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RESEARCH ARTICLE

Is 'conversion therapy' tortious?

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Abstract
So-called 'conversion therapy' involves therapeutic attempts to change an individual's sexual orientation or gender identity. It is widely considered to be harmful to sexual minorities and there have been calls for it to be banned in the UK. In this paper, we examine whether victims of the practice could bring tort claims against 'therapists' for mental harm. Focusing on talking therapies, we assess tort doctrine in the law of negligence, the rule in *Wilkinson v Downton*, the Protection from Harassment Act 1997 and deceit. We conclude that while some forms of conversion therapy will be tortious, others will not and so this area of law may fail to assist many victims of the practice.

Keywords: torts; health; LGBT+ rights; negligence; conversion therapy

'Why is a marriage counsellor telling my son how to be straight?'[1]

Introduction

Notwithstanding moves towards greater equality for gay people, homosexuality is still widely stigmatised.[2] Hate crimes based on sexual orientation or transgender identity are increasing in the UK.[3] Given the privileges that heterosexuality attracts and the continued oppression of LGBT+ (lesbian, gay, bisexual and transgender) people, some individuals attracted to the same sex may wish to become 'straight'. Numerous motivations will drive this desire, such as fear of rejection by their family or religious community, or a wish to be part of the majority.[4] One method of attempting to do this is through so-called 'conversion therapy'. This is the 'umbrella term for a type of talking therapy or activity which attempts to change sexual orientation or reduce attraction to others of the same sex'.[5] Studies have described consumers of conversion therapies as being 'plagued by serious psychological and

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[1]G Conly *Boy Erased* (London: William Collins, 2018) p 326.

[2]See R Booth 'Acceptance of gay sex in decline in UK for first time since Aids crisis' (*The Guardian*, 11 July 2019) https://www.theguardian.com/society/2019/jul/11/acceptance-gay-sex-decline-uk-first-time-since-aids-crisis. This and all other web links were last accessed on 18 May 2021.

[3]Home Office *Hate Crime, England and Wales, 2018/2019* (Home Office, 2019) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/839172/hate-crime-1819-hosb2419.pdf.

[4]TF Murphy 'The ethics of conversion therapy' (1991) 5 Bioethics 123 at 133.

[5]UKCP et al *Memorandum on Conversion Therapy in the UK* Version 2 (October 2017) https://www.psychotherapy.org.uk/media/cptnc5qm/mou2-reva_0421_web.pdf. See also UN General Assembly *Practices of So-Called 'Conversion Therapy': Report of the Independent Expert on Protection Against Violence and Discrimination Based on Sexual Orientation and Gender Identity*, 1 May 2020, A/HRC/44/53 at [17] https://undocs.org/A/HRC/44/53.

interpersonal problems during the therapy and after its termination'.[6] They have reported depression, suicide ideation and attempts, damaged self-esteem, intrusive thoughts, eating disorders and damaged relationships.[7] Attempts to 'cure' LGBT+ people are now opposed by all leading medical, regulatory and counselling bodies in the UK.[8] A memorandum of understanding signed by leading mental health bodies and the NHS in 2017 describes conversion therapy as unethical and harmful.[9] Many countries have limited or prohibited the practice.[10] There have been plans to ban conversion therapy in the UK but, so far, none have been implemented.[11]

In this paper, we examine whether tort law could provide redress to victims of this practice. We will demonstrate that while some forms of conversion therapy will be contrary to tort doctrine, others will not and so many victims will be unable to claim. While there has been some academic discussion in the USA concerning litigation against conversion therapists,[12] there has been no such analysis of English law. In addition to being of academic interest, shedding light on the lacunas in the law's application to this social problem will be of practical significance to those hoping to sue conversion therapists or to reform the law in this area.

One might be tempted to question whether this is merely a historic problem that, at most, only affects a small minority of people in the UK. Such a critique would be misguided. There is no evidence that conversion therapy is a thing of the past in the UK, even if it now mainly takes place outside of the psychiatric mainstream.[13] Organisations such as the CORE Issues Trust (their slogan: 'Challenging Gender Confusion; Upholding Science and Conscience') openly advertise the benefits of 'change oriented therapy' on their website.[14] In Scotland, a Roman Catholic group called Courage International, which 'offers pastoral support to men and women experiencing same-sex attractions who have chosen to live a chaste life',[15] was recently accused of offering conversion therapy.[16]

[6]A Shidlo and M Schroeder 'Changing sexual orientation: a consumers' report' (2002) 33 Prof Psychol Res Pr 249 at 254.

[7]Ibid, at 254–255.

[8]UKCP et al, above n 5.

