

“To what extent can Bell’s conception of an absolute right to personal safety, and his account of reparation for affront and insult in paragraphs 2028 and 2032 of his *Principles*, provide a more coherent and adequate doctrinal basis than negligence for vindicating reproductive autonomy in Scots law actions arising from wrongful pregnancy and wrongful birth?”

Bell’s relevant paragraphs:

Para 2028:

“Everyone who lives under the protection of the law, has an absolute right to the safety of his person; and wherever this right is invaded, there is in civil law a provision for redress of the injury, as well as in penal law a punishment for the crime.”

Para 2032:

“Personal violence is so direct and gross an invasion of the right now under review, as to require reparation wherever there is no justification on account of official duty; or absolute necessity; or self-defence; or the defence of one’s wife or child, or property; or excuse by unavoidable accident. Verbal injury is no justification. The civil claim of damage is not merely for damage sustained, but in *solatium* for affront and insult. It is not discharged by the interposition of the penal law; and the demand is for indemnification of the injury, not for punishment.”

Introduction

Questions of reproductive autonomy have exposed deep structural weaknesses in the way Scots law currently addresses wrongful conception and wrongful birth, which has resulted in a “piecemeal and arbitrary evolution of rules”.¹ Originally the action for negligence in Scots law was based on the *damnum iniuria datum* but has increasingly now has been viewed through the lens of the English tort of negligence. However, prevailing reliance on the current negligence framework forces courts to translate autonomy-based harms into categories such as pure economic loss, pain and suffering, or personal injury. However, none of these categories capture the central wrong suffered by women whose reproductive choices have been frustrated. This doctrinal mismatch has produced inconsistent and morally uncomfortable outcomes in cases where the courts have struggled to articulate why certain losses are recoverable while others are not. Against this background, Bell’s conception of an “absolute right to the safety of his person” in paragraph 2028 of his *Principles*², and his

¹ KM Norrie, ‘The Actio Iniuriarum in Scots Law: Romantic Romanism or Tool for Today?’ (2013) 17 *Edinburgh Law Review* 1, 1.

² GJ Bell, *Principles of the Law of Scotland* (4th edn, 1839; KG Reid ed, Edinburgh Legal Education Trust 2010) at [2028].

account of reparation for affront and insult in paragraph 2032³, offer a strikingly different foundation for analysing autonomy-based wrongs. Bell's framework, rooted in the Roman *actio iniuriarum*, treats affronts to personality, dignity, and bodily integrity as actionable in themselves, without requiring proof of patrimonial loss. This essay examines the extent to which Bell's *iniuria*-based model provides a more coherent and adequate doctrinal basis than negligence for vindicating reproductive autonomy in Scots law. It argues that Bell's approach, properly understood within its civilian context, aligns more closely with the nature of the harm suffered in wrongful pregnancy and wrongful birth, and that an adapted *iniuria*-based delict could resolve many of the conceptual difficulties that currently plague the negligence approach.

Bell's absolute right to personal safety and *iniuria*

At paragraph 2028 of his *Principles*, Bell states that there is an "absolute right to the safety of his person" under the law.⁴ Slightly later, at paragraph 2032, he briefly but importantly refers to a delict of "insult".⁵ It is important to understand how the idea of a delict of insult was not Bell's invention but a much older civilian tradition. The Roman *actio iniuriarum*, originating in the XII Tables, recognised a delict of *iniuria*, which was a wrongful affront to personality, that long pre-dates Bell's formulation. To understand Bell's formulation therefore requires situating them within the broader civilian framework from which Scots law historically developed. That is not to say however that Roman law is authoritative in Scots law but instead suggestive of how to understand the more complex intricacies of modern Scots law. Zimmerman describes how the *actio iniuriarum* was "a complex and intriguing concept" as this complexity is central to its relevance for modern autonomy-based wrongs.⁶ This is because the action focused on: intentional or "contumelious" affronts; vindication of personality; *solatium*; and a more general sense of autonomy, dignity, and bodily integrity.⁷ Nicholas reinforces this point when he observes that "if it is to be translated by a single English word, "insult" or "outrage" may serve, but neither suggests the full width of the Roman idea, which embraced any contumelious disregard of another's rights or personality."⁸ Zimmerman's and Nicholas' academic framing is important as it emphasise that *iniuria* was fundamentally about affronts to personality and not economic loss. Zimmerman further argues that the *actio iniuriarum* "afforded a strong and efficient protection against injuries to immaterial interests, and in particular against insulting behaviour of any kind."⁹ This is because the *actio iniuriarum* did not focus on economic loss, which the analysis of cases below will show to have been problematic for the negligence approach, but instead had a

³ Ibid at [2032].

⁴ Ibid at [2028].

⁵ Ibid at [2032].

⁶ R Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (Oxford University Press 1990) 1050.

⁷ Ibid 1050-1053.

⁸ Barry Nicholas, *An Introduction to Roman Law* (Oxford University Press 1975) 216.

