j*):

> … I regard this as being one of those cases which are now rare in the field of actions for negligence where it is necessary to inquire whether the defendants' negligence was causative of the asserted loss. Upon the facts of this case the answer to that question must be No. Had the defendants not been negligent, *Mrs Salih's pregnancy would have been terminated and she would have sought another pregnancy.* It is probable that she would again have become pregnant. That it is probable is shown by the occurrence of the unplanned pregnancy which was terminated. *The loss represented by the capitalised cost of maintenance would thus probably have been incurred by the plaintiffs in any event.* That being so the negligence is not causative of the loss. [emphasis added]

40 Following *McFarlane*, the result in *Salih* is correct: upkeep claims brought in wrongful birth cases will sound only in the damages attributable to the *additional* cost of raising a disabled child (see below at [66]). However, the reasoning adopted by the court in *Salih* is one which we, with respect, have considerable difficulty with. As a starting point, we cannot accept that there is any issue as to causation here. As Butler Sloss LJ and Sir Christopher Slade pointed out, the claim in question was for the cost of maintaining ***Ali*** and *not*

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some *other child*, and this cost would not have been incurred but for the defendants' negligence. There therefore cannot be an issue as to causation. However, this reasoning applies ***equally*** to the argument on *quantification of loss*. The problem with the reasoning of the majority, with respect, is that it rests on a tenuous equivalence: that the costs that they would have incurred in raising another child are "identical [in] purpose [and] *in pari materia* with the costs of Ali" (see *Salih* at 405*b per* Butler-Sloss LJ). This can only be correct, as Lord Morison pointed out in *McLelland v Greater Glasgow Health Board* [2001] SLT 446 at 457 (a decision of the Inner House of Session and where, although Lord Morison was in a minority, only he in fact expressed a view on the correctness of *Salih*), if the claim is regarded as one "made on behalf of the 'family unit', rather than as one made in respect of an individual" (at 457). It is only if one takes this perspective that it can be possible to say that the expenses incurred are in any way equivalent. But the problem is that the claim in *Salih* (like the claim here) was not framed in such an abstract way. Instead, each of Ali's parents had brought a claim in their individual capacities for the costs of maintaining a child with disabilities when neither of them contemplated having to do so (and indeed, this was the very result they sought to avoid and in respect of which they had sought advice from the defendants).

41 With respect to the Judge, to say that the Appellant "had wanted a second child all along" is overly simplistic. The Appellant sought IVF ***not*** in order to beget a child *irrespective* of paternity (just so that she could have an addition to "her family unit") but to have ***a child with her husband***. This makes all the difference. The short point is this. There is no question that if the IVF procedure had been correctly performed and the Appellant had given birth to a child who was genetically related to herself and her Husband, she would have been perfectly willing to bear the costs of raising that child. However, it

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surely cannot be said that she or her Husband ever contemplated (let alone intended) having to raise a child that was not completely theirs, particularly one who had been born to them in the present circumstances (see Margaret Fordham, "An IVF Baby and a Catastrophic Error—Actions for Wrongful Conception and Wrongful Birth Revisited in Singapore" [2015] Sing JLS 232 ("*Catastrophic Error*") at 237). In this essential detail (and at the risk of putting the matter somewhat indelicately), the present case is like the wrongful conception cases in the sense that the Appellant's argument is that, but for the Respondents' negligence, Baby P would not have been born and the Appellant would not now be put to the expense of raising her. We also observe that in *Andrews* (which is, as far as we are aware, the only wrongful fertilisation case in which the issue of upkeep costs was litigated), the defendants did not argue that the upkeep costs were not causally linked to the defendants' negligence.

42 In explaining why the quantum of damages awarded to the plaintiffs in *Salih* had to be reduced, Butler-Sloss LJ compared the position of the parents with that of the plaintiff in *Cutler v Vauxhall Motors Ltd* [1971] 1 QB 418 ("*Cutler*"). In *Cutler*, the plaintiff suffered a grazed ankle due to the defendant's negligence. The wound became ulcerated because the plaintiff had varicose veins and an operation had to be performed to remove the veins. The English Court of Appeal held that the cost of the operation was not recoverable because the evidence was that the operation would have been necessary in any event (albeit at a later date). With respect, we think the comparison to be quite inapposite. The difference between *Cutler* on the one hand and wrongful birth or wrongful fertilisation claims (such as *Salih*) on the other is the fact that the former concerned a pre-existing condition. As one commentator pointed out, the plaintiffs in *Salih* were not persons whose financial condition was "already damaged by their plan to have a family of

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four children" (see P R Glazebrook, "Unseemliness Compounded by Injustice" [1992] CLJ 226 at 227). The fact that they elected, once they found out that Ali was born handicapped, to limit the size of their family was a matter entirely personal to them and should not have been of any concern to the court in assessing the damages arising out of the defendants' negligence. Indeed, to hold otherwise would be to compound the injustice: it would be tantamount to suggesting that the parents had a duty to mitigate their losses by forgoing having children whom they would otherwise have had – this is a conclusion which is repugnant in the extreme.

43 What this shows is that the question of whether upkeep costs are an actionable head of damage cannot, as the Judge thought, be avoided. We will now take that question in two parts, beginning first by setting out the general analytical framework to be applied before turning to the arguments proper.

The concept of actionable damage

44 From the outset, it is important to distinguish between two distinct but related concepts. The first is that of "damage", which refers to the injury that a claimant must prove in order to make out a case for recovery. This arises out of "an interference with a right or interest recognised as capable of protection by law" (see the decision of the High Court of Australia in *Cattanach and another v Melchior and another* (2003) 199 ALR 131 ("*Cattanach*") at [23] *per* Gleeson CJ). The second is that of "damages", which refers to the monetary sum that is payable consequent upon the proof of that injury (at [23]). Logically, the former is anterior to the latter: a claimant must first establish that he has suffered injury of a sort that the law may take cognisance of before the discussion can then turn to the compensation which might be awarded in respect of that injury. Returning to the three issues which we

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identified above at [18], the first two issues – upkeep costs and loss of autonomy – relate to the concept of damage. They each raise the question of whether a particular type of damage is actionable. The third issue – punitive damages – relates to the concept of damages. It engages the question of the proper basis upon which an award for those admitted heads of damage should be assessed.

45 The concept of "damage" is nebulous and defies easy definition. In the House of Lords decision of *Rothwell v Chemical & Insulating Co Ltd and another and other appeals* [2008] 1 AC 281 ("*Rothwell*") at [7], Lord Hoffmann defined it as "an abstract concept of being worse off, physically or economically, so that compensation is an appropriate remedy". This definition is a helpful start because it captures the essence of the concept of damage, which is the notion of being "worse off". It was for this reason that in *Rothwell* the court refused to recognise asymptomatic physical changes to one's body that had no effect on one's health, whether on its own or in combination with a general anxiety over the onset of a disease, as actionable damage. However, this definition also suffers from several problems. One is the restriction of harms to the physical and the economic – if this was intended to leave out psychiatric harm (which cannot have been the intention), then the definition is incomplete. The second problem lies in its circularity. It amounts, at the end of the day, to the statement that "damage" is detriment of a sort which the law will grant damages for. This might be true, but it is not, with respect, particularly helpful. What it does reveal, however, is that the concept of damage is at the end of the day not a factual, but a normative concept. As one commentator put it, "[a]ll damage is socially constructed" (see Donal Nolan, "Damage in the English Law of Negligence" [2013] 4 JETL 259 at 267).

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46 The question whether a particular head of damage is actionable will depend greatly on the cause of action raised (see, for example, the English Court of Appeal decision of *E (A Minor) v Dorset County Council and other appeals* [1994] 3 WLR 853 at 876D *per* Evans LJ). For instance, the law of contract does not *generally* award recovery for reputational damage and mental distress arising from a breach of contract (see the House of Lords decision of *Addis v Gramophone Co Ltd* [1909] AC 488 ("*Addis*"); though *cf* below at [53]), while the recovery of damage to reputation is a *sine qua non* of an action in defamation. Differences also exist between torts. For example, the causing of substantial inconvenience and discomfort resulting in the loss of the amenity value of land constitutes damage in the tort of private nuisance, but not in the tort of negligence; and, conversely, personal injury is actionable in negligence but not in nuisance (see, for example, the House of Lords decision of *Hunter and others v Canary Wharf Ltd and other appeals* [1997] 2 WLR 684 at 699C–D *per* Lord Hope of Craighead). Different causes of action will also treat the question of actionability at different stages of the analysis, even if the factors that are taken into account are the same. Given that the Appellant has brought an action in both negligence and contract, we will discuss the concept of actionability in each separately.

Actionable damage in the tort of negligence

47 The tort of negligence is only actionable upon proof of damage. As Lord Scarman put it in the House of Lords decision of *Sidaway v Board of Governors of the Bethlem Royal Hospital and Maudsley Hospital and others* [1985] AC 871 at 883H, damage is the "gist of the action" of negligence. What this means is that no action can lie if there is no proof of a compensable loss. For a long time, the law of negligence dealt with the requirement of actionable damage as a question of policy to be dealt with under the heading

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of duty of care (see *Cattanach* at [21]–[22] *per* Gleeson CJ) – that is to say, the issue of whether a particular type of injury is an actionable head of damage resolves itself to the question: Did the defendant owe the plaintiff a *specific duty of care* in respect of this *particular head of loss*? As Lord Hoffmann put it in the House of Lords decision of *South Australia Asset Management v York Montague Ltd (sub nom Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd)* [1997] AC 191 at 211:

> … A duty of care such as the valuer owes does not, however, exist in the abstract. A plaintiff who sues for breach of a duty imposed by the law (whether in contract or tort or under statute) must do more than prove that the defendant has failed to comply. He *must show that the duty was owed to him and that it was a duty in respect of the kind of loss which he has suffered*. [emphasis added]

A similar approach is taken in Australia, where Brennan J held that "a postulated duty of care must be stated in reference to the kind of damage that a plaintiff has suffered and in reference to the plaintiff of a class of which the plaintiff is a member" (see the decision of the High Court of Australia in *Sutherland Shire Council v Heyman and another* (1985) 60 ALR 1 at 48).

48 Given that the question of actionable damage is to be dealt with as an issue concerning the existence of a duty of care, the framework set out by this court in *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR(R) 100 ("*Spandeck*") applies. In *Spandeck* at [71], we clarified that a single test should be applied to determine the existence of a duty of care in negligence, irrespective of the head of claim pleaded. In broad terms, the approach to be adopted is this. If a particular head of damage is factually foreseeable, the courts will apply a two-stage test to determine whether a duty of care exists. At the first stage, it will consider whether there is sufficient legal proximity between the plaintiff and the defendant. If there is,

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the court then moves to the second stage, where it considers whether there are any policy considerations which (in the main) militate *against* the imposition of a duty.

49 As we explained in *Ngiam Kong Seng and another v Lim Chiew Hock* [2008] 3 SLR(R) 674 ("*Ngiam*") at [42], two different and distinct conceptions of "policy" apply at each stage of the *Spandeck* test. At the first stage, what the court is concerned with are matters of "legal policy", namely, whether the relationship between the parties possesses the requisite relational incidents necessary for a duty of care to arise (at [43]) – although it should be noted that the court preferred to avoid using the term "policy" and advocated using the rubric of "proximity" instead (at [43]). The concern, at this stage, is with *interpersonal* justice between the parties and the question is whether it would be proper to recognise that *this particular* defendant owed *this particular* plaintiff a duty of care (see also Andrew Robertson, "Justice, Community Welfare and the Duty of Care" (2011) 127 LQR 370 ("*Robertson (2011)*") at 378). If the answer is in the affirmative, a *prima facie* duty of care is established. At the second stage, the court is concerned with matters of "public policy". The matters which fall under the broad heading of "public policy" comprise a miscellany of disparate issues of juristic concern which include considerations of public morality, social philosophy, and economics. The focus at this stage is on *broader societal considerations* rather than matters which bear only on the interests of the parties *inter se* and the question is whether there are concerns of community welfare which would require the denial of a duty of care that would otherwise arise (see *Ngiam* at [44] and *Robertson (2011)* at 371).

50 The issue of whether a particular head of damage is actionable is one which affects not just the parties to the instant suit, but all of society and, thus,

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the analysis usually takes place at the second stage of the *Spandeck* analysis. A good illustration would be the decision of this court in *Man Mohan Singh s/o Jothirambal Singh and another v Zurich Insurance (Singapore) Pte Ltd (now known as QBE Insurance (Singapore) Pte Ltd) and another and another appeal* [2008] 3 SLR(R) 735. The appellants in that case were parents who had lost both of their children in a car accident caused by the second respondent. The appellants brought suit and claimed damages for a number of things including the cost of fertility treatment that they underwent following the accident in the hope of begetting more children. The High Court judge disallowed the claim for fertility treatment and this decision was affirmed on appeal. At [51], we explained why the recognition of such a head of damage (for fertility treatment to "replace" a deceased loved one) would be contrary to public policy:

> In essence, in challenging the Judge's decision to disallow their claim for the cost of fertility treatment, *the appellants are asking this court to recognise that they have a right at common law to replace their deceased sons (Gurjiv and Pardip), who were all the children that they had.* We do not believe that we can or should recognise such a right, as a matter of both law and policy, even though we are deeply sympathetic towards the appellants' plight. Human beings are unique. The law makes provision for damages to alleviate the pain and suffering arising from the loss of a loved one, but that is the furthest extent of compensation that the law permits. *As a matter of policy, defendants should not be liable for the costs of "replacing" a loved one since there is no fundamental or legal right to "replace" a deceased person.* … [emphasis added]

51 We observe that there has been a trend in recent scholarship, beginning perhaps with an influential article published in the *Law Quarterly Review* nearly 30 years ago (see Jane Stapleton, "The Gist of Negligence" (1988) 104 LQR 213), for the requirement of actionable damage to be dealt with as a standalone requirement instead of being dealt with as a subset of the "duty of care" analysis (see also Donal Nolan, "New Forms of Damage in Negligence"

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(2007) 70 MLR 59 ("*New Forms of Damage*") as well as Craig Purshouse, "Judicial reasoning and the concept of damage: Rethinking medical negligence cases" (2015) 15 Medical Law International 155 at 157). There is much to be said about the conceptual tidiness of such an approach, and it was also the approach adopted in *Rothwell*. However, we think that, ultimately, as long as the policy factors are ventilated openly and explicitly, as this court stressed at [85] of *Spandeck* ought to be done, the same conclusion should be reached irrespective of whether the court treats the requirement of actionable damage as a separate step in the inquiry or addresses it as a component of the duty of care analysis.

Actionable damage in an action for breach of contract

52 Generally, when one speaks of "policy" in the context of the law of contract what comes to mind is the doctrine of the "defence of illegality and public policy". In this context, "public policy" plays a wholly negative role: it provides a basis for the court to hold a contract to be void and unenforceable because of the wider public interest (see the decision of this court in *Ting Siew May v Boon Lay Choo and another* [2014] 3 SLR 609 at [24]). The role played by "public policy" in this narrow sense is limited in two significant ways. First, it is employed as *a vitiating factor* to bar the enforceability of the contract; it is not used to deny recovery of a particular *head of loss*. Second, the established heads of public policy are all referable to the *objects of the contract* and do not fix on the *head(s) of claim asserted.* For example, public policy would deny the validity of contracts savouring of maintenance or champerty, contracts to deceive public authorities, or contracts concluded with the object of committing an illegal act (see, generally, *The Law of Contract in Singapore* (Academy Publishing, 2012) ("*The Law of Contract*") at ch 13).

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53 However, policy also has, in our view, a role (albeit a limited one) to play in contract *outside* the defence of illegality and public policy. In particular, contrary to what Mr Sreenivasan submitted, policy has long had a role to play in regulating the types of damages which are recoverable in an action for breach of contract. In general, the law of contract concerns itself with the remediation of pecuniary damage, and the scope for recovering damages for non-pecuniary loss in contract is greatly limited. This is the reason for the well-established rule that the law of contract does not *generally* award recovery for reputational damage and mental distress arising from a breach of contract (see, generally, *Addis*). In the English Court of Appeal decision of *Watts and another v Morrow* [1991] 1 WLR 1421 at 1445F, Bingham LJ (as he then was) explained that these restrictions were not "founded on the assumption that such reactions are not foreseeable, which they surely are or may be, *but on considerations of policy*" [emphasis added]. One of the policy reasons for this rule is that the law of contract has long concerned itself with commercial affairs, in which contract-breaking is, as explained by Lord Cooke of Thorndon in the House of Lords decision of *Johnson v Gore Wood & Co* [2001] 2 WLR 72 at 108C–D, "an incident of commercial life which players in the game are expected to meet with mental fortitude" (although *cf The Law of Contract*, especially at para 21.112, as well as Andrew B L Phang and Goh Yihan, *Contract Law in Singapore* (Wolters Kluwer Law & Business, 2012) at paras 1539−1540).

54 However, this justification of course does not apply to tort. This leads us to an important point, which is that while policy guides the recoverability of damages in both contract and tort, it does not operate in precisely the same way in both. There are considerations which might bar recovery only under contract but not in tort, and *vice versa*. The reason for this is that contract and

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tort are founded on different principles and pursue different policies. The former deals with obligations which are voluntarily assumed and has as its primary object the enforcement of parties' bargains; the latter deals with obligations imposed by the general law and is primarily concerned with the prevention of harm. This is a point which we shall return to at [102]–[105] below. With that, we now turn to the authorities on the recovery of upkeep costs proper.

The foreign authorities

55 In their submissions, the parties canvassed a wide arc of practice spanning a multitude of decisions from both common law as well as civil law jurisdictions decided during the last fifty years. We are very grateful for the assistance rendered. As noted above, almost all of the decisions relate to cases of wrongful conception, but we consider that the principles articulated therein will be of use to us. Of necessity, we cannot set out everything, although we have considered all the relevant material in reaching our decision. What we propose to do is to limit ourselves only to consideration of the material from common law jurisdictions, focusing in particular on the decisions emanating from the United Kingdom ("UK") and Australia, for that is where this subject has received detailed treatment in the apex courts of those jurisdictions.

56 Before we commence our review of these decisions, we consider it important to clarify the nature and purpose of this exercise. In *McFarlane*, Lord Steyn issued the following reminder prior to undertaking his own survey of the state of the authorities at the time (at 1317F–G):

> … the discipline of comparative law does not aim at a poll of the solutions adopted in different countries. It has the different and inestimable value of sharpening our focus on the weight of competing considerations. And it reminds us that

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> the law is part of the world of competing ideas markedly influenced by cultural differences. …

57 We bear this in mind as well. The question of recoverability is one for the courts of each jurisdiction to answer for themselves, having regard to the social mores and values of the legal culture and the times in which they inhabit. What we hope to achieve through this small conspectus is to distil the principles and competing policies of the law which other courts have identified and struggled to reconcile. With that in mind, we turn, first, to consider the cases from the UK.

The UK

58 Several leading commentators, writing in 2013, observed that the law on the recovery of upkeep costs "has followed a course of sinewave appearance in the last 35 years or so" (see *Mason and McCall Smith's Law and Medical Ethics* (Kenyon Mason, Graeme Laurie, Alexander McCall Smith eds) (Oxford University Press, 2013) at para 10.13). A useful starting point is the decision of the English High Court in *Udale v Bloomsbury Area Health Authority* [1983] 1 WLR 1098 ("*Udale*"), which involved – as many of these cases do – an unsuccessful sterilisation operation. The plaintiff conceived a child and delivered a healthy boy who, as the judgment records, was loved and accepted into the family. After her pregnancy, the plaintiff brought suit against the Area Health Authority and claimed, among other things, damages for pain and suffering arising from the pregnancy and childbirth as well as upkeep costs. Jupp J allowed the claim for pain and suffering but denied the claim for upkeep costs. His decision was grounded firmly in public policy (at 1109D–G):

> The considerations that particularly impress me are these: (1) It is highly undesirable that any child should learn that a court has publicly declared his life or birth to be a mistake – a

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> disaster even – and that he or she is unwanted or rejected. Such pronouncements would disrupt families and weaken the structure of society. (2) A plaintiff such as Mrs. Udale would get little or no damages because her love and care for her child and her joy, ultimately, at his birth, would be set off against and might cancel out the inconvenience and financial disadvantages which naturally accompany parenthood. By contrast, a plaintiff who nurtures bitterness in her heart and refuses to let her maternal instincts take over would be entitled to large damages. In short virtue would go unrewarded; unnatural rejection of womanhood and motherhood would be generously compensated. This, in my judgment, cannot be just. (3) Medical men would be under subconscious pressure to encourage abortions in order to avoid claims for medical negligence which would arise if the child were allowed to be born. (4) It has been the assumption of our culture from time immemorial that a child coming into the world, even if, as some say, "the world is a vale of tears," is a blessing and an occasion for rejoicing.

As will be seen, these four reasons have formed the standard bases for the rejection of upkeep claims worldwide (see J K Mason, *The Troubled Pregnancy: Legal Wrongs and Rights in Reproduction* (Cambridge University Press, 2007) ("*The Troubled Pregnancy*") at p 108).

59 However, a reversal in trend, so to speak, began almost immediately. In the English High Court decision of *Thake and another v Maurice* [1986] 2 WLR 215 ("*Thake (HC)*"), the first plaintiff underwent a vasectomy. The procedure was initially successful, but following a natural process known as "recanalisation", the procedure reversed itself. This was not detected by the defendant doctor, who negligently advised the plaintiffs that they could have sexual intercourse without the use of contraceptives without fear of conception. Soon after, the second plaintiff conceived and delivered a child. She brought suit in both contract and tort, seeking to recover the cost of raising the child. Peter Pain J found the four reasons given by Jupp J in *Udale* to be unconvincing and allowed the claim for upkeep costs. "[S]entiment", he said, had to be placed firmly to one side; and in a now-memorable passage, he

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remarked that "every baby has a belly to be filled and a body to be clothed" (at 230F). However, he held that a set-off had to be made in order to account for the joy that the birth of the child had brought. He achieved this by disallowing the claim for ante-natal pain and suffering arising out of the pregnancy itself, holding that this should be set off against the joy of new life, and did not reduce the quantum of upkeep costs sought.