[9]This point is made in the 2017 Memorandum of Understanding on Conversion Therapy in the UK, which is signed, among others, by NHS England, NHS Scotland, the British Psychological Society, the Royal College of General Practitioners, the British Psychoanalytic Council (ibid at [4] and [6]).

[10]See R Savage 'Albania psychologists banned from conducting gay "conversion therapy"' *Thomson Reuters* (*Foundation News*, 18 May 2020) https://news.trust.org/item/20200518134805-jc0ht; Affirmation of Sexual Orientation, Gender Identity and Gender Expression Act 2016 (Act No LV of 2016) (Malta); Act to Protect Against Conversion Treatments 2020 (Germany); https://www.lgbtmap.org/equality-maps/conversion_therapy (USA); The Affirming Sexual Orientation and Gender Identity Act (Bill 77) (Ontario); the Sexual Orientation and Gender Identity Protection Act 2018 (Novia Scotia); 'Canada presents bill banning conversion therapy' (*BBC*, 9 March 2020) https://www.bbc.co.uk/news/world-us-canada-51773586; ch 5B of the Health Legislation Amendment Act 2020 (Queensland) https://www.legislation.qld.gov.au/view/pdf/bill.first/bill-2019-069.

[11]See Government Equalities Office *LGBT Action Plan: Improving the Lives of Lesbian, Gay, Bisexual and Transgender People* (GEO 2018) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/721367/GEO-LGBT-Action-Plan.pdf, p 2; the Counsellors and Psychotherapists (Regulation) and Conversion Therapy Bill 2017–19 (lost when parliament was prorogued); and J Milton 'Boris Johnson is scrapping long-overdue plans to allow trans people to self-ID despite overwhelming public support, report claims' (*Pink News*, 14 June 2020) https://www.pinknews.co.uk/2020/06/14/trans-self-id-uk-boris-johnson-liz-truss-gender-recognition-act-leak-sunday-times/; 'Equalities minister Kemi Badenoch urged to quit over LGBT+ stance' (*BBC News*, 11 March 2021) https://www.bbc.co.uk/news/uk-politics-56362329.

[12]See eg DB Cruz 'Controlling desires: sexual orientation conversion and the limits of knowledge and law' (1999) 72 S Cal L Rev 1297 and LA Gans 'Inverts, perverts and converts: sexual orientation conversion therapy and liability' (1999) 8 BU Pub Int LJ 219.

[13]Conversion therapy could still take place in the mainstream, though. A study, albeit over 10 years' old and also dealing with historic cases, stated that 'Two hundred and twenty-two professionals (17%) reported having treated at least one client/patient in order to reduce or change his or her homosexual or lesbian feelings': see A Bartlett et al 'The response of mental health professionals to clients seeking help to change or redirect same-sex sexual orientation' (2009) 9 BMC Psychiatry 11.

[14]See https://www.core-issues.org/change-oriented-therapy.

[15]See https://couragerc.org/for-individuals/.

[16]N Christie 'Catholic church told to shut down gay conversion therapy groups' (*The Ferret*, 28 June 2020) https://theferret.scot/catholic-church-gay-conversion-therapy-courage/.

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Accurate and up-to-date statistical evidence of its pervasiveness is hard to obtain, but a 2017 survey administered by YouGov on behalf of Stonewall, an LGBT+ charity, found that 5% of British LGBT+ people had been pressured to access services to question or change their sexual orientation.[17] Similarly, the *National LGBT Survey* published by the Government Equalities Office in 2018 found that '5% of respondents had been offered so called "conversion" or "reparative" therapy (but did not take it up) and a further 2% had undergone it'.[18] While we do not claim that the majority of LGBT+ people are subject to conversion therapy, there is reason to believe it still takes place. Besides, the redress of serious damage to people is worthy of tort law's attention, even if only a small number of individuals are affected.

Before we proceed, we should make clear that although conversion therapy can take many forms,[19] the focus here will be on talking therapies that cause mental or emotional harm. And while the emphasis is on attempts to change sexuality, many of our arguments will equally apply to attempts to repress the expression of an individual's gender identity. An attempt to make a transgender person conform to cisgender identities can also be regarded as conversion therapy.[20]

This paper is doctrinal in nature. Claims against conversion therapists may raise interesting theoretical issues but those questions fall outside of our aim here, which is to expose how tort law may be unable to remedy injuries caused by a practice that many will regard as shocking.

In terms of structure, we begin by briefly outlining the ways tort claims may assist claimants. The primary reason is compensation but we will also show how tort claims can serve vindicatory and, more controversially, deterrent purposes. We will then assess whether victims of conversion therapy will be able to bring claims in the law of negligence, the rule in *Wilkinson v Downton*, claims under the Protection from Harassment Act 1997 and the tort of deceit. We conclude by highlighting tort law's limitations in claims against conversion therapists.