⁹ R Zimmerman, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (Oxford University Press 1990) 1062.

focus on the affront and insult to the person. This means that practically even if there was no measurable loss to the person to whom the insult was afflicted, the fact that was an affront to the individual that was “contumelious” meant that there was a remedy in law. Therefore, as Bell briefly highlights, there is already a vast network within Scots law from its origins in Roman law that can protect autonomy. This is still true despite the increase of the anglicisation of Scots law in the last 300 years or so from English law which focuses more heavily on concepts of negligence.¹⁰ Ainslie supports Zimmerman’s argument as he contends “the concept of *dignitas* is capable of evolution” meaning that the Roman concern with honour and reputation can readily accommodate modern interests such as privacy and autonomy.¹¹ Ainslie also asserts that “it is from the synecdochical nature of *dignitas* that the *actio iniuriarum* in Scotland draws its relatively greater flexibility compared to the English law of torts.”¹² This is doctrinally significant as *dignitas* in Scots law operates as both a general marker of personal worth but also as a label for specific dignitary interests such as autonomy. Therefore, both Ainslie and Zimmerman demonstrate how a distinct personality rights’ based protection of autonomy can be born out of the *actio iniuriarum* in Scots law that is distinct from the traditional negligence framework but that is far better suited to vindicating reproductive autonomy. Therefore, Bell’s references to personal safety and insult are not isolated academic curiosities but instead indicators of an old doctrinal lineage that can support a modern autonomy-based delict.

The conceptual suitability of the *actio iniuriarum* in autonomy case

In modern Scots law, the law of negligence dominates. The law of negligence is distinct from the *iniuria* based framework as it does not focus on the mere fact that there has been an affront to an individual but instead on things such as: a duty of care; legal and factual causation; remoteness as well as a multitude of other factors that make matters far more complex than they need to be when dealing with an autonomy-based action.¹³ However, as Reid critically points out “if respect for autonomy, including reproductive autonomy, has become established as the “cornerstone of modern medical jurisprudence”, the delictual framework by which it is supported is not yet entirely secure.”¹⁴ This can be seen by the fact that in both Scots and English law this area is heavily plagued with inconsistencies, a lack of secure legal reasoning and personal issues of morality being embedded by male judges, as can be seen prominently in cases such as *McFarlane*¹⁵ and *Parkinson*¹⁶ which will be analysed in depth further on. The purpose of this paragraph is to illustrate theoretically why

¹⁰ J Ainslie, ‘Intrusion of Privacy and the Actio Iniuriarum’ (2023) 34 *Juridical Review* 139, 4.

¹¹ Ibid, 7.

¹² Ibid, 10.

¹³ E C Reid, ‘Duty of Care’ in *The Law of Delict in Scotland* (Edinburgh University Press 2022).

¹⁴ E C Reid, ‘Interference with Bodily and Mental Integrity’ in *The Law of Delict in Scotland* (Edinburgh University Press 2022), 554, quoting G T Laurie and others, *Mason and McCall Smith’s Law and Medical Ethics* (11th edn, Oxford University Press 2019) para 9.02; see also *Chester v Afshar* [2004] UKHL 41, [2005] 1 AC 134 at [92] (Lord Walker).

¹⁵ *McFarlane v Tayside Health Board* 2000 SLT 154.

¹⁶ *Parkinson v St James & Seacroft University Hospital NHS Trust* [2002] QB 266.

the law of negligence does not work and why the Roman based delict of insult is perhaps more suitable. Firstly, the main reason why the law of negligence struggles to comprehend the true extent of the wrong caused to women from wrongful conception and wrongful pregnancy is that it struggles to comprehend (or even allow) pregnancy to be considered a “harm”.¹⁷ This is mainly because pregnancy is a natural process and a natural process cannot be considered harmful. Secondly, the modern law of negligence exhibits considerable conceptual convolution, which obliges decision-makers to engage with an increasingly elaborate series of thresholds and substantive inquiries before liability can be established. For example, a lot of debate around wrongful conception and wrongful birth issues rest on issues of pure economic loss, remoteness, as well as a lot of confusion around factual and legal causation.¹⁸ However, whilst these mechanical issues undermine negligence’s capacity to address the legal questions of reproductive autonomy, it is nevertheless confusing that a doctrine which ought to be able to do so fails in practice. For example, a lot of remoteness and causation issues were completely modified in *Fairchild v Glenhaven Funeral Services Ltd*, where multiple employers were found vicariously liable for mesothelioma even though it could not be proved which of the employers caused the harm in the first place.¹⁹ Therefore it is hard to see why ordinary maintenance costs for the raising of a child that was never supposed to be conceived or born but for the negligence of the doctor who most definitely caused the “harm” cannot be recovered. However, this still does not help with the fundamental issue of how pregnancy is not accepted as a “harm” in the eyes of the law. Therefore, looking towards Bell’s *Principles* on *iniuria* in his reference to the Roman *actio iniuriarum* is quite helpful.²⁰ This is largely attributable to the fact that the *actio iniuriarum* avoids the layers of doctrinal and procedural elaboration that have accumulated around the law of negligence. This is because a loss or “harm” does not need to be found but instead the loss of the right to autonomy. Therefore, the issue of economic loss for example would be redundant.

However, whilst there is a lot of reasons for why this method of sticking instead to a rights-based autonomy delict would be very useful there are several theoretical issues at play still. Firstly, in Scotland there is a law of delict and not delicts as “Scots lawyers have always been fond of claiming that their system is one derived from principle rather than practice”²¹ unlike the English system where there are a law or torts. This is because the law of delict developed from the Civilian tradition where there was a unified branch of obligations.²² On the other hand, the English system grew out of the medieval writ system where the case at hand would

¹⁷ See for example *McFarlane v Tayside Health Board* 2000 SLT 154, 4; *McLelland v Greater Glasgow Health Board*, 2001 S.L.T. 446, 2.