60 By the time *Thake (HC)* was heard on appeal, the English Court of Appeal had already handed down its decision in *Emeh v Kensington and Chelsea and Westminster Area Health Authority and others* [1985] 2 WLR 233 ("*Emeh*"), where it unanimously rejected the public policy reasons articulated in *Udale*. For this reason, the defendant in *Thake (HC)* did not take up the point about public policy on appeal (probably considering, quite rightly, that the argument would have been a non-starter), and confined himself only to disputing the findings made by Pain J on liability. On this basis, the appeal was dismissed and the decision of Pain J was unanimously affirmed (see *Thake and another v Maurice* [1986] 2 WLR 337 ("*Thake (CA)*")), save only that the appellate court reversed Pain J on the issue of the set-off and allowed the claim for ante-natal pain and suffering. Following *Emeh* and *Thake (CA)*, the position in both England and Wales and Scotland appeared to be well-settled. For 15 years thereafter, the courts regularly awarded damages for upkeep costs (see *The Troubled Pregnancy* at pp 110–111). However, this changed in 1999, when the House of Lords handed down its seminal decision in *McFarlane*.

(1) *McFarlane*: healthy parents and healthy child

61 The facts of *McFarlane* were, in a sense, entirely unremarkable. A vasectomy was performed on Mr McFarlane, but it turned out to be

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unsuccessful. After the operation, he was informed that his sperm count was negative and that he could resume sexual intercourse without the use of contraceptives and he did so. Soon after, Mrs McFarlane became pregnant and delivered a healthy daughter, which the judgment also records as having been accepted into the family with "love and joy" (at 1341C). An action in negligence was brought against the defendant-hospital and, in the usual way, two heads of claim were asserted: the first was what was referred to as the "mother's claim" for pain and suffering arising out of the pregnancy and the childbirth; the second was the "parents' claim" for upkeep costs. The former was allowed by a majority of 4-1; the latter was unanimously disallowed. One difficulty with *McFarlane* is that even though the law lords were agreed on the result, they spoke in vastly different terms.

62 It will be helpful to begin with the speech of Lord Millett, for he was the only one of the five law lords to reject the mother's claim entirely. He admitted that, as a *factual proposition*, the birth of a child is "a mixed blessing" – in his words, it "brings joy and sorrow, blessing and responsibility" (at 1347G–H). For this reason, individuals might elect to eschew parenthood, and it would be perfectly open for them to do so. However, as a matter of *legal policy*, he held that "society itself must regard the balance as beneficial. It would be repugnant to its own sense of values to do otherwise. It is morally offensive to regard a normal healthy baby as more trouble and expense than it is worth" (at 1347H). In an oft-quoted line, he stressed, drawing on the language of the law of restitution, that the plaintiffs could not be allowed "by a process of subjective devaluation, to make a detriment out of a benefit" (at 1346F). Unlike the other law lords, however, he saw this chain of logic as leading inexorably to the conclusion that the mother's claim should also be disallowed in its totality. As he explained, the

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"only difference between the two heads of damage claimed is temporal" (at 1348B). Ultimately, he explained, both the mother's claim for damages for pain and suffering and the parents' claim for upkeep costs flowed from the fact of the child's birth, the consequences of which the law was bound to regard as not sounding in damages.

63 The remaining law lords adopted a narrower approach. They eschewed the broad policy-based analysis adopted by Lord Millett and preferred, instead, to rest their decision on what they considered to be the ordinary principles of the law of negligence. Lord Clyde considered that the award of upkeep costs would "[go] beyond what should constitute a reasonable restitution for the wrong done" (at 1340B). His reasoning, in essence, proceeded in three parts: (a) the object of compensation was to place the plaintiffs in a position as if no wrong had been committed; (b) it was impossible for such an exercise to be carried out here because the benefits received by the plaintiffs from the birth of the child were unquantifiable and no set-off could be effected (at 1337H); and (c) in conclusion, it would not be reasonable or proportionate for the plaintiffs to enjoy the blessings of parenthood but be relieved of the obligations which it necessarily entails (at 1340B).

64 Lord Slynn of Hadley, Lord Steyn, and Lord Hope were each troubled by the fact that the claim for upkeep appeared to be one for pure economic loss. On this basis, they approached the issue on the footing that the question to be considered was whether the defendant owed the plaintiffs a duty of care to avoid the costs associated with the raising of a child. In their own way, each answered this question in the negative. Lord Slynn adopted the approach set out in the leading House of Lords decision of *Caparo Industries plc v Dickman and others* [1990] 2 AC 605 ("*Caparo*") which sets out a "three part test" for determining the existence of a duty of care. In broad terms, a duty of

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care will be found under the *Caparo* approach where (a) the harm to the victim was foreseeable; (b) there is a relationship of proximity between the parties; and (c) the court considers that it is "fair, just and reasonable" for a duty of care to arise. In this regard, the learned law lord concluded that the mother's claim failed at the last hurdle: he held that it would not be "fair, just or reasonable to impose on the doctor or his employer liability for the consequential responsibilities, imposed on or accepted by the parents to bring up a child" (at 1312H). Lord Hope likewise concluded that it would not be "fair, just or reasonable" for the upkeep claim to succeed. His reasons, in essence, were the same as those of Lord Clyde, namely, that the compensatory principle would demand that a deduction be made for the benefits of parenthood, but that no such deduction could be made: in his words, "the value which is to be attached to these benefits is incalculable" and he thus concluded that upkeep costs would not be recoverable (at 1332D–E). Lord Steyn, on the other hand, sought recourse to the concept of distributive justice which, he said, concerned the "just distribution of burdens and losses among members of a society" (at 1318D). He held simply that members of society would "instinctively" say that "the law of tort has no business to provide legal remedies consequent upon the birth of a healthy child, which all of us regard as a valuable and good thing" (at 1318F–H).

65 What is clear from their speeches is that the majority of the law lords (Lord Millett dissenting on this particular point) proceeded on the basis that the reasons which militated against the allowance of the parents' claim for upkeep costs were distinct, and therefore did not wholly bar recovery of the mother's claim as such. Thus, they held that both general damages arising out of the pain and suffering associated with pregnancy and childbirth as well as special damages arising out of the consequential medical expenses were

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properly recoverable by the mother. However, they did not explain why this was so in any great detail. For instance, Lord Steyn merely stated that "[t]he considerations of distributive justice which militated against the claim for the [upkeep costs] did not apply for the claim for a solatium" (at 1320E), while Lord Clyde stated simply, without further elaboration, that the mother's claim was "reasonably a subject for compensation" (at 1339F).

66 After *McFarlane*, the issue as to whether upkeep costs could be awarded for the birth of a healthy child was well-settled, and it was consistently applied in the wrongful conception cases which were decided afterwards. It did not completely preclude upkeep awards in wrongful birth cases (see, for example, the decisions of the English High Court in *Rand v East Dorset Health Authority* [2000] Lloyd's Rep Med 181 and *Hardman v Amin* [2000] Lloyd's Rep Med 498), but it restricted such awards to only the *additional* costs of raising a disabled child. The courts hearing these wrongful birth cases felt themselves bound to hold that the ordinary costs of raising a healthy child would, following *McFarlane*, be irrecoverable. However, they considered that wrongful birth cases were sufficiently different that the policy considerations that the child-rearing costs which were *related directly to the disability* would still be recoverable (see *The Troubled Pregnancy* at p 126).

67 However, *McFarlane* left two points unresolved:

(a) First, it expressly left undecided the question of whether recovery should be allowed if the unplanned child was born disabled (at 1320C *per* Lord Steyn and at 1334D *per* Lord Clyde).

(b) Second, it also did not address the question of whether recovery would be allowed if one or both of the *parents*, rather than the child, was disabled.

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(2) *Parkinson*: healthy parents and disabled child

68 The issue as to whether upkeep costs could be awarded where the child was born disabled arose for decision in *Parkinson v St James and Seacroft University Hospital NHS Trust* [2002] QB 266 ("*Parkinson*"). The claimant, Mrs Parkinson, underwent a sterilisation operation which was negligently performed, and as a consequence she gave birth to her fifth child, who was born significantly disabled. This placed Mrs Parkinson, who was already living in very humble circumstances, under great financial pressure. She subsequently brought suit against the defendant-hospital and sought to recover the full costs of bringing up the child. While the English Court of Appeal held, mirroring the practice in wrongful birth cases decided post-*McFarlane* (see above at [66]), that while she was precluded from recovering the costs of caring for a normal healthy child, she was nevertheless entitled to an award for the *extra* expenses associated with bringing up a child with a significant *disability*.

69 Brooke LJ, delivering the first of the two fully reasoned judgments in this case, noted that parents in Mrs Parkinson's situation (that is to say, parents of children with congenital defects) had been able to recover upkeep costs for the better part of 15 years (since *Emeh*). This, he held, was not affected by the decision in *McFarlane*, which stood for the proposition that a medical professional did not, for reasons of policy, owe a duty of care in respect of the costs of raising a healthy baby. He accepted that this would preclude recovery for the *ordinary* costs of raising a child. However, the calculus was quite different where the *extra* expenses associated with the raising of a disabled child were concerned. In such a case, he ruled that it would both be "fair, just and reasonable" (to use the language of *Caparo* preferred by Lord Slynn and Lord Hope in *McFarlane*) and consistent with the principles of "distributive

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justice" (to use the language of Lord Steyn in *McFarlane*) to permit recovery of those extra costs: see *Parkinson* at [50].

70 The speech of Hale LJ (as she then was) began from the premise that all the consequences arising out of the unplanned pregnancy (which, as she noted, were many and varied and which she described in powerful detail) were directly caused by the defendant's negligence, and they would, according to what she termed the "normal legal principles" of the law of tort, normally be recoverable (see *Parkinson* at [75] and [76]). The only impediment was the decision in *McFarlane*. While she noted that the law lords had given different reasons for their conclusion in *McFarlane*, she ultimately located the *ratio* of the case in what she termed the "solution of deemed equilibrium" – that is to say, the benefits and burdens of parenthood were assumed to cancel each other out where one was concerned with a healthy baby (at [87] and [90]) (this reasoning did not, however, subsequently find favour). For this reason, Hale LJ confined the holding in *McFarlane* only to upkeep claims involving healthy children. There was, she said, "no reason or need to take that limitation any further than it was taken in *McFarlane's* case" (at [90]). She was careful to add, however, that her approach did not have the effect of treating a disabled child as being of any less worth than a healthy child. Instead, she concluded that her approach "treats a disabled child as having exactly the same worth as a non-disabled child. It affords him the same dignity and status. It simply acknowledges that he costs more" (at [90]). She also added that she thought that such an award could not be impugned as being either unfair, unjust, or disproportionate (at [95]).

(3) *Rees*: disabled mother and healthy child

71 The issue of whether upkeep costs could be awarded where a healthy

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child was born to disabled *parents* came up for decision in *Rees v Darlington Memorial Hospital NHS Trust* [2003] 3 WLR 1091 ("*Rees*"). The plaintiff, Ms Rees, was severely visually handicapped. Fearing that she would not be able to care for a child, she underwent a sterilisation operation which was, unfortunately, negligently performed. Subsequently, Ms Rees conceived and gave birth to a healthy child. She sued the defendant-hospital and brought an upkeep claim. This was disallowed at first instance but allowed in part by the English Court of Appeal, which restricted the quantum of the award to the *additional* upkeep costs which were attributable to the special difficulties *she* would face in taking care of the child as a result of her disability. When the matter came before the House of Lords, there were two issues. The first was whether *McFarlane* should be overruled entirely. On this, the law lords were unanimous: all of them declined to do so on the basis of the doctrine of precedent. The second issue was whether the decision of the Court of Appeal to grant Ms Rees a partial award should stand. By a slim majority of 4-3, the Court of Appeal was reversed and the upkeep claim was denied. However, the majority also awarded Ms Rees a "conventional award" in the sum of £15,000 to afford a measure of recognition of the wrong which she had suffered.

72 On the issue of upkeep costs, the majority was clear that the present case fell within the scope of the rule in *McFarlane*. Lord Millett was perhaps the clearest on this, as he pointed out that the focus in *McFarlane* was on the costs associated with the raising of a *healthy child* and, on this point, the holding of the House was that such costs were irrecoverable. On this basis, the decision of the Court of Appeal, which resulted in an award for the costs of raising a *healthy child*, was "not a legitimate extension of *Parkinson*, but an illegitimate gloss on *McFarlane*" (see *Rees* at [113]). The majority were also persuaded by the powerful dissenting opinion of Waller LJ in the court below,

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who pointed out that there would be serious anomalies if an award were to be made. He compared the situation of a claimant-mother with four children who lived in straitened circumstances, and for whom the addition of a fifth child would cause a breakdown in her health, with that of a claimant-mother who was disabled but wealthy. It appeared unfair and unprincipled (viewing matters through the prism of need) to award damages to the latter but not to the former (see the decision of the English Court of Appeal in *Rees v Darlington Memorial Hospital NHS Trust* [2003] QB 20 at [53]–[55] *per* Waller LJ). The minority accepted the force of this critique, but did not think it insuperable. At the end of the day, they simply rested their dissent on the ground that "special consideration" (at [39] *per* Lord Steyn) could and ought to be given to Ms Rees on the ground of her disability and that it was "fair, just and reasonable" (at [97] *per* Lord Hutton) for this to be done.

73 In many ways, the decision of the majority was not surprising – it was simply an affirmation of the holding which had been laid down scarcely four years earlier in *McFarlane*. The most controversial aspect of *Rees* has been the fashioning of the "conventional award", which was assailed by the minority for being "contrary to principle (at [46] *per* Lord Steyn), as well as "hugely controversial" and a subject better left to Parliament (at [77] *per* Lord Hope). We will defer detailed discussion of this aspect of the judgment until we come to the section on an award for a "loss of autonomy".

Australia

74 From the UK, we turn to Australia. Prior to 2003, there were relatively few cases which were directly on point and there was no consistent practice as such. In the wrongful conception case of *Dahl v Purnell* (1993) 15 QLR 33, the District Court of Queensland awarded upkeep costs following a failed

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vasectomy, but reduced the award by one quarter to account for the intangible benefits received from the child. In the wrongful birth case of *Veivers v Connolly* (1995) 2 Qd R 326, the Queensland Supreme Court awarded upkeep costs of approximately A$800,000 for the doctor's negligence in failing to diagnose that the mother suffered from rubella and warn her of the risks thereof. Finally, in the wrongful birth case of *CES v Superclinics (Australia) Pty Ltd* (1995) 38 NSWLR 47, the New South Wales Court of Appeal refused to award upkeep costs but allowed the claim for damages for pain and suffering. This was an unusual case because only one of the judges, Priestley JA, gave reasons in support of this result (he held that the decision of the mother to accept the child constituted a *novus actus interveniens*). Kirby P (as he then was) rejected this argument and would have been inclined to award *both* upkeep costs as well as damages for pain and suffering but concurred in the decision in order to produce a plurality in favour of the final result. The last judge, Meagher JA, would have not have made any award at all on the ground that the cause of action itself was barred by public policy.

75 All of these disparate lines of authority were swept away by the decision of the High Court of Australia in *Cattanach*. The plaintiffs in that case were husband and wife. Desiring to limit the size of their family, the wife sought medical advice and was advised to undergo a tubal ligation. During the consultation, the wife informed the doctor that her right fallopian tube had been removed. It turned out that this was incorrect; but the doctor did not inquire further and performed the procedure only on the wife's left fallopian tube. She eventually conceived and delivered a healthy baby boy. The plaintiffs then brought an action in both tort and contract claiming, among other things, upkeep costs. The trial judge made a finding of negligence on the basis that the doctor had too uncritically accepted the wife's assertion that her

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right fallopian tube had been removed and ought to have advised her to have it specifically investigated. The judge allowed the claim for upkeep but his decision was reversed on appeal to the Queensland Court of Appeal. By the time the matter came before the High Court of Australia, the claim in contract had been abandoned. By a slim majority of 4-3, the High Court reversed the decision of the Queensland Court of Appeal and allowed the upkeep claim.

76 The majority, comprising McHugh, Gummow, Callinan, and Kirby JJ, proceeded from the premise (as did the law lords in the later case of *Rees*) that the claim – being one that was causatively linked to the defendant's negligence and reasonably foreseeable – was recoverable under the ordinary principles of tort liability and that the onus, though they did not quite put it in those terms, was on those who opposed recovery to put forward cogent reasons for the denial of liability (at [51], [179] and [298]). This is perhaps clearest in the opinion of Kirby J, who wrote that "the relevant question is why the wife was *not* entitled to recover damages for all these consequences; it is not why she *should* be held to be entitled to recover for them" [emphasis in original] (at [192]). They warned against the creation of a "zone of legal immunity" (at [149] *per* Kirby J) for healthcare professionals, which they said would not only be unprincipled, but also contrary to the public interest (at [57] *per* McHugh and Gummow JJ and at [295] *per* Callinan J).

77 For this reason, large portions of their opinions were given over to detailed rebuttals of the principal arguments against the award of upkeep costs. In particular, the following common themes ran through their judgments:

(a) First, it was stressed that the "damage" which the law sought to compensate was not the birth of the child *per se*, but the *financial* burdens arising therefrom. At [68], McHugh and Gummow JJ stated

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that the "unplanned child is not the harm for which recompense is sought in this action; it is the burden of the legal and moral responsibilities which arise by reason of the birth of the child that is in contention." Thus, it was held that the award of damages did not necessarily entail a negative value judgment of the worth of the child (at [148] *per* Kirby J).

(b) Secondly, it was argued that many of the negative policy considerations rested on dubious factual foundations. At [148], Kirby J observed that the claim that the birth of a child was always a blessing was a received notion that was not always true and should not apply to a particular case unless substantiated by objective empirical evidence (see also at [79] *per* McHugh and Gummow JJ and at [292] *per* Callinan J). At [301], Callinan J gave short shrift to the argument that the award of damages should be refused because it would detrimentally affect the child's psychological well-being, holding that "there are many harsher truths which children have to confront in growing up than the knowledge that they were not, at the moment of their conception, wanted" (see also at [79], where McHugh and Gummow JJ dismissed the same argument – that recovery should be precluded because it would cause psychological harm to the children – on the ground that it was too speculative).

(c) Thirdly, they held that there should not be any offset for the intangible benefits brought by the child, as had been the practice in some American jurisdictions (see, for example, the decision of the Californian Court of Appeal in *Custodio v Bauer*, 59 Cal Rptr 463 (1967) ("*Custodio*")). The reason for this, as McHugh and Gummow JJ explained at [90], was that it was impermissible in principle to place on

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> the same scales the benefits accrued from one legal interest against the losses occasioned by the infringement of a separate legal interest (see also at [175] *per* Kirby J and at [298] *per* Callinan J).

78 The minority comprised Gleeson CJ and Hayne and Heydon JJ. They each argued that the expenses incurred in the upkeep of a child was not a proper subject for recovery. In arriving at this conclusion, they eschewed many of the traditional justifications and/or re-cast them in a different light. Central to their view was the insight that the creation of the parent-child relationship was an integral aspect of the damage for which recovery was sought and this made it untenable for recovery for upkeep to be claimed (at [26] *per* Gleeson CJ). Hayne J warned against the "commodification" of the child and said, "[i]f attention is to be paid to *all* of the consequences of the defendant's negligence, one of those consequences is that there is a new life in being … life is not an article of commerce and to it no market value can be given" [emphasis in original] (at [248]).

79 To permit such an exercise of valuation, the minority held, would be fundamentally inconsistent with the obligations, both legal and moral, which attend parenthood (at [35] *per* Gleeson CJ and at [261] *per* Hayne J). It would also be detrimental to the parent-child relationship, as it might open the door for parents to "embark upon proving that the economic costs of the child will, in the long run, outweigh whatever advantages or benefits the parent may derive from the child's existence" (at [259] *per* Hayne J). This was a problem, Heydon J said, that would exist even if there were no offset solution. He explained that if the award were to be truly compensatory, then there would always be a financial incentive (a "temptation") for parents either to exaggerate the educational goals which they had for their children or to over-emphasise their weaknesses (both of which would entail a higher pay-out): at

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[338]–[346].

80 In an interesting postscript to the judgment, three Australian States swiftly moved to pass legislation to reverse the decision of the High Court of Australia. In New South Wales (see s 71 of the Civil Liability Act 2002 (NSW)) and South Australia (see s 67 of the Civil Liability Act 1936 (SA)), the position now mirrors that in the UK post-*Parkinson*, that is to say, no damages may be awarded for the ordinary costs of raising a healthy child although damages may be claimed for the *additional* costs of raising a child born with disabilities. In Queensland, no damages may be awarded for the "costs ordinarily associated with rearing or maintaining a child" (see ss 49A and 49B(2) of the Civil Liability Act 2003 (Qld)). No carve out was included for the additional costs of raising a child with disabilities, but it appears that the intent of the legislature in that particular State was that the court would be able to make such an award (see Nicolee Dixon, "The Costs of Raising a Child: Cattanach v Melchior and the Justice and Other Legislation Amendment Bill 2003 (Qld)", (QPL, September 2003) at p 17). In the remaining States and Territories, *Cattanach* still remains good law (see *Catastrophic Error* at 235).