1. Claims against 'conversion therapists': can tort law help?

Tort law has a long history of adapting itself to address new social problems,[21] with Allen Beever referring to it as the 'Swiss Army knife of the common law'.[22] There have been suggestions that tort can be utilised to redress gendered harms.[23] Might the same be true of sexuality and the harms associated with conversion therapy? It is worth briefly considering the benefits of bringing litigation against practitioners before exploring the doctrine.

First, tort claims can provide redress to victims by enabling them to obtain compensation. The damage caused by conversion therapy is capable of causing substantial losses to individuals and tort law can remedy this through an award of damages (or an injunction).

[17]Stonewall *LBGT in Britain: Health Report* (Stonewall, 2017) p 5 https://www.stonewall.org.uk/system/files/lgbt_in_britain_health.pdf.

[18]Government Equalities Office *National LGBT Survey Summary Report* (GEO, 2018) p 14 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/722314/GEO-LGBT-Survey-Report.pdf. See also Ozanne Foundation *National Faith and Sexuality Survey Report* (Ozanne Foundation, 2019) at pp 12–17 https://drive.google.com/file/d/1NpGW3PtZTnT21O4PbwuD_rkvk6aG99iv/view.

[19]See UN General Assembly, above n 5, at [18] and [39], which documents a gruesome parade of activities ranging from 'corrective' rape to beatings.

[20]This is reflected in the Queensland legislation in Australia: Public Health Act 2005, s 213F as amended by Health Legislation Amendment Act 2020, s 28.

[21]For example *Rylands v Fletcher* (1868) LR 3 HL 330 could be seen as a response to 'the then novel problem of bursting dams causing significant loss of life and huge amounts of property damage': J Murphy 'Contemporary tort theory and tort law's evolution' (2019) 32 CJLJ 413 at 425. More recently, developments in the law of vicarious liability have been influenced by the problem of child abuse: see P Giliker 'Analysing institutional liability for child sexual abuse in England and Wales and Australia: vicarious liability, non-delegable duties and statutory intervention' (2018) 77 CLJ 506 at 529.

[22]A Beever *Rediscovering the Law of Negligence* (Oxford: Hart Publishing, 2007) p 197.

[23]See J Conaghan 'Gendered harms and the law of tort: remedying (sexual) harassment' (1996) 16 OJLS 407; N Godden-Rasul 'Claims in tort for rape: a valuable remedy or damaging strategy?' (2011) 22 KLJ 157; and T Keren-Paz *Sex Trafficking: A Private Law Response* (Abingdon: Routledge, 2013); M Chamallas 'Feminist legal theory and tort law' in R West and CG Bowman *Research Handbook on Feminist Jurisprudence* (Cheltenham: Edward Elgar, 2019).

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Secondly, tort law can also fulfil a vindicatory purpose.[24] As the authors of *Atiyah's Accidents, Compensation and the Law* state, 'Ordinary litigation, which is almost always conducted in public and which may attract a certain amount of media attention, can also satisfy the desire that wrongdoers be held publicly accountable'.[25] A successful claim would acknowledge that the 'therapist' behaved wrongfully towards the claimant and publicise that conversion therapy is unacceptable.

Finally, the prospect of paying compensation and facing the condemnation of a judge in court may have a deterrent effect and reduce the prevalence of conversion therapy.[26] True, tort law's effectiveness as a deterrent is often disputed.[27] But there is empirical evidence that professionals such as doctors[28] and social workers[29] change their behaviour – ie they adopt 'defensive practices' – as a result of the law of tort.[30] Whatever the limitations of tort's deterrent effect to the average person, tort law (or, at least, the perception of it) in *fact* appears to have a deterrent effect on professionals. Some of the putative defendants in the cases that we are considering will be professionals or quasi-professionals and thus more likely to have some knowledge of tort law's requirements through their professional training. It is therefore not implausible that a successful claim may deter *some* people from providing conversion therapy.

Different theories may see some of these aims as more legitimate than others. For example, corrective justice theories may dismiss appeals to deterrence[31] and Robert Stevens's rights theory has deprecated the 'loss model' of tort law.[32] Our argument below does not rest on adopting a particular theoretical approach. Instead, we merely wish to illustrate some of the different ways in which a tort claim may help the victims (and potential victims) of conversion therapy. Indeed, the reasons discussed above broadly match empirical evidence detailing the reasons why claims are brought: a study of litigation against healthcare professionals found that patients sought compensation but also wanted to hold people accountable, raise standards and prevent similar incidents occurring in the future.[33]

We are now in a position to explore the doctrine.[34] In doing so, we should first state that nothing we say below is inconsistent with the realist view that the law is often indeterminate.[35] This is particularly the case in tort law, which is littered with vague principles. As Jane Stapleton argued,

> It took most of the late 1980s and early 1990s before terms such as 'special relationship', 'just and reasonable', voluntary assumption of responsibility', 'reasonable reliance' and 'proximity' were finally revealed as little more than labels in which a court wrapped up the conclusion it had already reached on other (often unenunciated) grounds.[36]

[24] *Ashley v Chief Constable of Sussex Police* [2008] AC 962 at [22] per Lord Scott.