¹⁸ See for example *McFarlane v Tayside Health Board*; *Meadows v Khan* [2021] UKSC 21; *Parkinson v St James & Seacroft University Hospital NHS Trust* [2002] QB 266.

¹⁹ *Fairchild v Glenhaven Funeral Services Ltd* [2002] UKHL 22 at [38] per Lord Nicholls of Birkenhead.

²⁰ GJ Bell, *Principles of the Law of Scotland* (4th edn, 1839; KG Reid ed, Edinburgh Legal Education Trust 2010) at [2032].

²¹ K M Norrie, ‘The Actio Iniuriarum in Scots Law: Romantic Romanism or Tool for Today?’ (2013) 17 *Edinburgh Law Review* 1, 1.

²² K M Norrie, ‘The Actio Iniuriarum in Scots Law: Romantic Romanism or Tool for Today?’ (2013) 17 *Edinburgh Law Review* 1, 1–3.

need to fit into a distinct tort which had its own rules and defences that were distinct from the next.²³ Therefore accepting a separate and distinct delict of an invasion of autonomy would clash with this fundamental picture that Scottish system has. While this may seem quite marginal however a lot of scholars have spent many hours arguing why a law of delict (singular) is far superior, which may have some merit to it when one considers how the tort of trespass and the tort of negligence is continuously muddled in English law in medical negligence cases, as will be analysed further on.²⁴

The modern use of the *actio iniuriarum* in South Africa

Ainslie importantly points out that “Reid considers that the *actio iniuriarum* lacks a fully developed jurisprudence of the kind that exists in South Africa. The relative paucity of Scots material has therefore prevented the adaptation of the *actio iniuriarum* to the modern social realities that it is able to accommodate in South African law.”²⁵ Therefore perhaps the issues addressed at the beginning of this paper in how there are barriers for the *actio iniuriarum* in Scots law is much simpler than initially thought. In South Africa they too, like Scotland, draw on Civilian traditions in their equivalent law of delict. However, the *actio iniuriarum* has had a more concrete footing in South Africa than in Scotland as shown by Zimmerman²⁶. This had led the law around the *actio iniuriarum* in South Africa to be far more developed to the modern age in comparison. For example, in South Africa, whilst the *actio iniuriarum* protects a wide range of personality interests such as dignity, bodily integrity and privacy, it also protects more modern interests such as misuse of images and emotional distress. This was seen in the case of *Grütter v Lombard* where it was found that an unauthorised use of a person’s name for commercial advantage was an *iniuria* and that features that identify a person are protected personality rights under the concept of *dignitas*.²⁷ Furthermore, importantly in this case O’Reagan’s judgement from *Khumalo v Holomisa* was used in the decision which stated “The right to privacy entrenched in s 14 of the Constitution, recognises that human beings have a right to a sphere of intimacy and autonomy that should be protected from invasion. This right serves to foster human dignity. No sharp lines then can be drawn between reputation, *dignitas* and privacy in giving effect to the value of human dignity in our Constitution.”²⁸ This not only shows that the concept of *dignitas* is a broad idea that encapsulates other modern principles as Ainslie also highlighted²⁹ but that autonomy is heavily included in this too. This demonstrates how the *actio iniuriarum* can be adapted and

²³ LawStories, ‘Development of Law of Torts in England and India’

<https://lawstories.in/subjects/torts/notes/development-of-law-of-torts-in-england-and-india?utm_source=copilot.com> (accessed 27 July 2026).

²⁴ For example see *Sidaway v Board of Governors of the Bethlem Royal Hospital* [1985] A.C. 871; *F v West Berkshire Health Authority* [1990] 2 AC 1.

²⁵ J Ainslie, ‘Intrusion of Privacy and the Actio Iniuriarum’ (2023) 34 *Juridical Review* 139, 6.

²⁶ R Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (Oxford University Press 1990).

²⁷ *Grütter v Lombard* [2007] SCA 2 (RSA).

²⁸ *Khumalo v Holomisa* [2002] ZACC 12 at [27].

²⁹ J Ainslie, n.12.

developed to appropriately deal with related issues that were not within the minds of the Romans.

Another important point is how in South Africa the *actio iniuriarum* framework works independently to the law of negligence. This development is possible because South Africa retains the Roman grammar that distinguishes Aquilian negligence from *iniuria*. Therefore this suggests that the *actio iniuriarum* could be used in a similar way in Scotland. However, Ainslie's analysis makes clear that the obstacles facing the *actio iniuriarum* in Scots law are historical rather than conceptual. As he argues "the *actio iniuriarum*, if it had not been neglected from the Victorian period onwards, could have easily risen to the challenge of protecting the values contained within Article 8 of the ECHR".³⁰ As previously shown, South Africa provides a compelling illustration of what such development might have looked like. Drawing on the same Roman-Dutch foundations as Scotland, South African law has preserved a modern, flexible *actio iniuriarum* capable of protecting a wide range of personality interests. However, it is important to remember that the South African doctrine should not be transplanted but instead adapted to suit the Scottish regime as there are still many differences between the two's delictual frameworks despite their joint origins. For example, Fagan highlights how the law of negligence operates in South Africa would "baffle most Scottish and English legal scholars".³¹ Furthermore South Africa has a written Constitution, which makes the analysis of the idea of the *actio iniuriarum* easier in their legal sphere than ours due to more conceptual certainty. However, although the South African jurisprudence demonstrates how a modern *actio iniuriarum* can evolve to protect autonomy, the comparison ought not to imply that Scots law lacks the conceptual resources to do the something similar. For example, the Human Rights Act 1998 now provides a written constitutional component with Article 8 of the ECHR being incorporated.³² As Ainslie shows this incorporation has increasingly been interpreted as protecting personal autonomy, bodily integrity, and decisional privacy.³³ This shift doctrinal shift is very visible in *Chester v Afshar*³⁴ as well as *Montgomery v Lanarkshire Health Board*³⁵, which will have a more in depth analysis further on. Therefore an adapted *actio iniuriarum* framework could provide a far more coherent doctrinal basis for autonomy based wrongs than the current negligence based framework but it must not look identical to that in South Africa for it to fit into Scotland's legal framework.