Some interim conclusions on the foreign authorities

81 If nothing else, this brief survey of the foreign authorities demonstrates that there is no path which is free from difficulties. This is not surprising in the least, given the deep complexity as well as sensitivity of the issues involved. However, we think that it is possible to commence making some headway by identifying three reasons upon which we would *not* decide this matter (all of which were raised, in some form or other, in the foreign authorities). It might seem odd for us to begin with these negative arguments, but we consider it

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helpful to clear out some of the conceptual detritus before turning to the substantive analysis proper. These three reasons are:

(a) that the success of the claim is to be determined (or even affected) by its classification either as one for pure economic loss or consequential economic loss;

(b) the contention that the arguments against recovery rest on dubious factual propositions and should be rejected out of hand; and

(c) the suggestion that the Appellant's decision to accept Baby P constitutes a *novus actus interveniens*.

82 First, we consider that it does not matter whether the upkeep claim is classified as an action for the recovery of pure economic loss (see, for example, the speeches of Lords Slynn, Steyn, and Hope in *McFarlane* and the opinion of Gleeson CJ in *Cattanach*) or as one for the recovery of consequential economic loss (see, for example, Kirby J in *Cattanach* and Hale LJ in *Parkinson*) because there is no general exclusionary rule against recovery for pure economic loss in *Singapore* (see *Spandeck* at [69]). Thus, the characterisation of the claim cannot determine its success. The distinction is only useful as a proxy (and only then as a very rough one) for whether a duty of care in tort ought ordinarily to arise in a given context. At the end of the day, the existence of a duty of care falls to be adjudicated based on the facts of each case and cannot merely be an arid matter of labels.

83 Second, we think that it is important to emphasise that the dispute is fought not at the factual, but at the normative level. The claim that all children are a "blessing" or that the well-being of the unplanned children will suffer as a consequence of the making of an award for upkeep are, of course,

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contestable factual propositions. This point was well made by the majority in *Cattanach* (see above at [77(b)]). However, those who seek to deny upkeep costs have never seen themselves as making a factual claim that the benefits of having a child always outweigh the burdens, or that the children of the claimants will necessarily carry the psychological scars of the litigation. Rather, their claim is that the award of upkeep costs would be antithetical to settled legal policy concerning the value human life or the character of a parent-child relationship. As Gleeson CJ put it, the "value of human life, which is universal and beyond measurement, is not to be confused with the joys of parenthood, which are distributed unevenly" (see *Cattanach* at [6]; see also *McFarlane* at 1347G–H *per* Lord Millett, cited above at [62]).

84 Finally, we clarify that the Appellant's decision to accept Baby P cannot be considered a *novus actus interveniens*. Despite the difficulty of the subject of upkeep claims in general, this is one point on which there is near universal agreement: almost without exception, all jurisdictions hold that that the decision of the parent to accept the child and raise him/her after birth *cannot* be taken as an act which breaks the chain of causation (see *The Troubled Pregnancy* at p 116). It is settled law that in order for the act of the victim to break the chain of causation, it must be so "wholly unreasonable" that it eclipses the original wrongdoing and may be deemed to be a wholly independent cause of the damage (see the decision of this court in *TV Media Pte Ltd v De Cruz Andrea Heidi and another appeal* [2004] 3 SLR(R) 543 at [76]). In this case, Baby P is biologically related to the Appellant, who had spent nine months carrying her to term. The Appellant's decision to keep Baby P therefore cannot, by any stretch of the imagination, be considered to be one which is considered to be "wholly unreasonable". We would go so far as to say that it would be repugnant to suggest otherwise for it seems to us that

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the Appellant did *not*, *in fact*, have any choice in the matter.

85 As a general proposition, we agree with Lord Steyn that it is "difficult to envisage any circumstances in which it would be right" to challenge the parents' decision not to resort either to abortion or adoption (see *McFarlane* at 1317H). The reason for this is plain. The choice of whether to abort or to put a child up for adoption is of profound social and moral significance. It was one which the Appellant should never have been called upon to make and the only reason why the Appellant had been placed in this invidious position was because of the Respondents' negligence (see, generally, *McFarlane* at 1347D *per* Lord Millett). To the Respondents' credit, they never argued that the Appellant ought to have given Baby P up for adoption and even if such an argument would have been made, we would not have been disposed to accept it. Section 3(1) of the Termination of Pregnancy Act (Cap 324, 1985 Rev Ed) ("TPA") makes it clear that the choice to terminate a pregnancy is one for the pregnant woman *alone* to make. This is buttressed by s 5 of the TPA, which makes it an offence for a person to compel or induce a pregnant woman to undergo treatment to terminate a pregnancy. In like manner, s 4(4) of the Adoption of Children Act (Cap 4, 2012 Rev Ed) generally enjoins the court from making any adoption order unless the consent of the persons with custody of the child (in this case, the Appellant) has been procured. In our judgment, it would be wholly contrary to the policy of the law, as embodied in these provisions, to recognise that the voluntary decision of a woman *not* to terminate a pregnancy or, as in this case, not to give a child up for adoption can constitute a *novus actus interveniens*.

Analysis

86 After careful consideration of the competing arguments, we are

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ultimately persuaded by the arguments ***against*** the award of upkeep costs. Our essential reasons are twofold (and which, as we shall see, are, by their very nature, closely related):

(a) The obligation to maintain one's child is an obligation at the heart of parenthood and cannot be a legally cognisable head of loss.

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

We turn now to consider, *seriatim*, these reasons why we consider that the claim for upkeep should not be allowed.

The obligations of parenthood

87 Turning to the first reason, a common theme among those who would permit recovery is the argument that the upkeep claim is maintainable simply on the application of the conventional principles of civil liability. This is a view that is shared even among those who would deny upkeep claims (see, for example, *Cattanach* at [192] *per* Hayne J and *Rees* at [12] *per* Lord Nicholls). On this view, a claim for upkeep is no different in principle from a claim for damages for pain and suffering, or a claim for the cost of the medical expenses associated with the IVF procedure. In one sense, this is right – the claim for upkeep costs is simply the last link in the concatenation of obligation, breach, causation, foreseeability, and damage that forms the chain of civil liability in the law of negligence. With respect, however, we do not think that this presents the whole picture. This is *too general* an approach and requires more nuance (especially given the very sensitive issues that we are dealing with).

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The critical difference is this. In the present case (and in upkeep claims more generally), the complaint is *not* about the direct consequences to the Appellant ***qua patient*** of the physical and other aspects of pregnancy and birth; rather, it is about the consequences to the Appellant ***qua mother*** of the existence of the child and the concomitant creation of a relationship pursuant to which there are legal, moral, and social obligations to care for, support, and nurture Baby P (see *Todd* at 532). In short, the upkeep claim is an action seeking relief in respect of a particular consequence of parenthood – the duty to provide material support for one's child – and its success therefore necessarily depends on the recognition of the obligations of parenthood as actionable damage. In our judgment, this is *not* a step that this court should take.

88 In contemporary discourse, it has become common to speak of parenthood in the distinct senses in which it exists: biological, social, legal, and moral. For present purposes, we can put aside the differences amongst these different conceptions (and the extent to which they give rise to different claims) because the Appellant is both the biological as well as legal parent of Baby P. We can focus more broadly on the notion of parenthood as an institution arising out of the relationship between a custodial parent (that is to say, a parent who cares for a child and with whom the child stays) and a dependent child. At its core, this relationship is a moral one: to be a parent is to bear both rights and responsibilities towards one's child which are unique. In *TDT v TDS and another appeal and another matter* [2016] 4 SLR 145 at [111], we approved of the following passage written by Assoc Prof Debbie Ong (as she then was) in "Family Law" (2011) 12 SAL Ann Rev 298 at para 15.6:

> … Parents stand in an exalted position with respect to having authority over the upbringing of their children. They are also expected to bear the greatest responsibility for the protection,

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> nurture and maintenance of their children. No other adult has the same primary duty to maintain. …

89 Parental rights are, in essence, those of substituted judgment and surrogate decision-making and include, amongst other things, the liberty to make decisions ranging from immediate matters such as the child's diet, medical treatment, and travelling arrangements to longer-term decisions which have a far-reaching impact on the well-being of the child, such as educational choices and (for a time at least) religious observance. These rights are also exclusive, in the sense that a parent is entitled to exclude others (save in limited situations provided by law, when other persons may act *in loco parentis*) from making these decisions. Parental responsibilities encompass a set of different duties which relate to the advancement of the child's welfare. Minimally, these duties encompass the obligation to provide the child with the necessaries of life – that is to say, the basic material goods necessary for life and health. As we explained in *AUA v ATZ* [2016] 4 SLR 674 ("*AUA*") at [40], each parent has an "independent and non-derogable duty to maintain his/her children, whether directly, through the provision of such necessities as the child may need, or indirectly, by contributing to the cost of providing such necessities". This duty, which we described as a "central principle" of the Women's Charter (Cap 353, 2009 Rev Ed) ("the Women's Charter") is enshrined in s 68 of the Women's Charter as follows:

> Except where an agreement or order of court otherwise provides, it shall be the duty of a parent to maintain or contribute to the maintenance of his or her children, whether they are in his or her custody or the custody of any other person, and whether they are legitimate or illegitimate, either by providing them with such accommodation, clothing, food and education as may be reasonable having regard to his or her means and station in life or by paying the cost thereof.

90 The point, for present purposes, is this. The duty to maintain one's child is a duty which lies at the very heart of parenthood, and thus the

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expenses which are incurred towards the discharge of this estate are not capable of characterisation as a loss. This is not a factual claim and it has nothing to do with the subjective perceptions of individual parents; nor has it anything to do with the felt reality of parenthood, which, on occasion, can even feel like a chore. Rather, it is a *normative* claim about the paradigm of family relationships which exists in the law, which views the responsibilities of parenthood as obligations of a legal and moral character that arise in relation to the birth of *new life* (see, generally, *Cattanach* at [258] *per* Hayne J). These are obligations which arise out of the dual character of parenthood, which "inhabits the intersection of two distinct relationships": a *custodial* relationship between parent and child and a relationship of *trusteeship* between the parents and wider society (see Elizabeth Brake and Joseph Millum, "Parenthood and Procreation" in *The Stanford Encyclopedia of Philosophy* (Winter 2016 Edition), (Edward Zalta, gen ed), <https://plato.stanford.edu/entries/parenthood/> (accessed 5 December 2016)). Neither of these relationships gives rise to obligations which are capable of valuation as "loss" in any meaningful sense and therefore cannot, in our judgment, be the subject of a claim for damages.

91 It is important to emphasise that this is not a statement about the *difficulty* of any putative valuation exercise (the fact that there are difficulties with quantification is not an insuperable barrier to the making of an award: see the English Court of Appeal decision of *Chaplin v Hicks* [1911] 2 KB 786 at 791 *per* Vaughan Williams LJ), but, rather, about its *impossibility*, when viewed from a *holistic* perspective. The fact that the upkeep claim is *denominated* in dollars and cents does not change the analysis. The financial cost of raising a child lies beyond the compass of the law in the same way that the effort expended by the Appellant in all other aspects of raising Baby P –

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for instance, the hours of lost sleep spent putting her to bed; the sorrow and worry endured during a bout of illness; or the simple act of blowing on a spoonful of hot soup before feeding it to her – falls outside the domain of the law. These, and a million other sacrifices, both big and small, that parents make unthinkingly for their children during the course of their lifetime, are – to use the words of Viscount Simon LC in the House of Lords decision of *Benham v Gambling* [1941] AC 157 ("*Benham*") at 168 – "*incapable* of being measured in coin of the realm" [emphasis added]. As Heydon J put it at [356] of *Cattanach*:

> Human life is invaluable in the sense that it is incapable of valuation. It has no financial worth which is capable of estimation. It cannot be sold for money, at least not lawfully. *The duty cast on parents which flows from the arrival of new human life is also incapable of valuation or estimation or discharge by payment.* The financial costs of child-rearing can be calculated, but they represent only part − and in some ways an insignificant part − of the onerous aspects of the duty. *To calculate them in money terms and then permit their recovery in relation to the performance of the duty is to engage in an activity* ***lacking any meaningful correspondence with the duty****,* just as much as seeking to calculate the economic and other advantages of the new life is to engage in an activity lacking any meaningful correspondence with the phenomenon under consideration. [emphasis added in italics and bold italics]

92 A moment's reflection will reveal that parents provide for their children in a myriad of ways besides ensuring their material well-being. As Hale LJ put it in *Parkinson* at [72], "[t]he law has found it much easier to focus on the associated financial costs … [but these] costs are not independent of the caring responsibility but part and parcel of it". If this is so, one might justifiably ask if there is any principled reason why the financial costs incurred in raising a child should be distinguished from the emotional investment in providing for a child's self-esteem, happiness, and sense of worth, and so identified as being capable of being the subject of a claim (see *Cattanach* at

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[9] *per* Gleeson CJ). The challenge, for those who would allow claims for the costs of upkeep, is to find a principled justification as to why the pecuniary consequences of the birth of an unplanned child should sound in damages but the non-pecuniary costs should not. One solution to this incongruity would be to say that these non-pecuniary aspects of parenthood, too, should also sound in damages, but this suggestion need only be stated for it to be rejected. This intuition, we think, stems from the fact that to do so would be to seek recompense for a matter which is *intrinsically incapable of valuation* – the nurturing of a human relationship which has long been held up as the "natural and fundamental group unit of society" (see Art 23 of the International Covenant on Civil and Political Rights (19 December 1966), 999 UNTS 171). This principle has also been enshrined in the texts of many other international human rights instruments (see, generally, *Cattanach* at [35] *per* Gleeson CJ) and it also finds expression in Singapore in the Shared Values White Paper, where it is stated that the family is "the basic unit of society" (see *Shared Values White Paper* (Cmd 1 of 1991, 15 January 1991) at para 52).

93 In the premises, we do not think that it is open to the Appellant to argue, on the one hand, that she and her Husband have accepted Baby P as their own (and therefore assumed the status of parents) and yet, on the other hand, argue that the responsibility or obligation of maintaining the child is something which they have not accepted. Baby P is ***a holistic person*** who must be accepted as she is. If she is accepted, as we are gratified to observe she has been, then the Appellant must be taken to have simultaneously assumed the responsibility of maintaining her (financially and in all other respects). Parenthood comprises an indivisible bundle of rights and obligations which cannot be peeled away and hived off *à la carte*. In the words of the Judge, "[w]hen a parent has accepted his role in respect of that child, the

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obligation is his (and his spouse's). He cannot be a parent and have someone else pay to bring up the child" (see the Judgment at [16]). Once again, this not a factual claim, but a normative one about the meaning of legal parenthood. The reality is that there are many parents who do not in fact shoulder the bulk of the financial burden of raising their children. This may be so for many reasons, but it does not detract from the force of the normative argument, which is that the obligations of parenthood are *fundamental, indivisible, and incapable of sounding in damages*.

94 The majority in *Cattanach* (and those courts which have permitted claims for upkeep to proceed) was at pains to stress that what was being counted as loss was not the unplanned child *per se*, but the unplanned and unwanted *financial expenses* which attend the fact of the child's birth (see above at [77(a)]). This is correct, as far as it goes, and it might be a possible answer to the objection that the upkeep claim results in the denigration of the worth of the child. However, it is *not* an adequate answer to the present objection, which is this: no *parent* can claim a legal entitlement to be free from the responsibilities of parenthood (whether financial or otherwise). To clarify, we are not saying that the Appellant's decision to accept Baby P constituted a *novus actus interveniens*. For the reasons which we have already set out above at [84]–[85], we reject any such suggestion, which carries with it the imputation that the Appellant's decision to keep Baby P was "wholly unreasonable". However, what we can and must consider is the fact that the upkeep claim arises out of ***the parental relationship*** between the Appellant and Baby P. This is the *sine qua non* of the upkeep claim and an appreciation of it is key to an accurate understanding of the nature of the damage which the Appellant claims to have suffered.

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Inconsistency with the nature of the parent-child relationship

95 This brings us to our second reason, which is that the essentially custodial and fiduciary nature of the parental relationship raises the spectre of a possible conflict of interest between the parents' private interests in the litigation and their duties *vis-à-vis* their children. In order to establish a case for the recovery of upkeep costs, parents would have to come to court to prove that their children represent a net *loss* to them. The very nature of such an exercise encourages the exaggeration of any infirmities and the diminution of benefits as might exist in their children, in order that the account may be as favourable to the parents as possible. This is conduct which is fundamentally at odds with the overarching duty that parents have to provide, care for, and love their children. In the decision of the Supreme Court of Massachusetts in *Burke v Rivo*, 551 NE.2d 1 (Mass, 1990), O'Connor J (dissenting, with Nolan and Lynch JJ) put the point in the following way (at 7):

> "It is … the policy of this commonwealth to direct its efforts … to the strengthening and encouragement of family life for the protection and care of children." … That policy is surely not served, indeed it is disserved, by a rule of damages that would require parents, if their litigation is to succeed, to persuade a judge or jury that their child is not worth to them the cost of rearing that child. The Supreme Court of Illinois put it this way: "It can be seen that permitting recovery then requires that the parents demonstrate not only that they did not want the child but that the child has been of minimal value or benefit to them. They will have to show that the child remains an uncherished, unwanted burden so as to minimize the offset to which the defendant is entitled. …"

96 It has been suggested, in response to this objection, that the solution lies in doing away with the so-called American "benefit" rule, which requires a reduction to be made from any award of upkeep costs to account for the non-pecuniary benefits that the child brings. Among the proponents of this view are the minority in *Cattanach* who cited the commentary to §920 of the

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American Law Institute's *Restatement (Second) of Torts* ("the *Restatement*") in support of this position (see *Cattanach* at [85]). §920 of the *Restatement* states that where a defendant's tortious conduct has caused harm and has also conferred a benefit on the plaintiff, the "value of the benefit conferred is considered in mitigation of damages". This, which in American jurisprudence is known as the "benefit rule", is qualified by Comment *b* to §920 of the *Restatement*, which provides that "[d]amages resulting from an invasion of one interest are not diminished by showing that another interest has been benefitted". At [90] of *Cattanach*, McHugh and Gummow JJ remarked:

> … the head of damages that is relevant in the present case is the financial damage that the parents will suffer as the result of their legal responsibility to raise the child. The benefits to be enjoyed as a result of having the child are not related to that head of damage. The coal miner, forced to retire because of injury, does not get less damages for loss of earning capacity because he is now free to sit in the sun each day reading his favourite newspaper. Likewise, the award of damages to the parents for their future financial expenditure is not to be reduced by the enjoyment that they will or may obtain from the birth of the child.

97 However, the rub lies in determining when the same interest has been infringed such that a set-off is permissible. There are cases (see, for example, the decision of the Court of Appeals of Michigan in *Troppi v Scarf*, 187 N W 2d 511 (1971) and the decision of the Supreme Court of Minnesota in *Sherlock v Stillwater Clinic*, 260 N W 2d 169 (1977)) where a broad interpretation has been adopted and the non-pecuniary benefits of parenthood were offset against its pecuniary costs. However, there are also cases where such a set-off has been rejected (see, for example, *Custodio*, above at [77(c)]). It appears that the practice in civil law jurisdictions is mixed: most disallow set-offs on the basis that the benefits and burdens are incommensurable (for example, Germany and France), but there are some (for example, Austria), which permit such a set-off: see Barbara Steininger, "Wrongful Birth and

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Wrongful Life: Basic Questions" (2010) 1 JETL 125.

98 It is clear that this debate is a difficult one, but it seems to us that if recovery were to be permitted, it is difficult to resist the conclusion that some form of set-off must be made for the benefits brought by the child (this was also the view expressed by Lord Scott of Foscote in *Rees* at [134]). There are three reasons for this. First, all the arguments against the application of the benefit rule rest on the premise that the benefits which the child brings are incommensurable with the pecuniary costs of the child's upkeep. As a general statement, this is true. However, the truth is that children eventually *do* bring pecuniary benefits in the form of financial support in old age. In Singapore, the obligation is not just a moral but also a legal one, because of the operation of the Maintenance of Parents Act (Cap 167B, 1996 Rev Ed). In light of this, the (eventual) benefits brought by the child are not collateral (as in the case of the miner who gets to enjoy time in the sun), but *directly correlative*, to the birth of the child (see J A Devereux, "Actions for Wrongful Birth" (2004) XXXIII INSAF 63 at 83). It is not clear that there is a principled reason why these benefits should not be taken into account. Second, proponents of the award of upkeep constantly reiterate that difficulties in quantification are not a barrier to an award of damages. If this is accepted, as we think it ought to be, then there does not seem to be any reason why this exercise (of set-off) should not be attempted in order that a proper account might be achieved here. Third, and even accepting that the benefits cannot be quantified, it does not seem satisfactory to say that because the benefits cannot be measured, they should be discounted entirely. It is equally possible to suggest, as Lord Hope did in *McFarlane*, that as the benefits of having the child cannot be quantified, then it means that no value can be determined for the purpose of balancing the benefits and burdens and recovery should therefore be denied (see above at

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[64]); or, as was argued by Lord Clyde, that recovery should be denied because the award of *full* upkeep costs would be *disproportionate* if no set off can be achieved (see above at [63]).

99 If some form of off-setting must be done, then one would run up immediately against the objection that this gives rise to the "unseemly spectacle of parents disparaging the 'value' of their children or the degree of their affection for them in open court" (see the decision of the District Court of Appeal of Florida in *Public Health Trust v Brown* 388 So 2d 1084 (1980) at 1086 *per* Schwartz J). It would open the door for all manner of perverse incentives to enter into the parent-child relationship and taint its essential character. It would also lead to the undesirable outcome that "little or no damages would be awarded for loving mothers and fathers while generous compensation would be obtained by those who disparage and reject their child" (see the decision of the Court of Appeal of Queensland in *Cattanach v Melchior* (2001) 217 ALR 640 at [169] *per* Thomas JA). This was also a point which was raised by Jupp J in *Udale* (see above at [58]). In our judgment, the public interest lies in the adoption of a bright-line rule, as is adopted in cases involving conflicts of interest (see, for example, the House of Lords decision of *Bray v Ford* [1896] AC 44), that absolutely precludes parents from being placed in a position where their personal interests might conflict with their parental duties.