[25] P Cane and J Goudkamp *Atiyah's Accidents, Compensation and the Law* (Cambridge: Cambridge University Press, 9th edn, 2018) p 403.

[26] *Kuddus v Chief Constable of Leicestershire* [2001] UKHL 29 at [108] per Lord Scott.

[27] See Cane and Goudkamp, above n 25, pp 406–413. For a discussion of the ways in which tort law may have a deterrent effect see J Morgan 'Abolishing personal injuries law? A response to Lord Sumption' (2018) 34 PN 122 at 127–133.

[28] O Ortashi et al 'The practice of defensive medicine among hospital doctors in the United Kingdom' 14 (2013) BMC Med Ethics 42. See also P Case 'The jaded cliché of "defensive medical practice": from magically convincing to empirically (un) convincing' (2020) 36 PN 49.

[29] A Whittaker and T Havard 'Defensive practice as "fear-based" practice: social work's open secret?' (2016) 46 British Journal of Social Work 1158.

[30] For a recent discussion see Case, above n 28.

[31] Beever, above n 22, p 22

[32] R Stevens *Torts and Rights* (Oxford: Oxford University Press, 2007) p 2.

[33] C Vincent et al 'Why do people sue doctors? A study of patients and relatives taking legal action' (1994) 343 The Lancet 1609 at 1612. Similar reasons were given in a more recent study: Y Birks et al *Understanding the Drivers of Litigation in Health Services* (The King's Fund, 2018) p 26.

[34] We have chosen not to focus on the law of contract in this paper. Without terms to the contrary, the standard of reasonable skill and care will be the same as in negligence: M Brazier and E Cave *Medicine, Patients and the Law* (Manchester: Manchester University Press, 2016) p 223; *Thake v Maurice* [1986] QB 644 at 685 per Neill LJ.

[35] B Leiter 'American legal realism' in MP Golding and WA Edmundson (eds) *The Blackwell Guide to the Philosophy of Law and Legal Theory* (Oxford: Blackwell Publishing, 2005) p 51.

[36] J Stapleton 'In restraint of tort' in P Birks (ed) *The Frontiers of Liability* (Oxford: Oxford University Press, 1994) p 85. See also L Green 'The duty problem in negligence cases' (1928) 28 Colum L Rev 1014 at 1018.

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Given this indeterminacy, realists argue that judges often respond to what they think is 'fair' on the facts of the case, as opposed to legal rules.[37] Evidence supports this. Recent empirical studies have demonstrated that extra-legal factors are often influential in Supreme Court cases,[38] and John Murphy has detailed the numerous ad hoc stimuli that have been influential in developing the law of torts, such liability insurance and judicial predilection. He states, 'it is possible to identify a number of leading judicial figures who forged important developments in tort law on the anvil of personal ideological commitments'.[39]

Although this paper focuses on doctrine, rather than non-legal factors, we are alive to the fact that whether LGBT+ people can sue conversion therapists in tort may turn on the views of the judge deciding the case. True, judicial attitudes towards LGBT+ people have generally improved over time.[40] Take the law of defamation. Whereas it was once defamatory to say that a man was gay or a woman was a lesbian,[41] this alone is no longer enough, in itself, to lower the claimant in the estimation of right-thinking members of society generally.[42] But it would be a mistake to think that judges march in lock-step in a progressive direction on the issue of LGBT+ rights. The recent case of *Bell v Tavistock*,[43] makes it more difficult for puberty blockers to be prescribed to teenagers and is arguably detrimental for transgender people.[44] The individual judge's opinion of the correct balance between protecting LGBT+ people and the freedom of defendants to proselytise their religious views or carry out their professional practice may well be determinative.