The change of tide with *McFarlane v Tayside Health Board*

³⁰ J Ainslie, 'Intrusion of Privacy and the Actio Iniuriarum' (2023) 34 *Juridical Review* 139, 6.

³¹ R Zimmerman, D Visser, and K Reid. (eds.) *Mixed Legal Systems in Comparative Perspective – Property and Obligations in Scotland and South Africa* (Oxford: Oxford University Press, 2005), 505.

³² European Convention on Human Rights (adopted 3 September 1953).

³³ J Ainslie, 'Intrusion of Privacy and the Actio Iniuriarum' (2023) 34 *Juridical Review* 139, 10.

³⁴ *Chester v Afshar* [2005] 1 A.C. 134.

³⁵ *Montgomery v Lanarkshire Health Board* [2015] SLT 189.

*McFarlane v Tayside Health Board*³⁶ is the pivotal Scottish authority that generated the doctrinal mismatch now characterising wrongful conception and wrongful birth claims. In this case the House of Lords overturned the Inner House's earlier position that ordinary maintenance costs were recoverable and instead reclassifying them as irrecoverable pure economic loss. This reclassification has been widely criticised because it lacks both logical coherence and doctrinal justification as ordinary maintenance costs arise directly and foreseeably from the negligent failure to prevent conception, yet the court treated them as conceptually remote. Hoyano captures this argument succinctly when she argues "there was no attempt to offer a cogent conceptual reason for the cut-off. It is difficult to see why there is not an equally strong nexus between the physical harm and the need to feed and clothe the resulting child."³⁷ Hoyano's critique here exposes the central flaw in *McFarlane*³⁸ as the court's reasoning rests on an arbitrary distinction between losses that are intimately connected and those the court chooses to exclude. The instability of this legal reasoning seemed encased in a fictional public opinion poll on the London underground as relied on by Lord Steyn.³⁹ This idea makes very little sense as legal decisions are entrusted to judges and not to the general public and furthermore there are very few if not no other delictual cases where the whole decision rests on fictional underground commuters. Therefore it is strange as to why this decision was decided so. Lord Steyn argues continuously how due to distributive justice, maintenance costs for the upbringing due to wrongful conception cannot be recovered.⁴⁰ Furthermore, the fact that the route of negligence law is being followed means that the type of harm needs to be categorised which has led to a further incoherent distinction between wrongful birth and wrongful conception. Mason argues that "there is some confusion as to what is the precise type of action in each case. The seeds of doubt were, to an extent, sown in *McFarlane* itself where, it will be remembered, Lord Steyn referred to the action as being one for "wrongful birth" and Lord Clyde as one for "wrongful conception."⁴¹ Therefore this also suggests that simply having a modern action of the *actio iniuriarum* would resolve the primary confusion as there would be one action of an invasion of one's autonomy and therefore prevent the "piecemeal and arbitrary evolution of rules that is a defining characteristic of the common law".⁴² However, while some may argue that there should be a clear legal distinction between someone who wanted to be pregnant and one who did not, it must be argued overall that the loss of autonomy is the greater issue at hand and that this arguably minute distinction in the grand scheme of things wastes valuable time and analysis from judges.

³⁶ *McFarlane v Tayside Health Board* [2000] S.L.T 154.

³⁷ Hoyano LCH, 'Misconceptions about Wrongful Conception' (2002) 65 *Modern Law Review* 883, 884.

³⁸ *McFarlane v Tayside Health Board* [2000] S.L.T 154.

³⁹ *McFarlane v Tayside Health Board* [2000] S.L.T 154, 14.

⁴⁰ *McFarlane v Tayside Health Board* [2000] S.L.T 154, 14-20.

⁴¹ JK Mason, 'Wrongful Pregnancy, Wrongful Birth and Wrongful Terminology' (2002) 6 *Edinburgh Law Review* 46, 2.

⁴² KM Norrie, 'The Actio Iniuriarum in Scots Law: Romantic Romanism or Tool for Today?' (2013) 17 *Edinburgh Law Review* 1, 1.