100 In any event, we are of the view that even if no off-setting were to be allowed, this would only deal with half the problem. At most, it would remove the incentive for parents to downplay the benefits which their children bring; however, there would still be an incentive for them to emphasise the *detriments* brought about by the child in an effort to secure a larger award. It might also, as suggested by Heydon J, lead to a situation in which parents set

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unrealistic goals or expectations for their children and exaggerate changes to their lifestyle in order to receive a larger award (see *Cattanach* at [369]). We feel bound to say that we do not think these are merely fanciful concerns.

Conclusion on upkeep costs

101 For the foregoing reasons, we would uphold the decision of the Judge on the issue of upkeep costs. The recognition of a claim for upkeep would require the court to regard, as actionable damage, the incidents of a relationship which is regarded as socially foundational and incapable of estimation as loss. Such recognition would also be inconsistent with, and deleterious to, the health of the institution of parenthood and would be against the public interest.

102 We also consider, returning to a point which we developed only in part above at [54], that it does not matter whether this issue is considered from the perspective of contract or of tort. The reason for this, as pointed out by Lord Scott in *Rees* at [132], is that the gist of the claim, whether it is brought in contract or in tort, is the same: the Appellant is asking to be indemnified for the costs of raising Baby P. Given that all the policy considerations are premised, in one way or another, on the notion that it is objectionable for this to be done, there is no reason in principle why the outcome should depend on the cause of action concerned (see *Charlesworth & Percy on Negligence* (CT Walson gen ed) (Sweet & Maxwell, 13th Ed, 2014) at p 121 and *Cattanach* at [255] *per* Hayne J). We disagree with Prof Goh that the contractual analysis sidesteps the policy objections because it is a claim for the "failure of a promised outcome". With respect, in so far as the upkeep claim is concerned, this is, in *substance*, unpersuasive. One could conceivably characterise the claim in tort without reference to Baby P by framing it as an

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action for "loss arising from the combination of incorrect sets of genetic material". However, one can immediately see how strained and artificial this would be. At the end of the day, what is objectionable about the claim in tort is the same as what is objectionable about the claim in contract, namely, that it amounts to a claim for an indemnity for the costs of raising a child and places parents in a position where their personal interests as litigants will conflict with their duties as parents.

103 The case of *Greenfield v Irwin and others* [2001] 1 WLR 1279 ("*Greenfield*"), although factually quite dissimilar, is nevertheless illustrative of an important point of *principle*. In *Greenfield*, the plaintiff was prescribed a course of contraception by injection by her general practitioner. The nurse who administered the contraception neglected to test whether the claimant was already pregnant. It was admitted that this was a negligent act. As it transpired, the claimant was pregnant and she gave birth to a healthy daughter. She quit her job to take care of the child and then brought suit in tort against the general practice, arguing that had the test been performed, she would have aborted the child then (by the time she found out, it was too late). She claimed compensation not for upkeep costs *per se* but for loss of earnings because she had left her job to take care of her child. The English Court of Appeal denied her claim on the basis that it was precluded by *McFarlane*. May LJ wrote (at [44]):

> … there seems to me to be ***no material distinction between the costs of caring for and bringing up a child held to be irrecoverable in* McFarlane *and the mother's claim for loss of earnings in this appeal.*** It is, I think, correct that the House of Lords in *McFarlane* did not have to decide in terms whether loss of earnings in claims of this kind was recoverable. *But* ***the House did in substance decide that it was not fair, just and reasonable to impose on the doctor or his employer liability for the responsibilities consequential on the birth of the child*** *imposed on, or*

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> *accepted by, the parents to bring up the child:* see, for example, Lord Slynn, at p 96c, and Lord Hope, at p 97c-f. *The present claim for the loss of earnings is in my view plainly such a claim.* [emphasis added in italics and bold italics]

104 It seems to us that *Greenfield* stands for the proposition that one cannot so easily side-step *McFarlane* by re-framing the head of loss (as loss of the mother's earnings instead of upkeep costs of the child) if the substratum of the claim still consists in the burdens flowing from the birth and existence of the child. As explained in *The Troubled Pregnancy* at p 144, "since the financial consequences of both maintenance and loss of earnings stem from the same root, *Greenfield* and *McFarlane* fall into perfect alignment". By parity of reasoning, a plaintiff should likewise not be allowed to avoid the (objectionable) policy considerations merely by pleading a different cause of action. If the policy considerations hold sway in tort, they should also hold sway in contract.

105 Two possible exceptions, neither of which arises on these facts, may be when there is: (a) a contractual warranty guaranteeing a particular outcome – that is, that a child containing the genetic material of both parents would be born – or (b) a clause providing for damages in the event of a situation such as the present. Both of these possibilities were broached in *McFarlane*: the first by Lord Clyde (at 1334D–F); the second by Lord Slynn (at 1312H–1313A). The latter – a clause expressly providing for damages in the event of a mix-up – would require the court to resolve the tension between two sets of competing principles: the general enforceability of bargains on the one hand and the policy considerations against the award of upkeep on the other. On the question of how such a balance is to be struck, we express no concluded view and will leave it to be decided on another occasion should the issue arise.

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Loss of autonomy

106 We now turn to the second issue, which concerns a potential award for loss of autonomy. Like the judges in the courts which have been confronted with issues similar to those before us, we have some discomfort with the result which we have reached thus far. It may justifiably be asked if our finding leads to an incongruous − and even unjust as well as unfair – result. In particular, given the Respondents' own admission of liability, how can it be just and fair that they be liable for only a relatively small amount of damages (comprising, in the main, damages for pain and suffering arising from the pregnancy and/or the costs of the failed IVF procedure)?

107 In this regard, one aspect of this case that troubled us from the start, as we noted at [18] above, is the inadequacy of an approach that focuses *only* on upkeep costs. This involves, as Gleeson CJ said in *Cattanach*, a "partial and selective approach to the results of the child's birth and existence" (at [9]). It ignores not only the non-pecuniary aspects of parenting, such as the moral, psychological, and social obligations which are involved, but also many of the financial obligations which – although not necessary for subsistence – are nevertheless socially obligatory (*eg*, birthday presents and gifts). Underlying this is a deeper and more serious concern, which is that the focus on the financial consequences of the birth is not only inadequate, but (ultimately) *misleading*. In the words of Lord Bingham of Cornhill in *Rees* at [8], such an approach risks "mask[ing] the real loss suffered in a situation of this kind". This search for an award to compensate for the "real loss" culminated in the recognition, in *Rees*, of a novel head of damage: that for a ***loss of autonomy***.

108 The attraction of a focus on loss of autonomy is that it would seem to avoid the policy objections that beset the upkeep claim. A claim of this sort

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would fix not on the liabilities arising out of the care of *the unplanned child* (which is the gravamen of the objection against the award of upkeep) but on *the independent interests of* ***the parents*** *which have been transgressed as a result of the negligent act* (see *Catastrophic Error* at 239–240). What we propose to do in this part of the judgment is to explore this particular development in the law to determine if it is a step which we should also adopt.

The development of an award for loss of autonomy

109 The idea of reconceptualising the harm suffered by a plaintiff in a case involving wrongful conception in terms of a "loss of autonomy" was first mooted by Lord Millett in *McFarlane*. As noted above at [62], Lord Millett would have disposed of the appeal by rejecting both the mother's claim as well as the parents' claim. However, this did not mean that he thought that no loss had been suffered, or that no award could be made. In his words (at 1348D):

> … The rejection of their claim to measure their loss by the consequences of [the child's] conception and birth does not lead to the conclusion that they have suffered none. They 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. This should be a conventional sum which should be left to the trial judge to assess, but which I would not expect to exceed £5,000 in a straightforward case like the present. [emphasis added in italics and bold italics]

110 This development was given a powerful impetus by Hale LJ in *Parkinson*. In several powerful passages, which one commentator described as a "*tour de force*" (see Laura Hoyano, "Misconceptions about Wrongful Conception" (2002) 65 MLR 883 at 897), the learned judge explained that an

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unwanted pregnancy brought about serious and enduring physiological, psychological, social, and legal consequences to a woman (see *Parkinson* at [64]–[73]). All of these consequences, she explained, "flow inexorably … from … the invasion of the bodily integrity and personal autonomy involved in every pregnancy" (at [73]). She amplified these points extra-judicially in a speech delivered that same year, where she explained that pregnancy brings about "profound and lasting changes in a woman's life" and reiterated that the harms suffered by a plaintiff in a wrongful conception all flowed from the "invasion of bodily integrity and personal autonomy involved in every pregnancy" (see Brenda Hale DBE, "The Value of Life and the Cost of Living – Damages for Wrongful Birth" (2001) 7 British Actuarial Journal 747).

111 Lord Millett's suggestion that a conventional sum be awarded was eventually adopted by the majority in *Rees*, which considered that an award of £15,000 was an appropriate award to, in Lord Bingham's words, "mark the injury and loss" which had been suffered (see *Rees* at [8]). However, the award made in *Rees* differs from that proposed by Lord Millett in *McFarlane* in one significant respect: where Lord Millett would have awarded a conventional sum in lieu of *both* the mother's claim and the parents' claim (both of which he rejected), the award fashioned by the majority in *Rees* was *in addition to* the mother's claim for damages for pain and suffering, which was not in issue in *Rees*. One difficulty with the conventional award in *Rees* is that there was no clear consensus among the law lords on either (a) the nature of the injury which had been suffered; or (b) whether the award was intended to be vindicatory or compensatory. The positions taken by the various law lords may be summarised as follows:

(a) Lord Bingham stated that the "real loss" in this situation was the fact that the mother had been denied "the opportunity to live her

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life in the way that she wished and planned". The conventional award, he said, "would not be, and would not be intended to be, compensatory" and therefore "would not be the product of calculation". Instead, its object was to "afford some measure of recognition of the wrong done" (at [8]).

(b) Lord Nicholls explained that the award was intended to "recognise that in respect of [the] birth of the child the parent has suffered a legal wrong … [which had] a far-reaching effect on the lives of the parent and any family she may already have" (at [17]).

(c) Lord Millett elaborated on the points which he had made in *McFarlane*. He held that the parents had been denied "an important aspect of their personal autonomy, *viz*, the right to limit the size of their family" and that this was "an important human right which should be protected by law" and "a proper subject for compensation by way of damages" (at [123]). He then explained that while he initially conceived of it as a variable award, he was persuaded that it ought to be "a purely conventional one which should not be susceptible of increase or decrease by reference to the circumstances of the particular case" (at [125]).

(d) Lord Scott viewed the matter not in terms of injury or harm, but in terms of the deprivation of a benefit. He explained that the plaintiff was "entitled to the benefit of the doctor's contractual obligation to his NHS employers to carry out the operation with due care" and that it was open to the court to "put a monetary value on the expected benefit which she was, by the doctor's negligence, deprived" (at [148]).

112 The concept of a loss of autonomy was subsequently considered in the

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House of Lords decision of *Chester v Afshar* [2004] 3 WLR 927 ("*Chester*"). That case involved the provision of negligent advice. The defendant-doctor failed to inform the plaintiff-patient of the risk of developing a particular syndrome after the performance of a surgical procedure. The plaintiff agreed to undergo the procedure and the risk eventuated. The plaintiff was unable to show that she would not have opted for the treatment if she had been properly advised (although it was shown that she would have delayed it pending receipt of a second opinion). On an orthodox application of the traditional rules of causation, this should have been fatal to her claim since it could not be shown that the defendant's failure to warn her had, in any sense, "caused" the damage – the risk of a complication was latent and would have been the same irrespective of when the procedure was performed and whether a warning had been issued or not. However, the majority of the law lords nonetheless allowed the plaintiff's claim for damages. They held that the issue of causation could not be considered in the abstract but instead had to be considered with reference to the particular scope of the doctor's duty, which was to advise his patient of the dangers of the proposed treatment. This context, they held, justified a narrow modification of the conventional approach towards proof of causation such that the plaintiff's injury was to be regarded as having been caused by the doctor's negligent advice.

113 Thus summarised, it is clear that *Chester* was a case about the creation of a narrow exception to the traditional principles of causation in the context of a doctor-patient relationship (in the words of Lord Hope, the issue was "essentially one of causation": at [40]). It was not, strictly speaking, about the recognition of a *head of claim* for loss of autonomy (ultimately, the majority only awarded damages for the factual disability sustained by the patient, and did not award any damages for loss of autonomy *per se*). Nevertheless, the

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case is useful in at least two ways. The first, which we shall return to later, is that it illustrates how the concept of autonomy can be held up as a value or principle which underlies the existence or development of a legal rule without *itself* being the subject of the rule – in *Chester*, for instance, it moved the court to modify the traditional principles of causation in order to provide the plaintiff with a remedy. The second is because of what the law lords had to say on the subject of personal autonomy. Three of the law lords identified the plaintiff's autonomy as an important consideration that the law should recognise:

(a) Lord Steyn observed that a patient's right to be warned "ought normatively to be regarded as an important right" (at [17]) and that it was grounded in, amongst other things, the need to ensure that "due respect is given to the autonomy and dignity of each patient" (at [18]). As a consequence of the failure to warn, the plaintiff was unable to give full informed consent to the procedure. In the circumstances, her "right of autonomy and dignity can and ought to be vindicated" by a departure from traditional principles of causation (at [24]).

(b) Lord Hope openly admitted that his decision was motivated by policy. He stated that the "function of the law is to enable rights to be vindicated and to provide remedies when duties have been breached"; and that, unless liability could be found, the doctor's duty to warn would be "a hollow one, stripped of all practical force and devoid of all content" (at [87]). On this basis, he found that the requirement of causation had been satisfied and held the defendant liable.

(c) Lord Hoffmann recognised that the failure to warn represented "an affront to [the plaintiff's] personality" and thought that there was

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room for a "modest solatium" (at [33]–[34]). Ultimately, however, he decided against such an award because of the difficulty in arriving at a figure.

114 After the decision, at least one academic suggested that the case ought to have been disposed of not on the basis of causation, but as one in which a distinct interest – the plaintiff's right to autonomy – had been infringed (see Kumaralingam Amirthalingam, "Causation and the Gist of Negligence" [2005] CLJ 32 ("*Gist of Negligence*") at 34). On that view, the only difficulty with *Chester* would be the quantification of the loss. Since *Chester*, references to autonomy have cropped up occasionally in the English cases. In her separate concurring opinion in the UK Supreme Court decision of *Montgomery v Lanarkshire Health Board (General Medical Council intervening)* [2015] AC 1430, which was also a case concerning a surgeon's failure to properly advise a patient of the risks of a procedure, Baroness Hale of Richmond stated confidently that "the interest which the law of negligence protects is a person's interest in his own physical and psychiatric integrity, an important feature of which is their autonomy, their freedom to decide what shall and shall not be done with their body" (at [108]).

Arguments against the recognition of loss of autonomy as an actionable injury in its own right

115 There has been a veritable mountain of material written on the subject and, due to the industry of counsel, our attention was drawn to much of it. After careful consideration of the competing arguments, we are of the view that we should not – despite having been invited to do so by Mr Sreenivasan – take the step of recognising a loss of autonomy (without more) as an actionable injury in its own right. In our judgment, such a development would pose significant problems of legal coherence and would be contrary to well-

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established principles on the recovery of damages. Before we proceed to explain why, it is important to note at this juncture that our refusal to recognise a loss of autonomy as a *general* head of damage without more does *not* imply that a loss of autonomy has *no role* to play in a case such as the present. As alluded to earlier (at [113]) and as we shall explain later, a loss of autonomy may underlie a more ***specific*** award of damages in the context of ***a negligent interference*** with the plaintiff's ***reproductive plans***. The three reasons we have for refusing to recognise a loss of autonomy as actionable damage *per se* are:

(a) First, the concept of "autonomy" is too nebulous and too contested a concept to ground a claim. We shall refer to this as the "conceptual objection".

(b) Second, the notion of a loss of autonomy does not comport with the concept of damage in the tort of negligence. We shall refer to this as the "coherence objection".

(c) Third, the recognition of such a head of damage would undermine existing control mechanisms which keep recovery in the tort of negligence within sensible bounds. We shall refer to this as the "over-inclusiveness objection".

The conceptual objection

116 Autonomy is a slippery concept. In the English Court of Appeal decision of *Airedale NHS Trust v Bland* [1993] 2 WLR 316 (affirmed by the House of Lords in the same law report (also reported at [1993] 1 AC 789)), Hoffmann LJ (as he then was) equated it with the right of self-determination and explained it consisted simply of the "right to choose how [one] should live

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[one's] own life" (at 351F). Under this liberal, individualistic conception, autonomy is chiefly understood in negative terms as the liberty to live one's life free from external interferences or control. Its value, as Prof Ronald Dworkin explained in *Life's Dominion: An Argument about Abortion, Euthanasia, and Individual Freedom* (Knopf, 1993) at p 224, is that it makes "self-creation possible": it allows all of us to "be responsible for shaping our lives according to our own coherent or incoherent – but, in any case, distinctive – personality. It allows us to lead our lives rather than be led along them, so that each of us can be … what we have made of ourselves". This "thin" view of autonomy is often said to be "content-neutral", in the sense that it is not concerned with the desirability of the choices which are made, so long as they are freely chosen. As Lord Donaldson of Lymington MR observed in the English Court of Appeal decision of *Re T (Adult: Refusal of Treatment)* [1992] 3 WLR 782 at 796H–797A:

> … the patient's right of choice exists whether the reasons for making the choice are rational, irrational, unknown or even non-existent. That his choice is contrary to what is to be expected of the vast majority of adults is only relevant if there are other reasons for doubting his capacity to decide. …

117 However, this is by no means the only conception of autonomy which exists. Even within the liberal tradition, there are those who would espouse a "thicker" vision of autonomy that seeks to give effect not only to the *current* desires of the decision-maker, but also to his *long-term* desires and values as well. Proponents of this view would argue that a conception of autonomy which gives effect to a person's long-term goals is ultimately more productive of liberty and human dignity than one which focuses on his immediate volitions, which can be motivated by the exigencies of the moment. Take, for example, a struggling drug addict who voluntarily admits himself to a rehabilitation centre. Proponents of this view would argue that the doctors at

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the facility would be justified, on the ground of autonomy, in preventing him from consuming drugs even if – in the throes of withdrawal – that was in fact his immediate desire, because, in doing so, the doctors would be respecting his best desires and goals for his life (see, generally, Harry Frankfurt, "Freedom of the Will and the Concept of a Person" (1971) 68 The Journal of Philosophy 5 on the difference between "first order" and "second order" desires).

118 Yet others would argue that both of these accounts, being individualistic in nature, do not adequately take into account the socially embedded nature of human beings and the importance of social relations to one's sense of self and to self-determination. They would argue for a more substantive account of autonomy that reflects this relational dimension of personhood (see, for example, Antony Blackburn-Starza, "Compensating reproductive harms in the regulation of twenty-first century assisted conception" in *Revisiting the Regulation of Human Fertilisation and Embryology* (Routledge, 2015) (Kirsty Horsey ed) ("*Compensating reproductive harms*") at p 164). Among those who would support such a view are theorists who belong to the *communitarian* (as opposed to the individualistic) tradition. Feminist theorists would also support a more substantive account of autonomy, and they would in addition stress the role of traditional social structures in shaping beliefs and choices (see, for example, Craig Purshouse, "How should autonomy be defined in medical negligence cases?" (2015) 10 Clinical Ethics 107 ("*Purshouse*") at 109).

119 What this brief account reveals is that the very concept of "autonomy" itself is the subject of rigorous theoretical and conceptual disagreement as well as controversy. The differences amongst these competing conceptions (particularly if one subscribes to a "thicker" and more substantive account) of the concept of "autonomy" turn on more fundamental questions of political

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(the proper relationship between the State and its citizens) as well as moral (different conceptions of "the Good") philosophy. At the end of the day, it is neither possible nor is it the place of this court to decide such questions. But without a workable concept of autonomy, it is impossible to say that autonomy can, in and of itself, be the subject matter of legal protection. This is not just an academic issue, because it has important practical implications on the scope of liability, as we shall explain in the section on the "over-inclusiveness" objection.

The coherence objection

120 Even if a workable concept of autonomy could be found (such as the "thin" account of autonomy described in the previous section), it would be difficult to square it with the requirement of damage in the law of negligence. As explained at [45] above, the common law has traditionally understood "damage" in terms of objective detriment: in order to make out a cause of action, claimants have to demonstrate that they are more than minimally worse off than they would otherwise be. However, the difficulty is that most interferences with autonomy would fall far short of this standard (see, for example, *Purshouse* at 108). One need not look far. Any paternalistic act, such as that of forcing someone to belt up while in a motor vehicle, would technically constitute an interference with autonomy, *even if* it made the person *better off*. It would be difficult, in those circumstances, to identify precisely what it is that the claimant should be compensated for. This is quite different from damage in the form of physical injury, for instance, which is almost universally considered to be detrimental and therefore always sounds in damages.