In exploring the doctrinal hurdles that claimants may face, our focus below is on competent adults. A report from Outright Action International indicated that most of those who have undergone conversion therapy are over the age of 18 (63%) (though the vast majority of people are under the age of 24).[45] We hope to consider children and vulnerable adults in future research. Much of the doctrinal analysis below is applicable to them but they are likely to obtain greater protection from the courts because the inherent *parens patriae* jurisdiction of the High Court, and the Mental Capacity Act 2005 provides further protection for children,[46] vulnerable adults,[47] and incompetent adults[48] by mandating that decisions should be made in their best interests.[49]

2. Negligence

Claimants hoping to sue a conversion therapist in the tort of negligence will need to demonstrate: that they suffered a form of actionable damage; that the defendant owed them a duty of care; that the

[37]Leiter, above n 35, p 50.

[38]C Hanretty *A Court of Specialists* (Oxford: Oxford University Press, 2020) p 255 and RJ Cahill-O'Callaghan 'The influence of personal values on legal judgments' (2013) 40 JL & Soc 596 at 597.

[39]Murphy, above n 21, at 428.

[40]Compare *Knuller v DPP* [1973] AC 435 at 457 per Lord Reid with *HJ (Iran) (FC) v Secretary of State for the Home Department* [2010] UKSC 31 at [78] per Lord Rodger.

[41]See *Kerr v Kennedy* [1942] 1 KB 409 and *Liberace v Daily Mirror Newspapers* (1959) Times, 17 and 18 June. See also L McNamara *Reputation and Defamation* (Oxford: Oxford University Press, 2007) p 207.

[42]*Quilty v Windsor* (1999) SLT 346 at 350 per Lord Kingarth. It may still be defamatory to call someone homosexual if the sting is that they are a hypocrite or lying about their sexuality. See the successful, but unreported, defamation actions of Jason Donovan against *The Face* magazine and Robbie Williams against *The People* newspaper detailed in Vincent Graff 'Gay? Not gay? So what! Why should it be a matter for the libel lawyers?' (*The Independent*, 11 December 2005) https://www.independent.co.uk/news/media/gay-not-gay-so-what-why-should-it-be-a-matter-for-the-libel-lawyers-518915.html.

[43][2020] EWHC 3274 (Admin).

[44]See H Hirst 'The legal rights and wrongs of puberty blocking in England' (2021) CFLQ (forthcoming – kindly sent by personal correspondence).

[45]Outright Action International *Harmful Treatment: The Global Reach of So-Called Conversion Therapy* (Outright Action International 2019) p 42 https://outrightinternational.org/sites/default/files/ConversionFINAL_1.pdf.

[46]*Re W (A Minor)* [1993] Fam 64 at 78 per Lord Donaldson.

[47]*Re SA* [2005] EWHC 2942 and *DL v A Local Authority* [2012] EWCA Civ 253.

[48]Mental Capacity Act 2005, s 1(5).

[49]For some of the doctrinal implications of the law relating to children see E Cave and C Purshouse 'Think of the children: liability for non-disclosure of information post-*Montgomery*' (2020) 28 Med L Rev 270.

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defendant breached this duty; that the breach caused the damage. Let us now assess each of these elements in turn.

(a) Actionable damage

The first hurdle is that claimants must demonstrate that they have suffered some form of actionable damage.[50] Physical injury caused by lobotomies, castration, electro-shock treatment or the side-effects of drugs would constitute actionable damage.[51] Indeed, there are reports of patients who died as a result of the side-effects of drugs used as aversion therapy in the 1950s.[52] This hurdle would be relatively unproblematic for such claimants.

Talking therapies do not necessarily cause physical injury. With mental or emotional harm, the law makes a distinction between 'recognised psychiatric injuries' and 'normal human emotions' such as grief, distress and sorrow.[53] The former can form the gist of an action in negligence whereas the latter are insufficient to ground a claim. Ironically, whether a claimant is suffering from a recognised psychiatric injury is determined by the same manuals – the DSM and the ICD – that once classified homosexuality as a sociopathic personality disorder and sexual perversion alongside paedophilia.[54] There is anecdotal evidence that many of those who have attempted conversion therapy have suffered psychiatric injuries as a result.[55] Such patients will meet this threshold.

For mental or emotional harm that falls short of a recognised psychiatric disorder, patients will be unable to claim. Conversion therapists often tell participants that homosexuality is caused by faulty family dynamics and rely on tropes of bullying fathers and smothering mothers.[56] Some people have been advised to cut ties with families, end their relationships or undertake a heterosexual marriage.[57] In one report, an individual was told to stop playing the piano as it was making him gay.[58] Damage to relationships or interference with hobbies alone would not be forms of actionable damage in negligence. Nor would 'damaged self-esteem'.[59] A recent report from the Ozanne Foundation found that more than half who had attempted to change their sexuality reported 'mental health issues' and, of these, a number had attempted suicide or committed self-harm.[60] Further specifics are unavailable and if these mental health issues do not reach the threshold of being a recognised psychiatric injury then the law of negligence may not assist many people who have been harmed by these practices.