The flawed legal reasoning in *McFarlane*⁴³ was replicated further in *McLelland v Greater Glasgow Health Board*⁴⁴, which was a wrongful birth case that further exposed the doctrinal awkwardness of analysing reproductive autonomy through negligence and pure economic loss. *McLelland* held that disability-related costs were recoverable, whereas ordinary maintenance costs were not.⁴⁵ This distinction however further shows the “piecemeal and arbitrary evolution”⁴⁶ as logically both categories of cost arise directly from the negligent failure to prevent pregnancy. Lord Morison’s dissent makes this point clear as he describes the distinction made as “unfair, unjust and unreasonable”.⁴⁷ His reasoning highlights the inadequacy of the negligence framework, which forces courts to draw morally uncomfortable and legally incoherent lines between “normal” and “disabled” children. Therefore *McLelland*⁴⁸ exposes the limits of the law of negligence in cases such as these and shows how these artificial distinctions can create morally questionable outcomes for those who are most vulnerable.

However, the most crucial theoretical issue in applying the *actio iniuriarum* in these cases is that traditionally the harm needed to have been intentional as Zimmerman continuously points out.⁴⁹ However, Zimmerman does make a concession that it could have been possible also that “considering the context within which the phrase appears, it is not necessarily synonymous with *animus iniuriandi* but may simply have been used to indicate that the offender had to have been able to form a legally relevant will; since unless a person is able to distinguish between good and evil, the results of his actions are not attributable to him in law.”⁵⁰ Therefore perhaps reckless intent would have been enough or as Ainslie analyses the issue as “the contumelious mind, as the *Institutes* make clear, is essentially a hubristic one. What could be more excessively self-confident than the belief that one’s own objectives and priorities are too important to have proper regard to the *dignitas* of others?”⁵¹ This shows that modern scholarship suggests that intention in this context perhaps does not refer to a desire to cause harm, but to the deliberate performance of an act that disregards a protected interest. Therefore, this distinction allows intention to be separated from motive as it need not be shown that the doctor’s purpose was to deprive the patient of their autonomy, but rather show that the doctor acted in a way that disregarded that autonomy. Therefore perhaps a doctor believing that a patient should not have the proper right to decide whether they would want to have a caesarean section or not would qualify.⁵² Therefore, although this does not fully resolve the conceptual tension between *iniuria* and medical negligence, it nonetheless shows that the *actio iniuriarum* can accommodate autonomy-based wrongs without requiring proof

⁴³ *McFarlane v Tayside Health Board* [2000] S.L.T. 154.

⁴⁴ *McLelland v Greater Glasgow Health Board* [2001] S.L.T. 446.

⁴⁵ *Ibid.*

⁴⁶ KM Norrie, ‘The Actio Iniuriarum in Scots Law: Romantic Romanism or Tool for Today?’ (2013) 17 *Edinburgh Law Review* 1, 1.

⁴⁷ *McLelland v Greater Glasgow Health Board* [2001] S.L.T. 446 at [8] per Lord Morison.

⁴⁸ *McLelland v Greater Glasgow Health Board* [2001] S.L.T. 446.

⁴⁹ R Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (Oxford University Press 1990), 1061.

⁵⁰ *Ibid.*, 1060.

⁵¹ J Ainslie, ‘Intrusion of Privacy and the Actio Iniuriarum’ (2023) 34 *Juridical Review* 139, 9.

⁵² *Montgomery v Lanarkshire Health Board* [2015] S.L.T. 189.

of malice as the wrong ultimately lies in the affront to personality and not in the infliction of physical harm.

The judicial breakthroughs by Lady Hale

However, although both *McFarlane*⁵³ and *McLelland*⁵⁴ expose significant cracks in the way Scots law has approached reproductive autonomy, *Montgomery v Lanarkshire Health Board*⁵⁵ stands apart, mainly because of the judgement of Lady Hale, who is the only woman in the Supreme Court bench at the time. This case not only highlights important issues regarding women's reproductive autonomy but also the broader argument of informed consent v medical paternalism. For example, in the joint judgement of Lord Kerr and Lord Reid they argue for informed consent to prevail over the concept of medical paternalism.⁵⁶ This shows a wider trend in medical law of an overwhelming idea of patient autonomy developing. Therefore, this general idea helps support the more specific issue of women's reproductive autonomy. Lady Hale however goes further with this and argues "the issue is not whether enough information was given to ensure consent to the procedure, but whether there was enough information given so that the doctor was not acting negligently and giving due protection to the patient's right of autonomy."⁵⁷ This shift is doctrinally significant as Lady Hale treats autonomy as the primary legal interest at stake and not merely as factor within the duty of care analysis. Her further observation that "gone are the days when it was thought that, on becoming pregnant, a woman lost, not only her capacity, but also her right to act as a genuinely autonomous human being"⁵⁸ underscores the extent to which pregnancy engages fundamental personality interests. Lady Hale therefore is the only member of the court who approaches *Montgomery*⁵⁹ through a rights-based lens rather than through negligence or economic-loss categories. Lady Hale's language closely resembles Bell's conception of affronts to personal safety and dignity, which lead to an entitlement to *solatium* irrespective of patrimonial loss. Lady Hale is the only judge in the judgement that completely emphasises the importance of looking at this case from a rights-based framework instead of a negligence or pure economic loss analysis. Therefore, Lady Hale's reasoning exposes the core problem with relying on negligence in that autonomy-based harms are forced into distorted categories such as "pain and suffering" or "economic loss", which ultimately leaves the true injury of the invasion of reproductive autonomy legally unrecognised. *Montgomery*⁶⁰ therefore provides powerful support for the argument that Scots law requires a personality-rights

⁵³ *McFarlane v Tayside Health Board* [2000] SLT 154.