121 At the end of the day, the notion of an action for "loss of autonomy" is

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more compatible with a *rights*-based vindicatory model of tort law. This brings us back to the debate, which began in *Rees*, between the vindicatory and compensatory approaches towards loss of autonomy claims. Under the vindicatory approach, damages are awarded not as compensation for consequential losses, but to mark the infringement of a person's rights (see, for example, Yip Man, "The Use Value of Money in the Law of Unjust Enrichment" (2010) 30 Legal Studies 586 at 598). However, this poses a "fundamental challenge to negligence principles" (*see New Forms of Damage* at 79). It does not sit well with the structure of the common law in general and the tort of negligence in particular. Unlike the civil law, the common law is "less interested in rights" and more interested in the remedies for harms (see Patrick S Atiyah, *Pragmatism and Theory in English Law* (Stevens & Sons, 1987) at p 21). In the English High Court decision of *Kingdom of Spain v Christie, Manson & Woods Ltd and another* [1986] 1 WLR 1120, Sir Nicholas Browne-Wilkinson VC (as he then was) put the point in the following terms (at 1129D):

> … In the pragmatic way in which English law has developed, a man's legal rights are in fact those which are protected by a cause of action. It is not in accordance, as I understand it, with the principles of English law to analyse rights as being something separate from the remedy given to the individual. …

122 While a rights-based analysis may be useful in *understanding* some areas of the law (see, for example, Lord Diplock's speech in the House of Lords decision of *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827 at 848–849, where he famously explained the distinction between primary and secondary obligations in a contract), it is quite another thing to say that the infringement of a "right" can be a ground – in and of itself – for the award of damages. In *Regina (Lumba) v Secretary of State for the Home Department (JUSTICE and another intervening) and other appeals* [2011] 2 WLR 671, the

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UK Supreme Court rejected the introduction of the concept of "vindicatory damages" into the law of tort in no uncertain terms. Even in *Chester*, the House of Lords did not award damages for the violation of patient autonomy *per se*. Instead, it was the *desire* to vindicate the right of autonomy that *motivated* the court to develop an exception to the traditional rules of causation to allow recovery for a well-established head of harm (physical injury in the form of post-surgical complications) based on regular compensatory principles.

The over-inclusiveness objection

123 Finally, the recognition of "loss of autonomy" as a head of damage would allow for the circumvention of existing control mechanisms in the tort of negligence. The problem is that any form of damage can, with some ingenuity, be reconceptualised in terms of a damage to autonomy. To take one example, the persons who suffered from asymptomatic pleural plaques following exposure to asbestos in *Rothwell* might be able to bring a claim for loss of autonomy on the basis that their "right" to be free of physiological changes to their body had been infringed. Further, they would also be able to argue that their "right" to be free from the fear of developing a life-threatening disease had been infringed, even though their anxiety had not risen to the level of being a recognisable psychiatric illness and would therefore not have been actionable under existing principles (for a statement of the principles governing recovery for psychiatric harm, see *Ngiam* at [97], [109], and [131]).

124 An analogy can also be drawn with *Gregg v Scott* [2005] 2 WLR 268. In that case, the defendant-doctor had negligently misdiagnosed a lump in the claimant's arm as a benign collection of fatty tissue when it was in fact a tumour. If the mistake had been discovered earlier, the claimant would have

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enjoyed a 42% chance of disease-free survival for 10 years. Unfortunately, by the time the mistake was discovered, the claimant's chances had fallen to only 25%. The claimant brought suit on the basis that the defendant's negligence had reduced his chances of survival. His claim was rejected by the House of Lords, which refused to recognise a percentage reduction in the prospect of a favourable medical outcome (a "loss of chance") as a recoverable head of damage. At [224]–[226], Baroness Hale explained that recognising such a head of claim would have "substantial" implications since almost any claim for a loss of an outcome could conceivably be reformulated as a claim for a loss of a chance of that outcome, thus allowing the traditional rules on causation to be circumvented at will. The recognition of "loss of autonomy" as a head of claim would have similarly far-reaching implications. It would allow the requirement of actionable damage to be side-stepped almost at will.

The "real loss": genetic affinity

125 For the foregoing reasons, we are *not* disposed to recognise the loss of autonomy as a recoverable head of damage *in its own right*. However (and this is where we return to the point first discussed above at [113]), this is not to say that we do not recognise the relevance of autonomy as *an important background consideration*. We find the following statement made by Lord Hoffmann in the House of Lords decision of *Wainwright v Home Office* [2004] 2 AC 406 to be illuminating (at [31]):

> There seems to me a great difference between identifying privacy as a value which underlies the existence of a rule of law (and may point the direction in which the law should develop) and privacy as a principle of law in itself. The English common law is familiar with the notion of underlying values—principles only in the broadest sense—which direct its development. A famous example is *Derbyshire County Council v Times Newspapers Ltd* [1993] AC 534, in which freedom of speech was the underlying value which supported the decision to lay down the specific rule that a local authority

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> could not sue for libel. But no one has suggested that freedom of speech is in itself a legal principle which is capable of sufficient definition to enable one to deduce specific rules to be applied in concrete cases. That is not the way the common law works.

126 Although Lord Hoffmann made that remark in the course of rejecting an argument that there should be a standalone common law tort of invasion of privacy, we find the (general) principle–rule distinction to be a useful one. By reason of the Respondents' negligence, the Appellant has suffered a severe dislocation of her reproductive plans that is constituted principally by the fracture of biological parenthood. This is a complex concept; and to say simply that she has suffered a "loss of autonomy" is only correct at the highest level of generality. Her loss cannot be understood without a more developed and substantive (as well as nuanced) notion of "autonomy" that takes into account existing family building practices, kinship arrangements, and the socially-constituted value of genetic relatedness (see, generally, *Compensating reproductive harms* at p 155). What we propose to do is to unpack some of these ideas in order to identify the "*true loss*" which she has suffered in this case and explain why we consider that it can and should be considered *a distinct and recognisable head of damage*.

127 We begin with this. The Appellant's desire to have a child of *her own, with her Husband,* is a desire that is a basic human impulse, and its loss is keenly and deeply felt, even if it is difficult to put into words. Her desire (and therefore her loss), as explained by Fred Norton in an excellent article, was for "genetic affinity" (see Fred Norton, "Assisted Reproduction and the Frustration of Genetic Affinity: Interest, Injury, and Damages" (1999) 74 NYU L Rev 793 ("*Genetic Affinity*")). One prominent bioethicist put it the following way (see Leon R Kass, *Life, Liberty and the Defense of Dignity: The Challenge for Bioethics* (Encounter Books, 2002) at pp 96–97):

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> … the desire to have a child of one's own is a *couple's* desire to embody, out of the conjugal union of their separate bodies, a child who is flesh of their separate flesh made one. This archaic language may sound quaint, but … this is precisely what is being celebrated by most people who rejoice at the birth of Louise Brown [the first baby born *via* IVF], whether they would articulate it this way or not. Mr. and Mrs. Brown, by the birth of their daughter, embody themselves in another, and thus fulfil this aspect of their separate sexual natures and of their married life together. … [emphasis in original]

128 To say, as Mr Lok does, that the issue here is merely one about "'incorrect' / 'undesired' genetic mix or skin tone" (which we categorically state to be language that we abjure), is to completely miss the point. As Norton goes on to explain, the desire for genetic affinity is complex and multi-faceted. It is, at its core, a desire for identity bounded in consanguinity. The ordinary human experience is that parents and children are bound by ties of blood and share physical traits. This fact of biological experience – heredity – carries deep socio-cultural significance. For many, the emotional bond between parent and child is forged in part through a sense of common ancestry and a recognition of commonalities in appearance, temperament, and physical appearance. For yet others, genetic continuity and biological lineage is deeply important to religious and cultural belonging (see Dov Fox, "Reproductive Negligence" (2017) 117 Colum L Rev 149 ("*Reproductive Negligence*") at 179). This interest in affinity does not exist only at the bilateral level (between parent and child), but also multilaterally – it affects the parents' relationship with their extended relations; the child's relationship with his/her siblings; as well as the family's relationship with the wider community of which they are a part.

129 It is "affinity" – which Norton uses as a convenient shorthand for all those ties which are partly a result of genetic relatedness and partly a result of the social significance which it carries – which distinguishes familial ties from

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ties of friendship. Put simply, families cannot be thought of as just another social group such as a football club or a running club. This difference lies at the root of why the obligations of parenthood and the relationship between parents and children are so special and socially fundamental: obligations of kinship are inherited and not voluntarily assumed. Now, all this is not to lay out a prescriptive definition of what family should be or, worse, to denigrate adoption, which is a precious and valuable thing, but to explain that persons who *consciously choose* to undergo IVF do so because of a deep desire to experience, as far as it is possible, the ordinary experience and incidents of parenthood. And when, as in the present case, a person has been denied this experience due to the negligence of others then she has lost something of profound significance and has suffered a serious wrong.

130 It is for this reason that we consider, returning to a point we made above at [92], that one significant problem with the upkeep claim is that it severely misconstrues the nature of the harm. It suggests that the Appellant's loss consists solely or only of the obligations of childbirth and rearing, when that is far from being the case. The focus on the economic ramifications of what has taken place ignores the serious consequences that the disruption of the Appellant's reproductive plans have had on her life. These consequences consist not only in the frustration of the Appellant's decisional autonomy – her ability to make free choices about her reproductive life – but also in the substantive impact that it has had on the Appellant's well-being; in this case, the Appellant has suffered, among other things, a loss of "affinity", and the chance to have a family structure which comports with her aspirations (see *Reproductive Negligence* at 174). As a consequence of what has taken place, the Appellant's welfare has been detrimentally affected in myriad of significant ways.

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131 There is also another important aspect to genetic relatedness which bears on the present discussion. In her affidavit, the Appellant deposed as follows:

> 18 The aftermath has been extremely difficult for my family and me to cope with. The pain and suffering which my family and I had undergone physically, mentally and emotionally post these unpleasant events are beyond words. The past years had been agonizing.
>
> 19 Whenever we are out as a family, Baby P's different skin tone which is different from my eldest son's, my husband's and/or mine never fails to draw curious looks from the public. This always puts my family and me in an extremely awkward situation turning joyous family time into depressing moments.
>
> 20 Further, it is very disheartening to both my husband and me when my eldest son queries us on the difference in the way his sister looks. I simply cannot bring myself to explain to my young son the tragedy that had occurred. I could tell that he too is confused whenever Baby P's presence draws curious looks and comments from others.
>
> 21 In addition, my husband's relatives, my relatives and our friends who were aware that I was undergoing a second IVF procedure to conceive our second child have been curious about Baby P's skin tone. Very often, we are faced with questions as to why Baby P is born with a different skin tone.

132 In the Northern Ireland Court of Appeal decision of *A and B by C (their mother and next friend) v A – Health and Social Services Trust* [2011] NICA 28 ("*A and B*"), the appellants were twins born as a result of successful IVF treatment. The mother's eggs were used in the IVF process but the sperm was donated by the respondent-Health and Social Services Trust. The usual practice of the respondent would be to request only for sperm from "Caucasian" or "white" donors for white couples, as the appellants' parents were in that case. However, due to a mistake, sperm from a donor who identified himself as "Caucasian (Cape coloured)" was used instead (as explained in the judgment, persons from the Cape coloured community in

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South Africa have mixed ancestry and they have different racial markers, including different skin tones). The appellants brought suit on the ground that because of the respondent's negligence, they had been born a different skin colour from their parents. This, they argued, had led to their being the subject of abusive and derogative comments and hurtful name calling which had caused them emotional distress and affected their quality of life. The trial judge dismissed the suit on the ground that a difference in skin colour could not constitute a form of damage and his decision was upheld on appeal by the Court of Appeal.

133 We respectfully agree with the decision in *A and B* – the appellants' suit, pleaded as it was, was bound to fail. However, there are matters there which give us pause for thought. In a perceptive and sensitive case-note written on the decision, Sally Sheldon gently explains that the approach taken by the court, which had the effect of "reducing the alleged harm to irrelevant physical variation", failed to give voice to the *true harm* that was suffered (see Sally Sheldon, "Only Skin Deep? The Harm of Being Born a Different Colour to One's Parents" (2011) 19 Med L Rev 657 at 663). She elaborated that one could not assess the case without a proper appreciation of the social context: she observed that Northern Ireland, where the appellants lived, was overwhelmingly white and there was a history of racially-motivated bullying of children. To recognise this, she said, would not be to approve of such attitudes, or to accept outmoded attitudes on race, but to recognise that race as "a social concept can lie at the root of real and significant harms" (at 664). She also drew attention to the role of physical resemblance in familial and social relationships. As it turns out, the respondent had also mistakenly used the same donor sperm for other white couples. In her article, Sheldon reproduced segments of interviews that she had conducted with one other affected couple

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in which the husband reported not only the racist bullying which his child had been subjected to, but also the fact that their family had received unkind questions as to his wife's fidelity and the paternity of his children.

134 We draw attention to these points not because we approve of these attitudes – and, indeed, we hasten to declare our categorical and unequivocal objection to *any* suggestion that racism has any place in our society (especially in the context of Singapore) – but because they represent the social reality that we must confront, even if we do not support it. This was a point made recently by the Constitutional Commission chaired by Sundaresh Menon CJ in respect of race, which said that "Singapore cannot yet be considered a post-racial society: this is a reality that must be faced, even if it is one that is not to be endorsed" (see *Report of the Constitutional Commission 2016* (17 August 2016) at para 5.15). We should also clarify that this should *not* be taken as judicial sanction for any partiality for single-race families (the Appellant and her Husband are themselves the product of a cross-cultural union, so this should dispel any such notion), but as a recognition of the complex role that physical resemblance, race, and cultural and ethnic identity have had and continue to have on our individual well-being, as they so evidently have had on the Appellant's.

135 In summary, the loss suffered by the Appellant as a result of the Respondents' negligence is the result of a complex amalgam of biological, social, ethical, and historical factors. Many of these have to do with certain aspects of human relationships and personhood that are fundamental parts of the human condition, such as the role of genetic relatedness, physical resemblance, race, culture, and the importance of familial relations. Some are matters which are rightly cherished; others are perhaps regrettable features of the society which we inhabit. However, what is clear is that the Appellant

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would be ill-served by a judicial refusal to fully engage with these issues in order to recognise the true loss which has been suffered. In our judgment, the Appellant's interest in maintaining the integrity of her reproductive plans in this very specific sense – where she has made a conscious decision to have a child *with her Husband* to maintain an intergenerational genetic link and to preserve "affinity" – is one which the law should recognise and protect. And given that interests are the "positive aspects of damage" (see J A Weir, "Liability for Syntax" [1963] CLJ 216 at 218), we hold that the damage to the Appellant's interest in "affinity" is a cognisable injury that should sound in damages.

136 Before we leave this point, we observe an important difference between the Appellant's case and cases of wrongful conception. As Prof Fordham explains, in cases of wrongful conception, a child born following a failed sterilisation will be related to both parents and the parents will have a normal addition to their family. There is no loss of "affinity" in the sense that we have described above. However, in the present case, and in cases of wrongful fertilisation more generally, the child who is born is physically unlike the rest of the family (see *Catastrophic Error* at 237). This will not only be a constant reminder of the mistake which had been made, but it also carries profound social and emotional consequences which will persist for years to come. Of course, this is not to say that plaintiffs in wrongful conception and wrongful birth cases have not suffered a disruption to their reproductive plans – they clearly have. However, the types of harm which result from that disruption are qualitatively different from those raised in this case. We therefore reserve for another day the question of whether plaintiffs in those types of cases may bring a claim such as that which we are allowing here.

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Quantification of damages

137 The quantification of damages for intangible injuries is, by its very nature, an exercise that is invariably fraught with difficulty, because it seeks to ascribe a monetary value to matters which do not lend themselves easily to pecuniary expression. In such cases, the law does not pretend that there is any perfectly objective standard with which to conduct the assessment but it strives to achieve two goals. The first is to "award sums which must be regarded as giving reasonable compensation"; the second is to "endeavour to secure some uniformity in the general method of approach [of quantification]" (see the House of Lords decision of *H West & Son Ltd and another v Shephard* [1963] 2 WLR 1359 ("*West v Shephard*") at 1368 *per* Lord Morris of Borth-y-Gest).

138 Three possible approaches present themselves for consideration:

(a) the "conventional award" in *Rees*;

(b) an award for "necessary expenses in avoiding or coping with restrictions on autonomy"; and

(c) a conventional sum for general damages for non-pecuniary loss tailored to the particular motivations which the Appellant had for seeking IVF.

The "conventional award" in Rees

139 The loss of genetic affinity can be seen as an element of non-pecuniary loss, akin in some ways to an award for pain and suffering, but with distinct incidents. The quantification of damages for non-pecuniary loss is, as we have mentioned earlier, inherently challenging, because there is "no pecuniary

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guideline which can point the way to a correct assessment" (see the House of Lords decision of *Lim Poh Choo v Camden and Islington Area Health Authority* [1979] 3 WLR 44 at 54F *per* Lord Scarman). Any award that is made cannot be the product of precise calculation but must necessarily be "conventional" in the sense that it does not reflect the actual loss which has been suffered but is instead a sum which is thought appropriate in the circumstances. The figure arrived at is one which, in the words of Lord Denning MR in the English Court of Appeal decision of *Ward v James* [1965] 2 WLR 455, is "derived from experience and from awards in comparable cases" (at 470D).

140 However, the House of Lords in *Rees* took this one step further. Not only was the sum of £15,000 that it awarded "conventional" in the sense that it was not the product of precise calculation, but it was also said to be a fixed sum that would be awarded to *all* future claimants. In the words of Lord Millett, the conventional award of £15,000 "should not be susceptible of increase or decrease by reference to the circumstances of the particular case" (see *Rees* at [125]). The award of a fixed sum irrespective of the circumstances of each case is not without precedent in the law of damages. Such an approach is used in situations where a case-by-case analysis of the sum to be awarded would be unseemly. For instance, in *West v Shephard*, the House of Lords was faced with a claim for "loss of expectation of life" (in essence, a claim for the tortious shortening of life) which, until 1982, was a head of loss in negligence in the UK. In that case, the House of Lords affirmed its previous decision in *Benham* and awarded a fixed sum of £500 (increased from £200 to account for inflation) for this head of claim. In explaining why this approach was adopted, Lord Pearce stated that it "would be lamentable if the trial of a personal injury claim put a premium on protestations of misery and if a long face was the only

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safe passport to a large award" (at 1388).

141 This was also the approach which Mr Lok urged us to adopt, should we be disposed to make an award for loss of autonomy. He argued, amongst other things, that such an approach would have the virtues of consistency, uniformity, expedience, and fairness to commend it. We do not disagree that this approach brings with it the advantages that Mr Lok pointed to. However, after considered reflection, we do not consider it to be appropriate here for two reasons. First, we consider that it would be contrary to the value of individual autonomy, which lies at the heart of the current award. As one commentator has argued, the award of a uniform sum presupposes that all parents are identically situated and would be impacted in the same way by the disruption of their reproductive plans (see Nicolette M Priaulx, "Damages for the 'Unwanted' Child: Time for a Rethink?" (2005) Medico-Legal Journal 152 at 160). This would not only fly in the face of reality, but also fail to respect the unique life plans of the individual who is before the court. If the objective is to compensate the *particular* plaintiff for the *particular* types of harm which have been inflicted, then the award must be tailored to the facts and circumstances of each case.

142 Second, the creation of a uniform award is usually only appropriate where the harm in question is common and there is some basis for the courts to fix the sum by reference to the awards made in comparable cases. Given that this is the first time that such an award is being made and there are no comparable precedents to be found (whether locally or overseas), it would not be appropriate for this court to set a uniform sum to guide future awards at this juncture. As Lord Hope observed at [77] of *Rees*, the creation of a novel *and* a standard award should – if it is to be done at all – be performed by Parliament, perhaps assisted by a process of consultation. This was done, for example,

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when the Singapore Parliament passed the Civil Law (Amendment) Act 1987 (Act 11 of 1987) to create a statutory cause of action for "bereavement", the quantum of which was fixed by statute at $10,000 (it has since been increased and presently stands at $15,000: see s 21 of the Civil Law Act (Cap 43, 1999 Rev Ed).

Award for necessary expenses to avoid or cope with restrictions on autonomy

143 The second approach was that suggested by Prof Goh. Under his approach, "autonomy" consists of the "right to make life decisions so as to be free of unsolicited legal or moral obligations". Thus, autonomy is "lost" in this sense when obligations are imposed upon a person (such as those arising out of an unplanned pregnancy), and the damages for a loss of autonomy claim should therefore be assessed in terms of the expenses necessary to overcome or cope with the restrictions on autonomy which arise therefrom. This is analogous to the so-called "functional approach" towards the assessment of damages for non-pecuniary loss which is favoured in Canada, in respect of which damages for non-pecuniary loss are awarded as a means for the plaintiff to obtain substitute pleasures to replace the loss (see Law Commission, *Report on Damages for Personal Injury: Non-Pecuniary Loss*, Law Com No 257, 15 December 1998) at para 2.4). Prof Goh explained that such an approach would be compatible with the general compensatory nature of damages and *may* include such expenses as childcare or live-in help that would enable the parents to live their lives without the strictures imposed by having to care for the child. In this way, the damages that may be awarded, he said, would "overlap with aspects of upkeep expenses but are not the same conceptually".

144 Owing to the different way in which we have conceptualised the "harm" in this case, the methodology proposed by Prof Goh is, with respect,

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plainly not appropriate. His approach seems at once to lead us to go too far and yet also not far enough. It goes too far inasmuch as it attempts to pull within its orbit *all* the obligations of parenthood which we have already explained to be matters which are not capable of being the subject of compensation – for instance, the cost of providing the child with the "necessaries" of life would invariably have the effect of curtailing the parents' ability to spend their money as they wish, but it is not possible to make this a matter for compensation as it involves making, as a subject of compensation, that which is incapable of being counted as loss (see above at [90]–[94]). Yet, at the same time it does not go far enough because it rests on a particular view of autonomy (as the negative freedom *from* constraints on action), and therefore fails to recognise that a loss of autonomy may also be constituted in the positive freedom of persons *to* pursue certain goods (in this case, an interest in genetic affinity) and that the denial of such goods can result in appreciable harms. Furthermore, given the fact that the restrictions on autonomy would most tangibly manifest themselves in the financial obligations incurred as a result of parenthood, Prof Goh's approach would have the effect of encouraging plaintiffs to come to court to prove the burden that the child has been. As explained above at [95]–[100], this encourages behaviour which is inimical to parenthood, and it provides another reason for rejecting this approach.