At this juncture, it is worth mentioning that this aspect of the law has been widely criticised. Rachael Mulheron has argued that the bright-line rule leads to legal and medical distortions and has proposed replacing the requirement for a recognised psychiatric injury with one of 'grievous mental harm'.[61] Similarly, Jyoti Ahuja has argued that the threshold requirement is mistaken in perceiving

[50] *Sidaway v Bethlem Royal Hospital* [1985] AC 871 at 883 per Lord Scarman.

[51] For a catalogue of physical damage caused by conversion therapists see UN General Assembly, above n 5, at [55]–[58].

[52] M King et al 'Treatments of homosexuality in Britain since the 1950s – an oral history: the experience of professionals' (2004) 328 BMJ 429 at 429.

[53] *McLoughlin v O'Brian* [1983] 1 AC 410 at 431 per Lord Bridge.

[54] RC Friedman 'Sexual orientation change: a study of atypical cases' (2003) 32 Arch Sex Behav 432 at 432. Homosexuality was removed from the DSM in 1974 and the ICD in 1990. See American Psychiatric Association *Diagnostic and Statistical Manual of Mental Disorders* II (6th printing, APA Publishing, 1974) and World Health Organisation *International Statistical Classification of Diseases and Related Health Problems* (WHO, 1990).

[55] See King et al, above n 52.

[56] M Schroeder and A Shidlo 'Ethical issues in sexual orientation conversion therapies: an empirical study of consumers' (2002) 5 J Gay Lesbian Ment Health 131 at 150.

[57] J Drescher 'Sexual conversion ("reparative") therapies: history and update' in BE Jones and MJ Hill (eds) *Mental Health Issues in Lesbian, Gay, Bisexual, and Transgender Communities* Review of Psychiatry Series, Vol 21, No 4 (Washington DC: American Psychiatric Publishing, 2002) p 84.

[58] Ibid, p 149.

[59] Cruz, above n 12, at 1352.

[60] Ozanne Foundation, above n 18, p 15.

[61] R Mulheron 'Rewriting the requirement for a "recognised psychiatric injury" in negligence claims' (2012) 32 OJLS 77 at 107 and 112.

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psychiatric disorders as more *serious* than merely 'psychological' harms. Instead, psychiatry is concerned with *abnormal* emotions and behaviour. Questions regarding whether an injury is psychiatric or merely a normal human emotion 'while crucial for therapeutic purposes, are irrelevant for assessing the impact of the suffering upon a person's life'.[62] In Canada, the requirement that a claimant suffer a recognised psychiatric injury was recently jettisoned by the Supreme Court[63] and Israeli law has permitted negligence actions by children for the emotional damage they suffered after being abandoned by their father.[64] If similar approaches were followed in England then such claims could proceed.

Likewise, it is theoretically possible that the courts could develop new forms of actionable damage.[65] For example, Tsachi Keren-Paz has argued that discriminatory behaviour should be actionable in the tort of negligence.[66] Another suggestion is that the English law should recognise violation of autonomy as a new form of free-standing damage in negligence.[67] Both of these proposals, if implemented, could assist in claims against conversion therapists as it is arguable that attempting to change someone's sexuality discriminates against LGBT+ individuals and interferes with their autonomy.[68] Recognition of lost autonomy as a standalone form of actionable damage appears to have been stamped on by the courts,[69] but whether this hurdle could be cleared would largely depend upon the attitudes of the judge deciding the case.[70] It is possible that a sympathetic judge could develop a novel form of actionable damage to avoid sending a claimant home empty-handed. Without changes in the law, though, claims will fail at this hurdle if the claimant is not suffering from a 'recognised' psychiatric injury.

(b) Duty of care

Even if claimants who have undergone conversion therapy can establish that they have suffered damage, they will need to show that the defendant was under a duty of care to avoid causing it. Establishing a duty of care in psychiatric injury cases can be difficult. In 'accident' cases the law divides claimants into primary and secondary victims. Primary victims are (usually) those who have suffered psychiatric injuries after being immediately involved in an accident.[71] The main category is those who have been physically endangered by the defendant's negligence (or reasonably believe they were in danger).[72] Secondary victims are those who have suffered psychiatric injuries after witnessing another individual being killed, injured or endangered but need not detain us further.[73]

[62]J Ahuja 'Liability for psychological and psychiatric harm: the road to recovery' (2015) 23 Med L Rev 27 at 38.

[63]*Saadati v Moorhead* [2017] SCC 28.

[64]*Amin v Amin* [1999] CA 2034/98 at [19] per Englard J.