⁵⁴ *McLelland v Greater Glasgow Health Board* [2001] S.L.T 446.

⁵⁵ *Montgomery v Lanarkshire Health Board* [2015] SLT 189.

⁵⁶ *Ibid* at [87] "The test of materiality is whether, in the circumstances of the particular case, a reasonable person in the patient's position would be likely to attach significance to the risk".

⁵⁷ *Ibid* at [108].

⁵⁸ *Ibid* at [116].

⁵⁹ *Montgomery v Lanarkshire Health Board* [2015] S.L.T 189.

⁶⁰ *Montgomery v Lanarkshire Health Board* [2015] SLT 189.

framework, such as an adapted *actio iniuriarum*, to vindicate reproductive autonomy coherently.

It is important also to recognise how Lady Hale recognised the same doctrinal mismatch in the English case *Parkinson v St James and Seacroft University Hospital NHS Trust*.⁶¹ *Parkinson* is an important English case as the Court of Appeal held that the extra costs relating to the upbringing of a disabled child can be recovered in wrongful conception.⁶² Here Lady Hale provides an autonomy focused reasoning that shows the issues with the judgements of similar cases thus far. This can be seen when she highlights “from the moment a woman conceives, profound physical changes take place in her body...Along with these physical and psychological consequences goes a severe curtailment of personal autonomy.”⁶³ Lady Hale’s reasoning was completely distinct from the reasoning given by the other all-male judges on the bench. For example, Lord Brooke concluded that “an award of compensation which is limited to the special upbringing costs associated with rearing a child with a serious disability would be fair, just and reasonable.”⁶⁴ Interestingly, Lord Brooke treated both ordinary maintenance costs and disability-related costs as pure economic loss. This distinction was not due to categorisation but instead one of justification due to being not “fair, just, and reasonable to compensate parents for the ordinary maintenance costs, as shown in *McFarlane*⁶⁵, but it was “fair, just and reasonable” to compensate for the additional costs associated with disability. This reflects a *Caparo*⁶⁶ duty of care analysis, which has been influenced by the professional relationship between the doctor and patient, rather than a new analysis altogether. However, the justification for this type of analysis is given the same distributive justice reasoning and what is considered fair by “the ordinary people” which worryingly echoes Lord Steyn’s problematic judgement in *McFarlane*.⁶⁷ Therefore, this makes it difficult to understand why disability-related costs are not categorised as pure economic loss while ordinary maintenance costs are. It overall appears to be an arbitrary distinction that also leads to damaging logic. Whilst Lady Hale emphasises the purpose of the judgement “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”, there appears to be gaps in logic in the case and the integration of poorly worded past judgements that cause a lot of debate around the merit of this. This is because as most of the judges in this case are determined to analyse through the law of negligence, it forces judges to treat the child’s existence as a cost and to classify that cost. This therefore creates a conceptually incoherent and morally uncomfortable distinctions between “normal” and “disabled” children. For example, Lord Toulson’s reasoning from the case of *Lee v Taunton and*

⁶¹ *Parkinson v St James and Seacroft University Hospital NHS Trust* [2002] Q.B. 266.

⁶² *Parkinson v St James and Seacroft University Hospital NHS Trust* [2002] Q.B. 266.

⁶³ *Parkinson v St James and Seacroft University Hospital NHS Trust* [2002] Q.B. 266 at [64].

⁶⁴ *Parkinson v St James and Seacroft University Hospital NHS Trust* [2002] Q.B. 266 at [50].

⁶⁵ *McFarlane v Tayside Health Board* [2000] S.L.T 154.

⁶⁶ *Caparo Industries Plc v Dickman* [1990] 2 A.C. 605.

⁶⁷ *McFarlane v Tayside Health Board* [2000] SLT 154, 14.

*Somerset NHS Trust*⁶⁸ as well as Lord Millett's from *McFarlane*⁶⁹ are often invoked to illustrate the judicial tendency to treat a healthy baby as a "blessing", which is a characterisation that is not extended to a disabled baby. Therefore, this uncomfortable and unnecessary distinction undervalues the life of a disabled child. Therefore, this shows the importance of looking at these cases through the lens of a rights-based claim of autonomy. Crucially however, this is much easier to transplant into Scots law than English law as the law of delict is distinct in its development from the law of tort as the Roman *actio iniuriarum* cannot be modified into English law. Therefore, Bell's delict of insult and the broader *actio iniuriarum* can accommodate autonomy-based wrongs without forcing courts into the problematic economic categorisations seen in *Parkinson*.⁷⁰ This is particularly because pregnancy has to be framed as an "injury" in English law but not so much in Scots law as its Roman route avoids this tricky conceptual paradox. This can be clearly seen also when reminded that Ainslie argued "it is from the synecdochical nature of *dignitas* that the *actio iniuriarum* in Scotland draws its relatively greater flexibility compared to the English law of torts."⁷¹ Therefore, this route to achieving greater protection for reproductive autonomy rights in Scotland is unique to the UK.