Conventional sum for non-pecuniary loss

145 This leaves us with the final approach, which is to award a conventional sum (which is not to be confused with a "conventional award", since it is not fixed across all cases, but is instead tailored to the unique facts of each case: see above at [139]–[141]) for the non-pecuniary loss suffered in this case. This approach is analogous to that employed by the Supreme Court

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of British Columbia in *Bevilacqua v Altenkirk* [2004] BCSC 945 ("*Bevilacqua*"). *Bevilacqua* was a wrongful conception case involving a negligent sterilisation. After an extensive analysis of the various authorities on the subject, Groberman J concluded that while there was "no completely adequate method of assessing damages for wrongful [conception] … the appropriate method of assessment is one that treats the damages as essentially non-pecuniary in nature" (at [182]). Elaborating, he continued as follows (at [182] and [194]):

> 182 … While the redistribution of economic resources within the family may be a factor in assessing those damages, that redistribution should not itself be treated as if it were simply a pecuniary loss. The lifestyle re-adjustments necessary to effect the redistribution of resources are simply an aspects [*sic*] of non-pecuniary damages.
>
> …
>
> 194 In assessing the non-pecuniary loss, the *court should not attempt to assess the relationship of the child with the parent. Such inquiries are invidious,* and fail to respect the child as an individual. Rather, the *court should assess the damages suffered by the parents by considering their reasons for having wanted to limit the size of their family, and their actual circumstances both at the time of the sterilization*, and at the time of the pregnancy and childbirth. From these circumstances, the court may assess the magnitude of the burdens that the parents face in raising a child they planned not to have, and can arrive at an assessment of general damages adequate to compensate the plaintiffs for the harm suffered.
>
> [emphasis added]

146 Groberman J observed that the motivations of the parents for wanting to limit their family were different. Mrs Bevilacqua was motivated primarily by the desire to limit the size of the family in order that they could broaden the range of activities which each of them could participate in so her harm consisted principally of the limitations imposed on her lifestyle choices and autonomy arising out of, among other things, pregnancy and childbirth.

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Mr Bevilacqua, on the other hand, was motivated principally by financial reasons and thus the injury he suffered related to his need to work more than he would otherwise have wanted to. After a careful consideration of the evidence (in which he rejected certain assertions, such as the claim that Mr Bevilacqua had been unable to complete his Master's degree because of the birth of the child), Groberman J awarded Mrs Bevilacqua Can$30,000 and Mr Bevilacqua Can$20,000. In arriving at these specific figures, he was guided by awards which had been made in other cases decided in British Columbia in respect of the pain and suffering arising from an unplanned pregnancy.

147 Given that the court in *Bevilacqua* was concerned with a different form of harm, the approach adopted there cannot be transposed to the context of the present case without modification. However, the aspect of the decision which commends itself most to us is the focus on the precise motivations of each plaintiff. In our view, this properly reflects the compensatory objective of an award of damages. It is vital, in our judgment, to take into account the unique types of harm suffered by a person when his/her reproductive plans are disrupted in deciding on an appropriate award (see, generally, *Reproductive Negligence* at 219–220). These types of harm will, as we explained above, vary depending on the particular reasons fertility treatment was sought, the precise manner in which the negligence took place, and the personal circumstances of the plaintiff (such as the presence of other children or the familial and/or cultural histories particular to him or her).

148 Of course, there is still the matter of fixing a precise quantum. Unlike the court in *Bevilacqua*, we have no comparable precedents (whether local or foreign) against which to draw appropriate comparisons. In the circumstances, we consider that we should benchmark the eventual award as a *percentage* of

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the financial costs of raising Baby P. Although we have determined that this is not an appropriate case in which to award upkeep costs as such to the Appellant, the financial costs of raising Baby P are not, in our view, wholly irrelevant as, absent such costs, there would be *no other criterion or standard* by which to assess the quantum of damages that ought to be awarded. This approach would have several advantages. First, to the extent that one of the purposes behind the grant of damages for non-pecuniary loss is to provide solace to the claimant, we consider that an award which is benchmarked against upkeep costs would achieve this purpose. Second, any such award would not be derisory but would instead produce a substantial award that offers "reasonable compensation". Indeed, we note that such an approach is not wholly without precedent. Prof Amirthalingam has suggested that the majority in *Chester* implicitly recognised the deprivation of patient autonomy as the "harm" in that case, and the physical injury (the surgical complication) was a matter which went to the *quantification* of loss (see *Gist of Negligence* at 34).

149 Lest there be any confusion, we clarify that an award for loss of genetic affinity and an award of upkeep costs rest on very different theoretical bases. The former is an award of damages for *non-pecuniary* loss as compensation for the *plaintiff-mother's* loss of genetic affinity; the latter is an award for *pecuniary* loss arising from the expenses incurred in relation to the raising of the *child*. Our approach of using the latter as a *benchmark* for assessing the magnitude of the former does not derogate from what we have said about how the obligations of parenthood are incapable of being regarded by the law as loss (see [90]–[94] above). Whilst it is perhaps not theoretically elegant, the approach of benchmarking the present award against upkeep costs is practical (provided one always bears in mind that the quantum of full

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upkeep costs is but a *benchmark*) and it prevents the court from having to pluck a figure out of thin air, so to speak. In any event, a theoretically elegant result would, in any event, be elusive in the extreme, given the nature and complexities of the issue and the attendant difficulties that arise from such a controversial area of the law.

150 As we have explained above at [102], the award of full upkeep costs would amount to giving the Appellant an indemnity for the costs of raising Baby P. This would not, in our judgment, be appropriate compensation for the loss which has been suffered. However, it is also neither logical nor desirable to award the Appellant a merely nominal sum because to do so would be to make a mockery of the value of the interest at stake. It is clear that the damages to be awarded should therefore lie somewhere between these two extremes. On the issue of precisely where along the spectrum it should fall, the facts and circumstances are of the first importance. In our judgment, it is clear that *substantial damages* ought to be awarded to the Appellant. Whilst (as we have already noted), the Appellant and her Husband have accepted Baby P as their own, the reality of the situation cannot be denied (see, especially, the anguish, stigma, disconcertment, and embarrassment suffered by the Appellant and her family as expressed in the Appellant's affidavit (reproduced above at [131] and discussed at [132]–[135])). In the circumstances, we are of the view that the Appellant ought to be awarded ***30%*** of the financial costs of raising Baby P as compensation, which is an amount that, we consider, properly reflects sufficiently the seriousness of the Appellant's loss and is ***just, equitable, and proportionate*** in the circumstances of the case.

151 We therefore remit the issue of the quantum of damages to be awarded to the High Court for assessment in accordance with what has been stated in the preceding paragraphs. We observe, as a final matter, that this exercise of

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assessment may not be without difficulty. During the course of the hearing, our attention was drawn to some of the potential pitfalls. These include the fact that the financial costs of raising a child would depend, in large part, on the subjective preferences of the claimants (for instance, whether they insist on private education or extra-curricular enrichment classes). As pointed out by Gleeson CJ in *Cattanach* at [26], in a great many cases, the line between legal obligation, moral obligation, and parental discretion will be difficult to draw. Furthermore, it is difficult to identify a suitable cut-off date for liability since it is common in modern affluent societies for children to be dependent on their parents for a longer time than was previously the case. However, given that we have not heard the parties on these points, we do not think it proper for us to express any concluded views on the proper methodology of assessment. Undoubtedly, the potential difficulties and issues raised here and/or at those proceedings will be dealt with by the judge concerned after receiving detailed submissions on the matter.

152 Before we leave this point, however, we would like to observe that given the protracted nature of the legal proceedings up to this particular point in time, it would be preferable for the parties to arrive at an amicable settlement in relation to the issue of quantification. Whilst we understand that the Appellant and her Husband have confronted – and will continue to confront – difficult emotional and relational challenges, we think that an amicable settlement will assist them in achieving some closure. We do not consider that an extension of this litigation would be of any help to them in putting these unfortunate experiences behind them and moving forward in life (together with Baby P). It would also be appropriate, in our view, for the Respondents to assist the Appellant and her Husband in achieving such closure.

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The issue of punitive damages

153 The final issue which was canvassed in this appeal concerns the issue of punitive damages in the law of tort. There are weighty legal issues that arise for consideration. The first, and perhaps most crucial, is whether it is now time to *depart* from the relatively straitjacketed approach embodied in the House of Lords decision of *Rookes v Barnard* [1964] AC 1129 ("*Rookes*"), which, as we will elaborate below, lays down three extremely limited situations in which the English courts would be prepared to award punitive damages in the tortious context. It is only if this hurdle can be overcome that the next issue arises for decision, which is whether punitive damages can *ever* be awarded when the defendant has been punished under the criminal law. If the answer to that is in the affirmative, the final issue which arises for consideration is whether a punitive award can ever be made in respect of a *negligent* (as opposed to a deliberate or intentional) act. As will be clear in the course of our analysis, these are difficult questions not only of legal principle but also of policy, and are subjects in respect of which courts in different jurisdictions have arrived at different conclusions. It is only if these legal hurdles can be surmounted that we can turn to the facts of the present appeal to consider if this is an appropriate case for an award of punitive damages to be made.

154 Before we turn to consider these issues, we will deal with a preliminary point. As noted earlier in this judgment, the second Respondent is liable not only in tort but also in contract as well. This raises the issue as to whether punitive damages can be awarded for a breach of *contract*. Given the present controversy surrounding this particular issue and the fact that the focus in the present appeal has been on the scope for the award of punitive damages in the law of *tort*, we do not propose to consider the issue of punitive damages in a contractual context. That is an extremely difficult subject in its own right

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and we consider that it can and should be left for another day, when the issue is squarely raised on the facts of the case and a decision is necessary.

The decision in Rookes

155 Punitive damages were first awarded in a series of 18th century cases involving the arbitrary interference by public officers with the private rights of citizens (see Harry Street, *Principles of the Law of Damages* (Sweet & Maxwell, 1962) at p 29). In these cases, the juries awarded damages far in excess of the material harm constituted by such trespasses. In *Huckle v Money* (1763) 95 ER 768, the Court of the King's Bench held that the jury had "done right in giving exemplary damages", stating that "to enter a man's house by virtue of nameless warrant, in order to procure evidence, is worse than the Spanish Inquisition" (at 769). In a later decision by the same court in *Wilkes v Wood* (1763) 98 ER 489, Pratt LCJ explained that juries had it in their power to "give damages for more than the injury received" and that damages were "designed not solely as a satisfaction to the injured person, but likewise as a punishment for the guilty, to deter any such proceeding for the future, and as proof of the detestation of the jury to the action itself" (at 498–499). In this short passage, the three-fold purpose of punitive damages – to punish, deter, and condemn – was succinctly articulated for the first time.

156 Before we proceed further, we will say a few words about terminology. First, the expression "punitive damages" has historically been used interchangeably with the expression "exemplary damages" and no distinction is to be drawn between them (see the Singapore High Court decision of *Li Siu Lun v Looi Kok Poh and another* [2015] 4 SLR 667 ("*Li Siu Lun*") at [195]). The former was favoured until the decision of the House of Lords in *Cassell & Co Ltd v Broome and another* [1972] 2 WLR 645 ("*Broome (HL)*")

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where Lord Hailsham of St Marylebone LC said that he preferred the expression "exemplary damages" because he thought it "better expresses the policy of the law" (at 671D). The Law Commission of England and Wales, however, thought otherwise (see Law Commission, *Report on Aggravated, Exemplary and Restitutionary Damages* (Law Com No 247, 11 September 1997) ("the *Law Commission Report*") at para 5.39. Ultimately, we do not think anything turns on this, but for the sake of consistency, we shall use the expression *punitive damages*, which appears to be the more commonly used term in Singapore. Second, punitive damages are to be distinguished from "aggravated damages". Whilst there was initially some confusion as to whether they were to be equated, this issue was put to rest by Lord Devlin in *Rookes* (at 1221). Punitive damages, as stated above, are meant to punish, deter, and condemn; aggravated damages, on the other hand, serve a compensatory function – they are awarded to *augment* a sum awarded in general damages to compensate for the enhanced hurt suffered by the plaintiff due to the aggravation of the injury by the manner in which the defendant committed the wrong or by his motive in so doing, either or both of which might have caused further injury to the plaintiff's dignity and pride (see the decision of this court in *Koh Sin Chong Freddie v Chan Cheng Wah Bernard* [2013] 4 SLR 629 at [75]–[77]).

The position in the UK

157 It was once thought that exemplary damages could be awarded in any case of tort where the defendant's conduct had been particularly outrageous (see, for example, *Clerk and Lindsell on Torts* (Michael Jones gen ed) (Sweet & Maxwell, 21st Ed, 2014) ("*Clerk and Lindsell*") at para 28-139). This thinking changed with the decision of the House of Lords in *Rookes*. In that case, an agreement was reached between the plaintiff's trade union and

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his employer that no strike would be organised and that any disputes would be referred to arbitration. Subsequently, the plaintiff resigned from his membership of the trade union and the union, acting through the defendants, informed the plaintiff's employer that unless the plaintiff was dismissed immediately, the other members of the union would go on strike. The employer gave in to the threat and dismissed the plaintiff. The plaintiff then sued the defendants for the tort of intimidation. The jury found the defendants liable and awarded the plaintiff a sum of £7,500, a large part of which comprised punitive damages. The Court of Appeal reversed the decision on liability. The plaintiff appealed against the Court of Appeal's decision on liability while the defendant cross-appealed on the question of damages. The House of Lords restored the decision of the trial court on liability but it set aside the jury's award on the ground that punitive damages were not available on the facts of that case.

158 Lord Devlin, who delivered the only fully reasoned speech on the issue of damages, made it clear where his sentiments on the matter lay. From the outset, he observed that the object of damages in the "usual sense" was to compensate; however, the object of punitive damages was to "punish and deter". He then framed the issue as follows: "your Lordships therefore have to consider whether it is open to the House to remove an anomaly from the law of England" (at 1221). After an extensive review of the authorities, he concluded that two reasons compelled a negative answer to that question: the first was the weight of precedent; the second was the fact that punitive damages could sometimes serve a "useful purpose in vindicating the strength of the law" (at 1225–1226). However, he held that the award of punitive damages was henceforth to be restricted to cases falling within one of the following three categories:

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(a) first, where there had been oppressive, arbitrary or unconstitutional action by the servants of the government;

(b) second, where the defendant's conduct was calculated to make a profit for himself which might well exceed the compensation payable to the plaintiff; and

(c) third, where punitive damages were expressly authorised by legislation.

159 Further, Lord Devlin also set out three considerations which he said ought always to be borne in mind when a punitive award was being considered. First, the claimant must be the victim of the punishable behaviour (at 1227). Second, the power must be exercised with restraints because the award of punitive damages could "be used against liberty" (at 1227). Third, the means of the parties (although ordinarily irrelevant in an award of compensatory damages) should be taken into account in the calculation of a punitive award, as should "[e]verything which aggravates or mitigates the defendant's conduct" (at 1228).

160 The so-called "categories test" set out in *Rookes* was subjected to stinging criticism by the English Court of Appeal in *Broome v Cassell & Co Ltd and another* [1971] 2 WLR 853, where Lord Denning MR described it as "hopelessly illogical and inconsistent" (at 870G) and considered that it had been given *per incuriam* (at 871D). The House of Lords, Viscount Dilhorne dissenting, disagreed (see *Broome (HL)*). Lord Reid, who had been a member of the coram which decided *Rookes*, candidly admitted that the categories approach was not altogether satisfactory, but defended it on the basis that it was the best that could have been done in the circumstances. He observed as follows (at 683G):

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> I must now deal with those parts of Lord Devlin's speech which have given rise to difficulties. He set out two categories of cases which in our opinion comprised all or virtually all the reported cases in which it was clear that the court had approved of an award of a larger sum of damages than could be justified as compensatory. Critics appear to have thought that he was inventing something new. That was not my understanding. *We were confronted with an undesirable anomaly.* We could not abolish it. *We had to choose between confining it strictly to classes of cases where it was firmly established, although that produced an illogical result, or permitting it to be extended so as to produce a logical result. In my view it is better in such cases to be content with an illogical result than to allow any extension.* [emphasis added]

161 In *AB and others v South West Water Services Ltd* [1993] 2 WLR 507, the English Court of Appeal went even further in attempting to restrict the ambit of punitive damages. Relying on certain dicta made by Lord Hailsham and Lord Diplock in *Broome (HL)*, the court added a further "cause of action" requirement: in order for punitive damages to be available, the cause of action had to be one in respect of which punitive damages had been awarded before *Rookes* was decided. This "cause of action test" was accepted in several subsequent authorities (see the *Law Commission Report* at para 4.88) before it was conclusively overruled by the House of Lords in *Kuddus v Chief Constable of Leicestershire Constabulary* [2002] 2 AC 122 ("*Kuddus*") as being contrary to authority. Therefore, the position in England at present is that punitive damages may be awarded for any tort as long as it falls within one of the categories enunciated in *Rookes* (see *Clerk & Lindsell* at para 28-146).

The position in the Commonwealth

162 The categories test has, however, been ***rejected*** by almost all the other major Commonwealth jurisdictions. In *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118, which was decided soon after *Rookes*, the High Court of

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Australia declined to adopt the categories test. Its objections were rooted both in precedent (since punitive damages in tort had always been available in Australia on grounds wider than would be available under *Rookes*, which was not binding on the High Court of Australia) and in principle. Taylor J was of the view that the categories were too restrictive and also thought their boundaries to be nebulous. For instance, he said, of the second category, that there was no reason for the law to look with particular disfavour on wrongs committed with a profit motive and to consider them worse than, say, wrongs which were committed maliciously or vindictively (at 138). Windeyer J focused on the general principle underlying punitive damages which, in his view, was to make it clear that tort did not pay. That being the case, he said that he could see no reason to restrict the award of punitive damages only to the instances identified by Lord Devlin (at 149). Owen J opposed the restrictions on the ground that they were not in accord with precedent and would remove what he considered to be a "useful protection" against persons who exercised their power in disregard of the rights of others (at 160–161).

163 Today, punitive damages may generally be awarded in Australia for cases involving intentional torts, in addition to being generally available in actions in nuisance which cause property damage. In general, their availability is contingent on the subjective state of mind of the defendant when he committed the tort, with such damages are awarded chiefly in cases involving "conscious wrongdoing in contumelious disregard of the plaintiff's rights" (see the decision of the High Court of Australia in *Whitfeld v De Lauret and Co Ltd* (1920) 29 CLR 71 at 77 *per* Knox CJ, reaffirmed in *Gray v Motor Accident Commission (formerly State Government Insurance Commission)* (1998) 158 ALR 485 ("*Gray*") at [20]). Punitive damages have also been held to be available where the defendant's post-tort conduct evinces a callousness

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and indifference towards the interests of the plaintiff. There is, however, no need to demonstrate that the wrongdoing was motivated by any malice towards the plaintiff (see, generally, R P Balkin and J L Davis, *Law of Torts* (LexisNexis Butterworths Australia, 4th Ed, 2009) at para 27.10).

164 ***New Zealand*** has likewise *rejected* the categories test. In *Taylor v Beere* [1982] 1 NZLR 81, a decision of the New Zealand Court of Appeal, Richardson J held that the logic behind the categories was "not immediately apparent" and that the "arbitrary limitations of the kinds formulated by Lord Devlin would be wrong in principle and unsatisfactory in practice" (at 92). In so far as the first category in *Rookes* was concerned, he asked rhetorically: "Why should servants of the government be singled out?" "[T]echnicalities of employment status", he held, were not a good basis for determining whether there had been heinous conduct on the part of the defendant which justified a punitive award of damages. In so far as the second category in *Rookes* was concerned, he stated that he did not see any basis for singling out acts performed with a profit motive. Again rhetorically, he asked: "Is oppressive, calculated, conduct any more opprobrious or otherwise inherently worse if motivated by financial greed than, say, by spite, malice or a lust for power over others?" (at 92). Summing up, he expressed the view that it was the "quality of the conduct which should count" and that the "the availability of the remedy of exemplary damages should not hinge on the occupation of the defendant or on any fine analysis of his motivation" (at 92).

165 Today, the courts in New Zealand exercise the power to award punitive damages with considerable restraint, and save it only for cases where there has been "truly outrageous conduct" that cannot be punished in any other way (see the decision of the New Zealand Court of Appeal in *Dunlea v Attorney-General* [2000] 3 NZLR 136 at [34] *per* Keith J, with whom Richardson P,

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Gault, and Blanchard JJ agreed).

166 ***Canada*** has also rejected the categories test. In *Paragon Properties Ltd v Magna Envestments Ltd* (1972) 24 DLR (3d) 156 ("*Paragon Properties*"), the Appellate Division of the Alberta Supreme Court declined to follow *Rookes*. Clement JA, dissenting with regard to the result but not on the point of principle involved, explained that the project of categorisation was inconsistent with the general purpose of the punitive damages jurisdiction, which was to censure, deter, punish, and to serve as a recognition of the unnecessary humiliation and harm which the victim had been subject to (at 167). He opined that:

> It is the reprehensible conduct of the wrongdoer which attracts the principle, not the legal category of the wrong out of which compensatory damages arise and in relation to which the conduct occurred. To place arbitrary limitations upon its application is to evade the underlying principle and replace it with an uncertain and debatable jurisdiction.