[65]See D Nolan 'New forms of damage in negligence' (2007) 70 MLR 59, where he details potential new forms of actionable damage: negligent imprisonment, lost autonomy and educational under-development; and the decision in *ACB v Thomson Medical Pte Ltd* [2017] SGCA 20 at [129] per Andrew Phang JA ('loss of genetic affinity' recognised as a new form of damage in Singapore).

[66]T Keren-Paz *Torts, Egalitarianism and Distributive Justice* (Aldershot: Ashgate, 2007) p 161.

[67]See V Chico *Genomic Negligence: An Interest in Autonomy as the Basis for Novel Negligence Claims Generated by Genetic Technology* (Abingdon: Routledge-Cavendish, 2011) p 134 and T Keren-Paz 'Compensating injury to autonomy in English negligence law: inconsistent recognition' (2018) 26 Med L Rev 584. For the opposing view see C Purshouse 'Liability for lost autonomy in negligence: undermining the coherence of tort law?' (2015) 22 Torts LJ 226.

[68]See the discussion at the text accompanying n 133 below.

[69]See *ACB* and *Shaw v Kovak* [2017] EWCA Civ 1028; cf Keren-Paz, above n 67, at 599–602.

[70]The House of Lords was divided in the case that came closest to recognising lost autonomy as actionable damage in negligence: *Rees v Darlington Memorial Hospital NHS Trust* [2003] UKHL 52. However, the recent case of *Dryden v Johnson Matthey plc* [2018] UKSC 18, where the Supreme Court liberalised – and introduced a subjective element into determining – what counts as actionable damage, leaves the door open for the law to be developed.

[71]*Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310 at 407 per Lord Oliver.

[72]*Page v Smith* [1996] 1 AC 155 and *White v Chief Constable of South Yorkshire* [1998] 3 WLR 1509. For potential 'primary victims' outside endangerment cases see *Dooley v Cammell Laird* [1951] 1 Lloyd's Rep 271 and *W v Essex County Council* [2001] 2 AC 592.

[73]*Alcock*, above n 71, at 407 Lord Oliver.

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Conversion attempts via talking therapies are not accidents involving strangers that usually ground claims for psychiatric injury.[74] Outside of this type of claim, the law is more difficult to determine,[75] and may be dependent upon whether the 'therapist' is a professional. In *Farrell v Avon*[76] the claimant arrived at hospital and was negligently – and incorrectly – informed that his new-born baby had died. He was given a dead baby to hold before the hospital realised the mistake and informed him that his son was alive. He succeeded in bringing a claim for psychiatric injuries he suffered as a result. The judge said, 'the claimant here is clearly a primary victim as he was physically involved in the incident itself'.[77] As the claimant himself was not in any physical danger, this *dicta* is hard to reconcile with the leading cases on primary victims.[78] Mulheron asks, 'But how could he have been a primary victim? He was not in the zone of danger himself, nor had he imperilled the newborn child'.[79] Given this, *Farrell* is often interpreted as imposing a novel duty of care for the 'delivery of distressing news'.[80]

Recent cases have promoted a different interpretation of *Farrell*, which may hinder attempts to claim against conversion therapists. In *the Countess of Caledon v Commissioner of Police for the Metropolis*[81] the applicant sought disclosure of documents in the police investigation of one Mrs Craig, a faith healer/therapist who had been counselling the applicant's daughter, A. She alleged that Mrs Craig had 'poisoned A's mind against her family'.[82] Mrs Craig had been arrested by the police on suspicion of fraud but the criminal investigation was discontinued. Mrs Justice Slade had to conclude whether the applicant had shown that she had a cause of action against Mrs Craig for defamation, harassment, negligence and the tort in *Wilkson v Downton*. It was held that she did not.

On the negligence point, the applicant unsuccessfully relied upon *Farrell*. Instead of being a case on the delivery of distressing news, *Farrell* was said to impose a duty of care 'for professional malpractice causing psychiatric or psychological harm'.[83] The judge held that Mrs Craig 'did not hold herself out as having any professional qualifications as a therapist'[84] and that there was no evidence that the claimant had suffered from a recognised psychiatric injury. As such, the 'two necessary ingredients of the tort are absent'.[85]

By way of contrast, in *Brayshaw v The Partners of Apsley Surgery*[86] it was held that a doctor who inculcated a patient into his religion was liable in negligence. The claimant had 'complicated medical psychiatric and social problems'[87] and alleged that she had suffered psychiatric injuries as a result of religious practices and doctrines imposed on her by the defendant locum doctor, Dr O'Brien.

As part of the religious inculcation, Dr O'Brien had brought the claimant to a 'testimony' where a man had told a story about a witch doctor requiring him to set fire to an owl to stop his son dying and then being visited by Jesus. Subsequently, the claimant developed an owl phobia[88] and felt suicidal as

[74]P Handford 'Psychiatric injury in breach of a relationship' (2007) 27 LS 26 at 38.