The lessons learnt from an English comparison with trespass to the person

As a point of comparison, a series of English cases in this sphere of medical law reveal how autonomy has been mishandled within negligence and highlight the dangers that Scotland must avoid if it develops a rights-based delict. Importantly, English law already contains a rights-based mechanism capable of protecting autonomy due to the tort of trespass to the person, under which any non-consensual medical treatment is potentially actionable. Yet judges frequently blur trespass with negligence in their analysis, as seen in *F v West Berkshire*, where this case was argued in trespass but the Bolam test was continuously referred to by judges despite this test being specific to negligence law.⁷² This confusion stems from the fact that judges treat negligence and trespass as somewhat interchangeable rather than fundamentally distinct.⁷³ This doctrinal confusion then helps explain why English courts have produced inconsistent and often illogical reasoning in autonomy-related cases. In *Rees v Darlington Memorial Hospital*⁷⁴, the House of Lords denied recovery for the additional costs arising from the claimant's disability following a negligently performed sterilisation yet awarded an unexplained "conventional sum" of £15,000. This arbitrary figure reflected judicial discomfort as the court recognised a wrong but lacked doctrinal tools to remedy it,

⁶⁸ *Lee v Taunton and Somerset NHS Trust* [2001] 1 FLR 419 at [430].

⁶⁹ *Parkinson v St James and Seacroft University Hospital NHS Trust* [2002] Q.B. 266 at [42].

⁷⁰ *Parkinson v St James and Seacroft University Hospital NHS Trust* [2002] Q.B. 266.

⁷¹ J Ainslie, 'Intrusion of Privacy and the Actio Iniuriarum' (2023) 34 *Juridical Review* 139, 10.

⁷² *F v West Berkshire Health Authority* [1990] 2 AC 1.

⁷³ See for example *F v West Berkshire Health Authority* [1990] 2 AC 1; *Sidaway v Board of Governors of the Bethlem Royal Hospital* [1985] A.C. 871.

⁷⁴ *Rees v Darlington Memorial Hospital NHS Trust* [2004] 1 A.C. 309.

despite the tort of trespass to the person being an option as they had confined recovery in *Parkinson*⁷⁵ to disability-related costs alone.

Although not a wrongful conception or wrongful pregnancy case, *Chester v Afshar*⁷⁶ can be compared to *Rees v Darlington*⁷⁷ due to the House of Lords grappling with the same issue of autonomy but in a different medical context. *Chester v Afshar*⁷⁸ is a case that has constantly been misunderstood, and serves its importance by showing why negligence law needs to be a separate sphere from autonomy related issues in medical law. In this case decided by the House of Lords, a neurosurgeon had failed to properly warn a patient about a small risk in her spinal surgery that, even if conducted without negligence, could cause her to develop *cauda equina* syndrome, which is what unfortunately occurred. The judgement is plagued with a lot of conceptual issues to do with the law of negligence as some judges, such as Lord Bingham and Lord Hoffman, treated the issue as factual causation⁷⁹, while other treated it as legal causation via *novus actus interveniens*.⁸⁰ Yet despite these conceptual problems, the court still awarded damages because the patient's autonomy had been denied due to lack of consent. Lord Hoffman's statement that "even though the failure to warn did not cause the patient any damage, it was an affront to her personality and leaves her feeling aggrieved"⁸¹ closely resembles the *actio iniuriarum* to a Scottish lawyer but more resembles the idea behind trespass to the person to English lawyers. This therefore demonstrates judicial willingness to depart from orthodox negligence where autonomy is at stake but also shows how negligence becomes confused with trespass, such as was seen in *F v West Berkshire*⁸² and is a danger that Scotland must avoid if it adopts a rights-based delict. Crucially however, this autonomy-centred reasoning has not been sustained.

In *Meadows v Khan* however, the Supreme Court reverted to a rigid SAAMCO-style scope of duty analysis, whilst insisting that the classification of the loss was irrelevant.⁸³ This approach ignored the mother's reproductive autonomy entirely and reinstated a risk-allocation framework that is inappropriate as it is conceptually incapable of recognising autonomy-based injury. The judgement in *Meadows v Khan*⁸⁴ not only feels doctrinally incoherent due to the rigid stance it takes and how far it departs from the trend in previous case law, such as *Montgomery v Lanarkshire Health Board*⁸⁵, but is also reflective of deeper gender-based assumptions about pregnancy and harm. As Hoyano notes, the House of Lords in *McFarlane*⁸⁶ overturned fifteen years of consistent authority without parliamentary concern, suggesting a broader societal indifference to harms disproportionately affecting

⁷⁵ *Parkinson v St James and Seacroft University Hospital NHS Trust* [2002] Q.B. 266.

⁷⁶ *Chester v Afshar* [2005] 1 A.C. 134.

⁷⁷ *Rees v Darlington Memorial Hospital NHS Trust* [2004] 1 A.C. 309.

⁷⁸ *Chester v Afshar* [2005] 1 A.C. 134.

⁷⁹ *Ibid* at [6] to [10] per Lord Bingham & at [28] to [30] per Lord Hoffman.

⁸⁰ *Ibid* at [60] to [66] per Lord Hope & at [23] to [24] per Lord Steyn & at [90] to [93] per Lord Walker.

⁸¹ *Chester v Afshar* [2005] 1 A.C. 134 at [33]

⁸² *F v West Berkshire Health Authority* [1990] 2 AC 1.

⁸³ *Meadows v Khan* [2021] UKSC 21 at [73] per Lord Burrows.

⁸⁴ *Meadows v Khan* [2021] UKSC 21.

⁸⁵ *Montgomery v Lanarkshire Health Board* [2015] SLT 189.