167 This view was subsequently endorsed by the Supreme Court of Canada in *Vorvis v Insurance Corporation of British Columbia* [1989] 1 RCS 1085, where McIntyre J held definitively that *Rookes* should not apply in Canada (at 1105*a*–*g*). At present, punitive damages may be awarded in all tort claims in Canada, though they are more frequently awarded in cases involving intentional torts (see, generally, Lewis N Klar, *Tort Law* (Carswell, 5th Ed, 2012) at p 121). One caveat to this is that it has been held that it should not be awarded in cases of negligence unless the circumstances are "extreme" (see the decision of the New Brunswick Court of Appeal in *Canadian National Railway Co v di Domenicantonio* (1988) 49 DLR (4th) 342).

168 The position in ***Malaysia*** is somewhat less clear. In a recent case, the Malaysian Court of Appeal held that *Rookes* was the "most important

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authority for the award of exemplary damages" and disallowed a claim for punitive damages on the ground that it did not fall within one of Lord Devlin's three categories (see *Sistem Televisyen Malaysia Bhd & Ors v Nurullah bt Zawawi & Anor* [2015] 6 MLJ 703 at [31]–[32]). In the same year, *Rookes* was also applied by a differently constituted bench of that same court in *Zulkiply bin Taib & Anor v Prabakar a/l Bala Krishna & Ors and other appeals* [2015] 2 MLJ 607, which described the decision as the "best reference for a consideration of an award of exemplary damages" (at [74]). However, it has also been observed that the practice is less than uniform, and that the Malaysian courts have awarded punitive damages in cases falling outside the scope of *Rookes* (see the decision of the Malaysian High Court in *Cheong Fatt Tze Mansion Sdn Bhd v Hotel Continental Sdn Bhd (Hong Hing Thai Enterprise Sdn Bhd, third party)* [2011] 4 MLJ 354 at [53]). To the best of our knowledge, the issue has never been considered by the Federal Court of Malaysia.

169 The only clear exception, perhaps, is ***Hong Kong***, where it has been stated that *Rookes* has consistently been followed "without question" (see the decision of the Hong Kong Court of First Instance in *A & Ors v Director of Immigration* [2009] 2 HKC 452 at [53(10)]. *Rookes* has also been applied by the Hong Kong Court of Appeal on a number of occasions, though each time without substantial argument as to its correctness (see, for example, *China Light & Power Co Ltd & Anor v Ford* [1996] 2 HKC 23 and *Allan v Ng & Co & Anor* [2012] 2 HKC 266). To the best of our knowledge, the issue has never been considered by the Hong Kong Court of Final Appeal.

The position in Singapore

170 It has been hitherto at least tacitly assumed that Singapore courts

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would follow *Rookes*. In the Singapore High Court decision of *Afro-Asia Shipping Company (Pte) Ltd v Da Zhong Investment Pte Ltd* [2004] 2 SLR(R) 117 at [134], Judith Prakash J (as she then was) held that *Rookes* was good law in Singapore even though the majority of Commonwealth jurisdictions had declined to follow it (at [134]). In *Li Siu Lun,* which was also a decision of the Singapore High Court, Belinda Ang Saw Ean J likewise held that *Rookes* would apply in Singapore until such time as this court ruled otherwise (at [204]). In *MFM Restaurants Pte Ltd v Fish & Co Restaurants Pte Ltd* [2011] 1 SLR 150, we suggested that the position in Singapore *might* be broader than that in the UK, but we left the point open for further argument on another day (at [53], citing the observations made by the Singapore High Court in *CHS CPO GmbH (in bankruptcy) and another v Vikas Goel and others* [2005] 3 SLR(R) 202). Today, we squarely confront the issue of whether *Rookes* should be followed.

171 As a starting point, we begin with the notion that the award of punitive damages is "anomalous". This has always been the principal (if not sole) justification for the categories test (see above at [158] and [160]). The argument is that the award of punitive damages confuses the function of the civil law, which is to compensate, with that of the criminal law, which is to deter and punish, and therefore should be kept within narrow confines (see *Broome (HL)* at 683B *per* Lord Reid). However, we do not think this to be correct as a matter of principle. As Lord Wilberforce forcefully argued in the same case, this assertion rests on two contestable notions: first, that the civil law is focused *exclusively* with compensation; and second, that punishment and deterrence are the exclusive preserves of the criminal law. The former may be questioned because there are civil wrongs, of which the tort of defamation is but one example, where there is a "delictual element which

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contemplates some penalty for the defendant"; and the latter is a normative claim which is often made without any clear support in authority (at 708H–709C).

172 We respectfully agree with Lord Wilberforce. Even if it were accepted that the function of the civil law is *primarily* compensatory, this does not mean that it is *exclusively* so, and that there is consequently no room for the award of damages to serve the needs of punishment, deterrence, or condemnation. In the New Zealand Court of Appeal decision of *Daniels v Thomson* [1998] 3 NZLR 22 ("*Daniels*"), Thomas J (dissenting, but not on this particular point) stressed the wider functions of the law of tort in, among other things, vindicating and appeasing the victim of wrongs, condemning socially disreputable conduct, giving a voice to the victims of civil wrongs (its "therapeutic function"), and in signalling society's commitment to retributive justice (at 68–70). In the words of the Law Commission of England and Wales, without punitive damages there would exist "gaps" in the law in which existing "remedies or sanctions are inadequate, in practice, to punish and deter seriously wrongful behaviour" (see the *Law Commission Report* at para 1.15). We will discuss this in greater detail at [185] below but the point, for present purposes, is (as the Law Commission opined) that the existence of these "gaps" in the law gives rise to a "practical need" for punitive damages to act as a "supplementary device" to remedy these perceived deficiencies (see the *Law Commission Report* at paras 1.15 and 5.12).

173 In other words, the award of punitive damages has a distinct and important role to play in the context of private law by filling that important interstitial space that exists between those cases where the demands of justice are served purely by the award of a compensatory sum, and those cases which properly attract criminal sanction. Among other things, it permits the *private*

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enforcement of important interests (particularly personality interests) without the need for individuals to bring a private prosecution (which is rarely done in practice, outside of cases involving intellectual property violations) and it allows for punishment to be effected without the corresponding stigma of a criminal sanction, which is not always appropriate in all cases of wrongdoing (see the *Law Commission Report* at para 5.23). While the terrain covered by punitive damages has been eroded somewhat by the development of other forms of redress such as judicial review and the emergence of restitutionary damages (see *Kuddus* at [107]–[109]) and also by the judicial recognition of other heads of damage (as has been done in this case), it has not disappeared completely. The option of awarding punitive damages still remains an important tool in the judicial toolbox.

174 If this is accepted, as we think it ought to be, then the principal criticisms made against the categories test are irresistible. Chiefly, these are twofold. First, the test is unprincipled because it imposes an arbitrary limitation on the jurisdiction of the court to award punitive damages which does not correspond to the underlying principle of its grant (that is, to punish, deter, and condemn). Second, the categories are "illogical". As has been pointed out in many different cases, there is no reason to single out wrongs committed by public servants (the first category) or those committed in service of a profit motive (the second category) for special condemnation when there are so many other types of cases which are equally, if not even more, opprobrious. The categories are the product of history and not principle. They represent the types of cases in which punitive damages were awarded before *Rookes* which the House of Lords was not prepared to overrule (indeed, the Law Commission of England and Wales mused that Lord Devlin might have taken the bold step of proposing the complete abolition of punitive damages

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had the *Practice Statement (Judicial Precedent)* [1966] 1 WLR 1234 been in force then: see the *Law Commission Report* at para 5.1).

175 For the foregoing reasons, which are largely the same as those given by the courts in Australia, New Zealand, and Canada, we conclude that the categories test set out in *Rookes* should no longer be a part of Singapore law. Although the common law of England is part of Singapore law pursuant to s 3(1) of the Application of English Law Act (Cap 7A, 1994 Rev Ed), it is subject to the requirements of suitability (or applicability) as well as modification under s 3(2) (which also reflects the (prior) requirements under the general reception of common law). In our view, this is an occasion when the hitherto received common law as embodied in *Rookes* ought to be ***departed*** from. That law is no longer applicable to the circumstances of Singapore and, in any event, ought to be modified by being replaced with a more logical as well as appropriate rule. This is the issue to which we shall now turn.

Developing a coherent framework

176 We begin with the basic question: When should punitive damages be awarded? In *Broome (HL)*, Lord Diplock commented that the case law was replete with "a whole gamut of dyslogistic judicial epithets such as wilful, wanton, high-handed, oppressive, malicious, outrageous" (at 723B). For instance, in Australia, the preferred test is that punitive damages should be awarded where there has been "conscious wrongdoing in contumelious disregard for another's rights" (see above at [163]). It may be that it is quixotic to expect any single test to cover the entire field, but we consider that it is useful to settle on something as a touchstone. With this in mind, we indicate our preference for the expression "outrageous" because it – of all the

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adjectives used – relates not to the manner of the commission of the act, but to its gravity. This is an important point. As has been stressed in the various decisions cited above, if the award of punitive damages is a response to conduct which is beyond the pale and therefore deserving of special condemnation, then any restrictions imposed must be related to the *character* of the offending conduct. In our judgment, therefore, punitive damages may be awarded in tort where the totality of the defendant's conduct is so outrageous that it warrants punishment, deterrence, and condemnation.

177 Two specific considerations that merit more detailed discussion, both of which arise on the facts of this case, are:

(a) whether punitive damages may be awarded where the defendant has already been punished by the criminal law; and

(b) whether punitive damages may be awarded for *inadvertent* conduct.

The relevance of criminal punishment

178 In *Rookes*, Lord Devlin stressed that exemplary damages should only be awarded as a last resort, where the existing remedies are inadequate. He said that when assessing damages in a case where punitive damages are available, the jury should be directed that (at 1228):

> … ***if but only if****, the sum which they have in mind to award as compensation* (which may, of course, be a sum aggravated by the way in which the defendant has behaved to the plaintiff) is inadequate to punish him for his outrageous conduct, to mark their disapproval of such conduct and to deter him from repeating it, then it can award some larger sum. [emphasis added in italics and bold italics]

179 This restriction was unanimously affirmed by all seven judges in

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Broome (HL) and has since come to be known as the "if but only if" test (see the *Law Commission Report* at paras 4.115). It has been widely accepted throughout the Commonwealth, even though the categories test has been widely rejected (see the *Law Commission Report* at para 5.99). The principle behind it was lucidly set out by Lord Reid in *Broome (HL)* at 685G–686B, where he explained that one always had to bear in mind that the task of the court was not to devise *two sums* (one for compensation and one for punishment), but to decide on an appropriate sum which served *two purposes*: compensation and punishment. If the sum the court had in mind as compensation was already sufficient to serve the aim of punishment, then no more need be added. In our judgment, this is a sound principle and it should be followed.

180 To put the matter in more general terms, in considering whether punitive damages ought to be awarded, the court should consider whether there is any *need* for such an award. In doing so, it will have to consider not only the adequacy of any compensatory award, but also the existence and adequacy of any criminal and/or disciplinary sanctions that might already have been imposed on the defendant which could (in turn) obviate the need for a punitive award. This is already an established practice and two examples will suffice.

(a) In *Archer v Brown* [1984] 3 WLR 350, the defendant fraudulently induced the plaintiff to conclude two agreements for the purchase of shares in a company when, in actual fact, the defendant owned no shares in the said company. As a result of this, the plaintiff ended up heavily in debt and he sued in the tort of deceit, claiming punitive damages. This was refused by the English High Court on the ground that the defendant had already been convicted and imprisoned

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for his fraud and, since the purpose of punitive damages was to punish the defendant, such damages ought not to be awarded where the defendant had already been punished for his tortious act by the criminal courts (at 368C–D).

(b) In *KD v Chief Constable of Hampshire* [2005] EWHC 2550 (QB), the plaintiff claimed to be the victim of sexual harassment by a police constable. The plaintiff sought an award of punitive damages but this was refused by the English High Court on the ground that it was unnecessary since the primary tortfeasor (the constable accused of harassment) had already faced disciplinary proceedings, in which he had been found guilty and fined.

181 In *Gray*, the majority of the High Court of Australia held that where the criminal law had been brought to bear on the wrongdoer and "substantial punishment" had been inflicted for "substantially the same conduct which is the subject of the civil proceeding", this was an *absolute bar* to the imposition of punitive damages (at [40]). Two reasons were given for this bright-line rule: first, the purposes for the award of punitive damages would already have been wholly met if substantial punishment had been inflicted by the criminal law (at [42]); and second, the award of punitive damages in this context might result in the imposition of double punishment (at [43]). The majority was at pains to stress that this was not merely a matter of "discretion", but a "rule" which governed the court's punitive damages jurisdiction (at [55]). Kirby J, who was in the minority on this issue, did not dispute the validity of these two considerations. However, he would have held that the court should still retain a *discretion* to award punitive damages even where the defendant had been punished either under the criminal law or through disciplinary sanctions. That being said, he swiftly clarified that it was a "discretion to be exercised in

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accordance with principle", and explained that a court in exercising its discretion should have regard to the particular purposes for which a punitive award was contemplated in that case and the extent to which those purposes had already been achieved by criminal punishment in exercising its discretion (at [97]).

182 The choice between these two approaches is, as was pointed out in *Daniels*, one of policy (at 49 *per* Richardson P, Gault, Henry, and Keith JJ). This was also the view of the Privy Council. In *W v W* [1999] 2 NZLR 1 ("*W v W*"), which was the decision of the Board upon hearing the appeal from *Daniels*, the Privy Council held that the question whether punitive damages would be available where the defendant had already been punished under the criminal was one which "depends on a perception of the balance of public advantage and disadvantage" and was therefore a question of policy *par excellence* in respect of which the Board would not substitute its views for that of the national court (at 4 *per* Lord Hoffmann). We agree with the characterisation of this question as being a question of policy. However, it is a choice that is informed, in part, by deeper questions of principle concerning the comparability of civil and criminal punishments, as well as the purpose of an award of punitive damages. After careful consideration, we prefer a less categorical approach which still reposes the court with a discretion to decide whether punitive damages are warranted even if the defendant has already been the subject of criminal or disciplinary proceedings. We give two reasons for this conclusion.

183 First, we consider that civil punishment performs a distinct and unique function and its purposes are not exhausted just because the criminal law has been brought to bear on the defendant. A condign criminal sentence is one which accurately reflects *society's* interest in the "four pillars of sentencing" –

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that is to say, punishment, deterrence, prevention, and rehabilitation (see the decision of the English Court of Appeal in *R v James Henry Sargeant* (1974) 60 Cr App R 74 at 77, cited with approval by this court in *Public Prosecutor v Kwong Kok Hing* [2008] 2 SLR(R) 684 at [17]). While there is no doubt that a punitive award has important social functions as well (such as to mark society's disapproval of outrageous conduct), its chief purpose is to vindicate the plaintiff's *private* interests in punishing the defendant, vindicating his interests, and seeking appeasement. In short, therefore, "the task of fixing the appropriate sentence in the criminal proceeding and the inquiry into exemplary damages in the civil proceeding is essentially a different exercise" (see *Daniels* at 76 *per* Thomson J). For this reason, we disagree with the majority's opinion in *Gray* that the purpose behind a punitive award would *always* have been wholly met if substantial punishment had been already inflicted by the criminal law (see above at [181]).

184 Take, for instance, an offence involving a youthful offender. In such a case, it is well-established that "rehabilitation must be the dominant consideration" in the sentencing calculus (see the Singapore High Court decision of *Public Prosecutor v Mohammad Al-Ansari bin Basri* [2008] 1 SLR(R) 449 at [34]). However, the principle of rehabilitation – while undoubtedly an important societal object – has little role to play in the design of a punitive award. This being the case, any criminal sentence meted out may not adequately reflect the victim's legitimate *private* interests in punishing a tortfeasor for his outrageous conduct, vindicating his interests, or in seeking appeasement. Indeed, it might not even serve society's interest in marking disapproval of the offending conduct nor may it always adequately serve to deter other would-be offenders. We hasten to clarify that this does not entail the conclusion that the civil court is revisiting a matter already decided by the

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criminal court nor does it suggest that the civil court is sitting in judgment over the adequacy of the sanction meted out by the criminal court (which is sometimes cited as a reason for an absolute bar: see the decision of the majority in *Gray* at [46]). This is merely a recognition that civil punishment has purposes which are distinct from those of criminal punishment. An analogy can be drawn with disciplinary proceedings under the Legal Profession Act (Cap 161, 2009 Rev Ed), where professional sanctions are often meted out *on top of* any criminal sanctions which the defendant might face (see, generally, the Singapore High Court decision of *Law Society of Singapore v Tham Yu Xian Rick* [1999] 3 SLR(R) 68 at [18]).

185 Second, and closely related to the first reason, is what we shall term the "supplementary function" of punitive damages. As we explained above at [172], without punitive damages there would exist many unfilled "gaps" in the law. These gaps may exist for a variety of reasons but at a basic level, they exist because a criminal prosecution is, by design, a matter between the State and an accused person; it is not a mechanism for victims to seek vindication of their private interests As the Ontario Law Reform Commission pointed out, one of the disadvantages of the criminal process is that the victims of crime are "disenfranchised" – their role is merely that of complainant and they have little control over the process (see *Report on Exemplary Damages* (1 June 1991) (Chairperson: Rosalie S Abella) at p 45). The availability of punitive damages fills gap by affording victims who have been subject to "outrageous" conduct a means to vindicate their interests *themselves* as plaintiffs in civil suits. Because of the "formal equality of tort law, and the relatively greater degree of victim control that it affords", the opportunity to bring suit against the offenders has the potential to bring about significant symbolic and therapeutic benefits (see Bruce Feldthusen, "The Civil Action for Sexual

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Battery: Therapeutic Jurisprudence?" (1993) 25 Ottawa Law Review 203 at 203). In *W v W*, Lord Hoffmann put the point thus (at 2):

> There are plainly important differences, recognised in both judgments, between a criminal prosecution and an action for exemplary damages. The procedure is of course radically different and so is the standard of proof. A prosecution is generally speaking initiated and controlled by the state. A civil action is initiated and controlled by the victim. Thus the prosecution of an action for exemplary damages enables the victim publicly to vindicate his or her version of events and inflict punishment, even revenge, in ways which a criminal prosecution may not satisfy. Punishment takes the form of damages which go to the victim rather than imprisonment or a fine which can afford her only a more indirect satisfaction. Allowing the victim to pursue such a claim may have a therapeutic value which mitigates the effects of the offence.

186 Conversely, therefore, imposing an absolute bar in law that proscribes the award of punitive damages where the criminal law has intervened would be tantamount to a removal of the victim's right to seek civil redress through a punitive award. This has been referred to as the "disenfranchisement argument" and we accept the force of it (see *Daniels* at 74). In response, those who would support an absolute bar point out that victims would still be able to seek compensatory damages (and might even be able to obtain aggravated damages), but this seems to us to be an inadequate answer to the disenfranchisement argument. First, it does not answer the objection that the victim has been deprived of a legal entitlement through no fault of his/her own – after all, if the victim has suffered harm of a sort which would ordinarily entitle him/her to a punitive award, then it is not at all clear why this entitlement should be lost merely because the criminal law has entered the picture (see *Gray* at 509 *per* Kirby J). Second, it ignores the unique functions played by a punitive award which are not shared by a compensatory award (see above at [172]).

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187 In conclusion, therefore, we would put the matter as follows: the fact that a defendant has already been punished by the criminal law or through the imposition of a disciplinary sanction, is a ***weighty*** factor to be taken into consideration when deciding whether to award punitive damages ***but*** it is ***not*** determinative or conclusive. Regard must be had to the facts of each case and, in particular, to the purposes sought to be achieved by a punitive award and the extent to which they have already been achieved by the imposition of criminal punishment. That being said, at the end of the day, whether the approach is described as a matter of "rule" or as one of "discretion" is, it seems to us, of lesser moment than the point of principle involved, which is simply that the court should not make a punitive award when there is *no need to do so*.

188 Indeed, we observe that the difference between the approaches adopted by the majority and Kirby J did not make any practical difference to the result in *Gray*. The appellant in that case sustained serious personal injuries after he was struck by a car that had been deliberately driven at him by the respondent, who was subsequently convicted of causing grievous bodily harm and sentenced to seven years' imprisonment. The appellant sued the respondent and sought punitive damages but this was unanimously refused. The majority held that this was a case in which substantial punishment had already been imposed on the respondent through the criminal law, so punitive damages were, as a rule, unavailable (at [56]). Kirby J held that the lower court had not erred in the exercise of its discretion when it concluded that punitive damages should not be awarded because the sentence of imprisonment which had been imposed adequately fulfilled all of the purposes for which an award of punitive damages would otherwise have been appropriate (at [98]).

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Punitive damages for inadvertent conduct

189 The next matter concerns the question of whether, as a matter of law, a precondition for the award of punitive damages is that the defendant must consciously have run the risk of harm to the plaintiff. This resolves itself into a disagreement over whether ***inadvertent*** conduct (that is, conduct that is performed without consciousness of the risk to the plaintiff) can ever be the subject of an award of punitive damages. Although this concerns, for reasons which are obvious, an issue that chiefly, if not exclusively, relates to cases in the tort of negligence, it does *not* involve the reintroduction of a "cause of action" requirement as such. Rather, it is an issue that relates to the defendant's *state of mind* (for this reason, we shall term this the "state of mind requirement"). Proponents who support the introduction of a "state of mind requirement" hold that inadvertent conduct *cannot* be the subject of an award of punitive damages. They argue that, unlike the categories test or the cause of action test, their position is perfectly consistent with the principle underlying the punitive damages jurisdiction of the court. On the other hand, detractors who argue that there should not be any such requirement would say that inadvertent conduct *can* be the subject of a punitive award. They argue that the introduction of a "state of mind requirement" would have the effect of fettering the jurisdiction of the court in a manner that is neither necessary nor beneficial.