⁸⁶ *McFarlane v Tayside Health Board* [2000] S.L.T 154.

women.⁸⁷ This therefore suggests that Parliament’s continued silence, despite repeated judicial discomfort from judgements, indicates that reproductive autonomy has been sidelined rather than substantially engaged with like other areas of autonomy in medical law. Therefore, these English cases suggest how negligence produces fragmented, inconsistent, and conceptually strained outcomes when confronted with autonomy-based wrongs. These cases also demonstrate that without a clear *iniuria*-based delict, as suggested by Bell, autonomy risks being submerged within negligence just as it is close to being in England. *Meadows v Khan*⁸⁸ therefore heavily suggests the need for a coherent personality-rights framework in Scots that is also weary of the potential clashes with negligence.

Conclusion

Overall, the analysis throughout this essay demonstrates that the negligence approach in Scots law is structurally ill-equipped to vindicate reproductive autonomy as has led to a “piecemeal and arbitrary evolution of rules”.⁸⁹ The current structure’s insistence on categorising harm, its preoccupation with economic loss, and its doctrinal fragmentation have produced arbitrary distinctions. These distinctions are such as the ones drawn between wrongful conception and wrongful birth, between ordinary disability-related maintenance costs, and between “normal” and “disabled” children as well as mothers, which all lack principled justification. Cases such as *McFarlane v Tayside Health Board*⁹⁰, *McLelland v Greater Glasgow Health Board*⁹¹, *Parkinson v St James and Seacroft University Hospital NHS Trust*⁹², *Rees v Darlington Memorial Hospital NHS Trust*⁹³, and *Meadows v Khan*⁹⁴ reveal a jurisprudence struggling, and often failing, to accommodate autonomy within a framework designed for patrimonial and physical injury. However, across these cases a troubling pattern emerges. Lady Hale seems to be the most prominent judge that properly addresses the main autonomy issue at hand and frames it as such. Her reasoning in *Montgomery v Lanarkshire Health Board*⁹⁵ and *Parkinson v St James and Seacroft University Hospital NHS Trust*⁹⁶ identifies the core injury as an invasion of reproductive autonomy, yet her approach is consistently overlooked and instead the negligence framework is continuously used. The fact that Lady Hale’s judgements stand out not merely for their clarity but for their isolation suggests an underlying gendered dynamic in which reproductive autonomy claims are most coherently understood when analysed by the one judge whose perspective is shaped by lived experiences of the female reproductive body, yet her doctrinal

⁸⁷ LCH Hoyano, ‘Misconceptions about Wrongful Conception’ (2002) 65 *Modern Law Review* 883, 890.

⁸⁸ *Meadows v Khan* [2021] UKSC 21.

⁸⁹ KM Norrie, ‘The Actio Injuriarum in Scots Law: Romantic Romanism or Tool for Today?’ (2013) 17 *Edinburgh Law Review* 1, 1.

⁹⁰ [2000] S.L.T 154.

⁹¹ [2001] S.L.T 466.

⁹² [2002] Q.B. 266.

⁹³ [2004] 1 A.C. 309.

⁹⁴ [2021] UKSC 21.

⁹⁵ [2015] S.L.T 189.

⁹⁶ *Parkinson*, n.92.

insights have not been adopted by the courts more broadly or embedded in legislation by Parliament. This marginalisation is particularly stark when contrasted with *Meadows v Khan*⁹⁷, where the Supreme Court declined to extend autonomy-based reasoning despite *Montgomery*'s⁹⁸ clear doctrinal trajectory. These patterns cannot be dismissed as mere doctrinal missteps. They instead reflect a deeper structural problem: negligence, shaped historically by male judges and male-centred assumptions about harm, is ill-suited to recognising violations of reproductive autonomy. The repeated judicial discomfort with acknowledging pregnancy as a harm, the insistence on treating children as economic burdens to be categorised, and the reliance on distributive-justice reasoning grounded in imagined "ordinary people" all point to a framework that has never been designed to take women's autonomy seriously. By contrast, Bell's conception of an absolute right to personal safety, and his recognition of *solatium* for affront and insult, draw upon a civilian tradition in which personality interests are directly protected.⁹⁹ The Roman *actio iniuriarum* provides a doctrinal model that treats the invasion of autonomy as the injury itself, without forcing courts into the distorting categories of negligence. Importantly, South African law demonstrates how the *actio iniuriarum* can evolve into a modern, flexible, autonomy-protecting delict. This stands in stark contrast to the "piecemeal and arbitrary evolution of rules" characteristic of English tort law that are also increasingly visible in Scottish negligence jurisprudence.¹⁰⁰ The South African sphere shows that *iniuria* is not a romantic relic but a practical, principled tool capable of addressing modern personality-based harms. While the *iniuria* framework requires careful adaptation, particularly regarding intention, its underlying principles align far more closely with the nature of reproductive autonomy violations than negligence ever has. Bell's *Principles* therefore offer not merely historical insight but a viable doctrinal foundation for a contemporary autonomy-based delict in Scots law. Adopting such a framework would bring coherence, principled reasoning, and moral clarity to an area of law long marked by conceptual instability, gendered blind spots, and judicial discomfort. In this sense, Bell's *iniuria*-based model provides a more adequate, intellectually defensible, and socially responsive basis for vindicating reproductive autonomy in cases of wrongful pregnancy and wrongful birth.

Words: 5,808

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