(1) *Bottrill* and *Couch*

190 This issue was argued before us as a contest between two cases of the very highest authority. The first is *A v Bottrill* [2003] 1 AC 449 ("*Bottrill*"), a decision of the Privy Council where the Board held, overruling the decision of the New Zealand Court of Appeal by a 3-2 majority, that no "state of mind requirement" should be introduced. The second is *Couch v Attorney-General*

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(No 2) [2010] 3 NZLR 149 ("*Couch*"), a decision of the New Zealand Supreme Court where the court decided, by a majority of 4-1, to *depart* from *Bottrill* and to reinstate the "state of mind requirement". The arguments are finely balanced, and we will examine both cases in some detail.

191 In *Bottrill*, the defendant was a pathologist who misread and misreported the results of cervical smears taken from the plaintiff and failed to detect that she had high grade intraepithelial lesions, which are a precursor to aggressive cervical cancer. The plaintiff subsequently developed invasive cervical cancer which required aggressive treatment and she received a poor prognosis. If the smears had been correctly reported, the treatment would have been less severe and her prognosis much better. The plaintiff brought suit and claimed punitive damages but this was dismissed on the ground that the facts did not support the conclusion that, on the facts, the defendant, though plainly negligent, acted in a manner which evinced an outrageous and flagrant disregard for her safety. Subsequently, an investigation was carried out and it was revealed that the defendant had also been alarmingly negligent in respect of the treatment of other persons and that his false reporting rate exceeded 50%. On this basis, the plaintiff applied for a re-trial. Her application was allowed at first instance, but this was reversed by the New Zealand Court of Appeal. By a majority, the New Zealand Court of Appeal held that punitive damages were only available in cases where a defendant had been subjectively aware of the risk which his conduct posed. Their decision was, in turn, reversed by the Privy Council, which held that no such requirement was necessary.

192 The judgment of the majority (comprising Lord Nicholls, Lord Hope, and Lord Rodger of Earlsferry) was delivered by Lord Nicholls. As a starting point, he located the source of the court's jurisdiction to award punitive

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damages in the need to punish, deter, and mark society's approval of outrageous conduct (at [21]). That being the case, the scope of the court's jurisdiction should – as Lord Nicholls reasoned – extend to all cases which satisfied this criterion. He accepted that in the usual course of things, only cases involving intentional wrongdoing or, at the very least, a "reckless indifference" approaching intentional wrongdoing would be required (at [23]), but he held that there was no reason in principle to make this a *precondition* for the award of punitive damages since there could be "exceptional" cases of inadvertent conduct (at [64]) that might satisfy the criterion of *outrageousness*. In a paragraph which has since famously come to be referred to as the "never say never" passage, he made the case for leaving the door ajar (at [26]):

> *However, if experience in the law teaches anything, it is that sooner or later the unexpected and exceptional event is bound to occur.* It would be imprudent to assume that, in the absence of intentional wrongdoing or conscious recklessness, a defendant's negligent conduct will never give rise to a justifiable feeling of outrage calling for an award of exemplary damages. ***"Never say never" is a sound judicial admonition.*** There may be the rare case where the defendant departed so far and so flagrantly from the dictates of ordinary or professional precepts of prudence, or standards of care, that his conduct satisfies this test even though he was not consciously reckless. [emphasis in original omitted; emphasis added in italics and bold italics]

193 Lord Nicholls accepted that, in cases involving egregiously negligent conduct, the courts would often make an *evidential* finding that the defendant had been subjectively reckless. The example which he gave was the decision of the High Court of New Zealand in *McLaren Transport v Somerville* [1996] 3 NZLR 424, where the defendant negligently inflated a tyre to twice its recommended pressure, upon which it exploded and caused serious injuries to the plaintiff. However, he held that the availability of punitive damages should not depend on whether the judge was "able conscientiously to find that the defendant was subjectively reckless" (at [37]). Drawing a distinction between

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advertent and inadvertent conduct, he said, would only have the effect of "distract[ing] courts from making a decision in accordance with the fundamental rationale of exemplary damages", which was whether the defendant's conduct was *outrageous* (at [37]).

194 The minority, comprising Lord Hutton and Lord Millett, differed from the majority on the purpose of punitive damages. They held that the rationale behind the award of punitive damages was "not to mark the court's disapproval of outrageous conduct by the defendant … [but to] punish the defendant for his outrageous behaviour" (at [77]). On this basis alone, they considered that it would be inappropriate to visit punishment upon a defendant who did not possess the requisite "guilty mind" and they supported the introduction of the state of mind requirement (at [77]). Notwithstanding this, they joined the majority in ordering a re-trial because they held that the facts were such that there was a triable issue as to whether the defendant might have been subjectively reckless, and not just scandalously incompetent.

195 *Couch* was decided after the Supreme Court Act 2003 (No 53 of 2003) (NZ) had been passed to abolish appeals to the Privy Council and to establish a new Supreme Court for New Zealand which would take the place of the Privy Council as the apex court in the New Zealand judicial hierarchy. The plaintiff in that case was the victim of a serious attack committed by a parolee who had been inadequately supervised. She brought suit against the Attorney-General as the representative of the Government and sought an award of punitive damages. The appeal concerned a number of issues, but the only one which concerns us at this moment is the fact that the Supreme Court of New Zealand decided to depart from *Bottrill* and held that punitive damages were not to be awarded unless the defendant had a conscious appreciation for the risk of causing harm and had run that known risk.

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196 Of the judges in the majority, Tipping J delivered the most fully reasoned speech. He began, as the law lords did in *Botrill*, by examining the purpose of an award of punitive damages, which he identified as the punishment of the defendant (at [92]–[95]). While he acknowledged that such an award might serve several other subsidiary purposes (*eg*, deterrence, condemnation, and the appeasement of the victim), he held that all of these were ultimately ancillary (at [115]). They were, in his words, "best regarded as the consequences of a punitive award rather than as purposes of the award in their own right" (at [95]). On this footing he held, following the minority in *Bottrill*, that punishment should not be meted out to those who did not consciously appreciate the risk that was being run and therefore could take steps to avert punishment (at [111]–[112]). On this analysis, the introduction of the state of mind requirement was consistent with, rather than contrary to, the rationale for the award of punitive damages (at [124]). Tipping J also took issue with the use of "outrageousness" as the sole criterion for the award of punitive damages, holding that it was a concept which was inherently subjective and ought to be coupled with a requirement of consciousness of risk (at [151]).

197 In their own way, the rest of the judges in the majority pursued similar lines of reasoning. Blanchard J emphasised the point that because the purpose of punitive damages was to punish the defendant, the focus should be "on the character of the defendant's conduct, not on the loss or suffering of the plaintiff"; and emphasised that the subject of punishment was "the private wrong committed against the plaintiff, not a public wrong against the State" (at [58]). In a similar vein, Wilson J held that because the purpose of punitive damages was the punishment of the defendant, the focus should be "on the mind of the defendant, in order to decide whether punishment is deserved" (at

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[254]). McGrath J stressed that because of the focus on punishment, it was the "culpability of the defendant's conduct that justifies an award of [punitive] damages"; and given that culpability was closely related to the state of mind of the defendant, the court was justified in setting the threshold at the level of conscious recklessness (at [239]).

198 In dissent, Elias CJ held that punitive damages had long been generally available "irrespective of the grounds of liability in tort … wherever compensation to the plaintiff is inadequate to respond to the outrageousness of the defendant's conduct" (at [19]), and that the jurisdiction to award punitive damages was properly exercised "in vindication of a public interest otherwise not readily able to be addressed" (at [39]). On this basis, she concluded – echoing the words of Clement JA in *Paragon Properties* (see above at [166]) – that the introduction of the state of mind requirement would have the effect of "evad[ing] the underlying principle" behind the jurisdiction of the court. Additionally, she criticised such an approach as creating a new "species of negligence" in which conscious recklessness was an element for the sole purpose of either permitting or excluding an award of punitive damages, when no such distinction or requirement had previously been recognised in the case law (at [1] and [31]).

(2) The principle of the matter

199 The positions of both sides are powerfully argued indeed but, in our judgment, the issue comes down to a single point of principle, which is the *true* purpose of punitive damages. Both sides agree that as a matter of general principle "the availability of exemplary damages should be co-extensive with its rationale" (see *Kuddus* at [65] *per* Lord Nicholls), but they disagree on what that rationale is. As is clear from the foregoing, those who support the

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introduction of the state of mind requirement focus – almost to the exclusion of everything else – on the punitive purpose of such an award, whereas those who reject such a requirement consider the broader societal functions that an award of punitive damages performs – condemnation, general deterrence, the appeasement of the victim's rights *etc*. Undergirding this difference in views is a deeper philosophical divide between a more "liberal" approach which views the function of the law of tort as a tool for the protection of private rights and interests and a more "communitarian" approach which accords it a wider role in *also* promoting societal welfare (see Andrew Phang and Pey-Woan Lee, "Exemplary Damages – Two Commonwealth Cases" [2003] CLJ 32).

200 It should be sufficiently clear, from our endorsement of the "supplementary function" of punitive damages (see above at [172]–[173]), that we favour the broader view that punitive damages do not exist only to punish the defendant, but can also legitimately serve wider social functions. One way of looking at this is to distinguish between the "backwards looking" and "forward looking" functions of punitive damages (see Bruce Feldthusen, "Punitive Damages: Hard Choices and High Stakes" [1998] NZLJ 741 at 750). When it performs its retributive function, a punitive award looks backwards at the conduct of the defendant and imposes a condign sanction; however, a punitive award also looks *forward* by making an example of the particular defendant to deter would-be tortfeasors from committing similar transgressions, influencing societal behaviour, and allowing the victim of the wrong an avenue to vindicate his/her rights. The introduction of the "state of mind requirement" would only, to use an expression favoured in the authorities, cut back on the "vitality" of the court's punitive damages jurisdiction.

201 In the light of this, it is difficult not to take Lord Nicholls's warning

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about the limits of judicial prospicience to heart. Whilst it is true that the outrageous nature of the conduct often takes its colour from an intentional act on the part of the tortfeasor, and that, overwhelmingly, an award of punitive damages will only be appropriate where the defendant's wrongdoing was intentional or consciously reckless, one can never foresee every factual permutation that might arise. There may be situations where the defendant's conduct, though technically only negligent, was – "because of its quality or extent, or its duration or repetitiveness, or casualness or indifference, or any other reprehensible feature" (see *Bottrill v A* [2001] 3 NZLR 622 *per* Thomas J, dissenting) – so beyond the pale that it is properly characterised as outrageous. We would venture to suggest that *Bottrill* was such a case. Even if it could be shown that the defendant-doctor was not conscious of the risk that his misdiagnoses would pose to his patients, there is a good case for saying that his betrayal of the trust reposed in him by his patients (which was misplaced), the magnitude of the potential harm his conduct posed, and his sustained pattern of laxity and incompetence, were collectively sufficient to satisfy the criterion of outrageousness. In *Bottrill*, Lord Nicholls gave the example of a person who deliberately points a loaded gun at another person and, believing it to be unloaded, squeezes the trigger, causing serious injury. In such a case of "stupidly dangerous behaviour", there is an arguable case that the defendant's conduct should attract an award of punitive damages, even if he genuinely believed his act to be harmless (at [38]).

202 As a practical matter, most cases where a punitive award is justified would involve at least subjective recklessness, if not intentional conduct. However, this is, in our view, quite beside the point. Courts should not have to disguise their true reasons for imposing a punitive award by recharacterising cases of inadvertent conduct as cases involving subjective recklessness to

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justify a punitive award. As argued in J Manning, "'Never say never': exemplary damages in negligence" (2003) 119 LQR 24, the introduction of a requirement of subjective recklessness would lead "inevitably in very strong cases of negligence to a temptation in the tribunal to find conscious wrongdoing, when perhaps a lesser finding would be safer" (at 27). This would be undesirable. If the award of punitive damages is thought to be the fit and proper response to heinous conduct, then courts ought to ventilate their reasons openly and transparently in order that proper consideration may be given to the value judgment which is being made.

203 Whilst it might be attractive to have recourse to the concept of subjective recklessness as a kind of *via media*, it might be extremely difficult to draw the line between subjective recklessness on the one hand and negligence (or even gross negligence) on the other. This might also lead to much artificiality as courts might be tempted to reason in an *ex post facto* fashion after having first decided (without the application of logic and/or principle) whether or not the award of punitive damages is appropriate in the first place. We also note that the concept of subjective recklessness may be perceived as being a proxy of sorts for the concept of intention. This would not, in our view, be a principled way forward simply because both the aforementioned concepts are quite different and that it would, in fact, be *un*principled to *impute* intention in a situation where there was none to begin with.

204 Finally, we do not agree with criticism that the criterion of "outrageousness" introduces an unsatisfactory element of subjectivity into the process or that it risks confusing the functions of the civil and criminal law. In *Couch*, Tipping J framed his objections in the following terms (at [111]–[112]):

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> 111 … punishment is generally meted out only to those who have deliberately caused harm or who have deliberately run the risk of doing so, rather than to those who have been inadvertent, even grossly advertent. … I recognise that Parliament has, over the years, created a number of offences which do not require a guilty mind in the conventional sense. But the anomalous nature of exemplary damages at common law is such that they should be restricted to circumstances which are analogous to the conventional offences which require conscious appreciation of wrongdoing. At least in the present context a conscious appreciation of the risk of causing harm should be a necessary precondition to the infliction of punishment. Otherwise the distinction between crime and tort becomes even further blurred.
>
> 112 An allied point is that punishment should not be inflicted unless the person concerned is able to determine in advance with some certainty when their conduct is liable to punishment. The need for conscious appreciation of risk brings into the inquiry the state of the defendant's mind. The presence of the necessary state of mind, as a pre-existing matter of fact, must be shown before punishment by way of exemplary damages should be inflicted. A test for exemplary damages which did not have this ingredient would depend entirely on an after the event assessment by a judge or jury of whether the relevant conduct should be viewed as outrageous. That is a subjective and inherently uncertain criterion on which minds may well differ. Assessing whether the defendant consciously appreciated the risk inherent in the relevant conduct involves an objective and conceptually certain inquiry into the defendant's state of mind which is preferable to a test based on the adjudicator's subjective reaction to what has occurred.

205 Several points can be made in response to this. First, for reasons which we have already set out above, we reject the criticism that punitive damages should somehow be treated with suspicion because they are "anomalous" (see above at [171]–[173]). This critique overlooks the "supplementary function" of punitive damages. Second, there are many criminal offences in respect of which proof of negligence is a sufficient basis for liability (see, for example, ss 269, 284–289, 304A, 336–338(*b*) of the Penal Code (Cap 224, 2008 Rev Ed)). If negligence can be a basis for the imposition of liability in the criminal law (where foreseeability of liability is a matter of cardinal importance), we

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think that, *a fortiori*, it can be the basis for the imposition of punitive damages. Third, the use of the expression "outrageous" does not entail that the imposition of a punitive award is contingent on public distaste or any sort of emotional response. Rather, it sets out a reasoned normative standard that requires the court to consider whether the defendant's conduct is so reprehensible that a normal compensatory award is insufficient and something more is required. This involves an exercise of reasoned judgment of the sort that courts perform on a regular basis. Further, there is no reason to think that the process of determining whether the defendant was subjectively reckless would be any less certain. As we observed above at [202], drawing a distinction between advertent and inadvertent conduct in this context only risks obscuring the value judgment which lies at the heart of the inquiry.

206 The direction the law has taken in New Zealand can perhaps be explained by the presence of accident compensation legislation. Under the provisions of the Injury Prevention, Rehabilitation, and Compensation Act 2001 (NZ) ("the NZ Compensation Act") and its legislative precursors, the victim of an accident can make a claim for statutory compensation without proof of fault. However, s 317(1) of the NZ Compensation Act provides that all proceedings for damages "arising directly or indirectly out of" personal injury are barred. In *Donselaar v Donselaar* [1982] 1 NZLR 97, the New Zealand Court of Appeal held that this did not bar a claim brought *purely* for *punitive damages*, subject only to the caveat that punitive damages could not be used to make up for any perceived shortfall in the statutory sum (at 107). Against this background, it is understandable that the New Zealand courts would be careful not to expand the ambit of punitive damages too widely, lest it subvert the social and economic objects of the NZ Compensation Act (see, generally, Stephen Todd, "A New Zealand Perspective on Exemplary

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Damages" (2004) 33 Comm L World Rev 255 at 259). However, such a concern does not arise here, as we do not have a similar piece of legislation in Singapore. In our judgment, therefore, the state of mind requirement should not be a part of our law. Proof of intentional wrongdoing or conscious recklessness is not an essential prerequisite to the award of punitive damages in tort.

Can punitive damages be awarded here?

207 It is perhaps somewhat ironic that this particular issue (in relation to whether or not punitive damages ought to be awarded) was the *only* issue which *all* parties were actually *in agreement* on. Put simply, all the parties were of the view that, this being a case pertaining to purely *negligent* conduct on the part of the Respondents, there was no scope for the award of punitive damages. For the reasons we have given, we do not think this is an absolute barrier to such an award. We also do not think the fact that the first Respondent has been charged for breaching the conditions of its licence to provide assisted reproduction services is a bar to such an award. In our judgment, the substance of the charge against the first Respondent is quite different and does not present itself as an obstacle to the making of a punitive award. The offence for which the first Respondent was charged was that of breaching the conditions of its licence by failing to "ensure that suitable practices were used in carrying out [assisted reproduction] activities" (see above at [9]). Thus framed, the charge would appear to be a simple regulatory offence, and does not adequately capture the types of harm which were caused to the Appellant.

208 That being said, we do not think that we are presently able to conclude that this is a proper case for a punitive award. The facts are simply too scant to

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support a finding of outrageous conduct. The allegation in the SOC is that the mix-up had taken place because more than one sample had been handled in the laminar hood at the same time and because the disposable pipettes had not been discarded promptly after each use (see above at [9]). However, even accepting both of these allegations to be true, we are not satisfied that such conduct crosses the requisite threshold. *Bottrill* is instructive in this regard. When the matter first came before the High Court of New Zealand, the trial judge had no trouble concluding that the defendant had been guilty of professional negligence, but he was not prepared to say – just by looking at the plaintiff's case in isolation – that the defendant's conduct had crossed the threshold of outrageousness. This only changed after the results of the State-ordered inquiry revealed an alarming rate of false positives and a persistent pattern of incompetent performance on the part of the defendant. Likewise, we cannot conclude – from this single instance of negligence alone – that the Respondents' conduct was of such a character as to be considered outrageous.

209 However, we clarify that if an award of punitive damages were to be imposed, this would constitute an additional head of damages, and the sum awarded would be *additional to*, and not *in lieu of* any compensatory award that might be made (see the decision of this court in *ACES System Development Pte Ltd v Yenty Lily (trading as Access International Services)* [2013] 4 SLR 1317 at [58]). This flows naturally from the fact that punitive and compensatory damages serve different purposes.

Conclusion

210 This has been a difficult case, possibly one of the most difficult to come before this court thus far. However, not once have we wavered in our conviction as to the truth of the following principle, which has already been

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emphasised right at the outset of this judgment: ***the life of every person carries with it its own inestimable value and dignity and the worth of a person can neither be enlarged nor its importance abridged by any pronouncement of this court – nothing we have said should (or, indeed, could) be taken as a reflection of this court's view of the worth of Baby P. That is not the issue before this court nor can it ever be.*** The question in this appeal was the proper legal response to what is, by any account, a tragic set of facts. In summary, we dismiss the appeal in so far as the issue of upkeep costs is concerned. However, we recognise the Appellant's right to claim, as general damages, a sum in recompense of the injury which she has suffered to her interest in "genetic affinity". The quantum of this award should be assessed in accordance with the principles we have set out above at [145]–[152]. Finally, while we recognise that a claim for punitive damages may in principle be mounted in respect of claims in negligence, such an award is not available in this case.

211 On the issue of costs, we direct that that parties are to file written submissions, which should be limited to 5 pages and are to be submitted within two weeks of the date of this Judgment, as to the appropriate costs orders to be made both here and below.

212 Finally, we would like to record our deep appreciation once again to Prof Goh for the invaluable assistance he provided us – notwithstanding the fact that we did not ultimately agree with all of his submissions. His masterly integration of theory and practice exemplifies all that excellent legal scholarship should be. We also commend Prof Goh for his excellent advocacy. Indeed, this is not the first time that Prof Goh has been commended in the highest terms for his assistance as *amicus curiae* (see, for example, the Singapore High Court decision of *Ang Jeanette v Public Prosecutor* [2011]

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4 SLR 1 at [76] and the decision of this court in *Re Nalpon Zero Geraldo Mario* [2013] 3 SLR 258 at [72] (where it was observed that "both [Prof Goh's] written and oral submissions were models of clarity and conciseness")).

Sundaresh Menon Chief Justice	Chao Hick Tin Judge of Appeal	Andrew Phang Boon Leong Judge of Appeal

Tay Yong Kwang Judge of Appeal	Steven Chong Judge

N Sreenivasan SC, Palaniappan S, Derek Ow (Straits Law Practice LLC) for the appellant;
Lok Vi Ming SC, Audrey Chiang, Calvin Lim, Evans Ng, Nerissa Tan and Carren Thung (Dentons Rodyk & Davidson LLP) for the respondents;
Assoc Prof Goh Yihan (School of Law, Singapore Management University) as *amicus curiae*.

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