[75]Ibid. See also R Mulheron 'The "primary victim" in psychiatric illness claims: reworking the "patchwork quilt"' (2008) 19 KLJ 81 at 82 and P Case 'Now you see it, now you don't: black letter reflections on the legacies of *White v Chief Constable for South Yorkshire*' (2010) 18 Tort L Rev 33 at 42.

[76][2001] Lloyd's Rep Med 458.

[77]Ibid, per HHJ Bursell QC.

[78]Some judicial doubts about its correctness were expressed in *Walters v North Glamorgan NHS Trust* [2002] EWCA Civ 1792 at [23] per Thomas J.

[79]See Mulheron, above n 75, at 93.

[80]M Jones (ed) *Clerk and Lindsell on Torts* (London: Sweet & Maxwell, 22nd edn with 2nd supp, 2019) at [8–89].

[81][2016] EWHC 2214 (QB).

[82]Ibid, at [3].

[83]Ibid, at [35].

[84]Ibid, at [34].

[85]Ibid. *Countess of Caledon* and *Farrell* could also be distinguished by the fact that the claimant in the former case was, at best, a secondary victim: any psychiatric injury was caused as a result of the defendant's interactions with her daughter.

[86][2018] EWHC 3286 (QB).

[87]Ibid, at [9].

[88]Ibid, at [21].

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she believed her home to be riddled with demons. Martin Spencer J found that the claimant 'had an adverse psychological reaction to her experiences at that event'.[89] He said of the defendant:

> Given his knowledge of her, he owed her a duty of care not to subject her to the unreasonable and avoidable risk of harm, and that duty of care should have included and encompassed the risk that the claimant would fail to follow through her commitment to the doctrine of Christianity which he and his wife were espousing, with the consequences of the potential breakdown of their relationship.[90]

The judge said that 'it was foreseeable that she might react adversely in the way that she did'.[91] Although the basis of this duty is unclear, the defendant in *Brayshaw* was a professional.

Countess of Caledon and *Brayshaw* indicate that if a professional causes a patient to suffer a recognised psychiatric injury (or exacerbates an underlying disorder) then a duty of care will be owed.[92] This may assist victims if the conversion 'therapy' was performed by a qualified professional as their situation would be analogous to *Brayshaw*. This view is also supported by the House of Lords decision of *Phelps v Hillingdon London Borough Council*,[93] where Lord Clyde suggested that a person who suffers psychological harm as a result of a professional giving negligent advice was owed a duty of care.[94] However, not all 'therapists' are professionals. Such scenarios might be considered more analogous to *Countess of Caledon* and have less chance of success.

Yet if *Farrell* is interpreted as indicating that false but distressing news that causes psychiatric injury will be actionable, it may capture 'amateur' conversion therapists. Ample evidence exists that they often impart false but distressing information to 'consumers'. In their study of people who had undertaken conversion therapy, Schroeder and Shidlo state:

> Many conversion therapists appear to be providing patients false and prejudicial information on gay men and lesbians. In fact, there appears to be a significant element of propagandizing by some conversion therapists on the supposed horrors of life as a gay man or lesbian.[95]

There have been reports of conversion therapists telling consumers that 'all gay people live unhappy lives and that gay relationships are undesirable, unhealthy, and unhappy'.[96] In such circumstances, a duty of care may be owed.

'Assumption of responsibility' might provide another avenue for imposing a duty of care.[97] If a defendant has assumed responsibility towards the claimant for a statement or service then there can be a duty of care, even in situations that do not normally attract one.[98] Determining when there will be an assumption of responsibility is a more challenging matter. Despite the closeness of the doctor-patient relationship, there was no assumption of responsibility for the financial losses of raising a child after a failed sterilisation in *McFarlane v Tayside Health Board*[99] and the highest authority states that the police do not assume responsibility to victims of crime when emergency services say

[89]Ibid, at [51].
[90]Ibid, at [66].
[91]Ibid.
[92]See also *X v Bedfordshire County Council* [1995] 2 AC 633 at 763 per Lord Browne-Wilkinson.
[93][2001] 2 AC 619.
[94]Ibid, at 670.
[95]Schroeder and Shidlo, above n 56, at 145.
[96]Drescher, above n 57, p 85.
[97]See *McLoughlin v Jones* [2002] QB 1312. Indeed, Mulheron argues that all primary victim cases should be divided into those are physically endangered, as in *Page*, and cases involving an assumption of responsibility: above n 75, at 95.
[98]Assumption of responsibility is an exception to 'no liability' scenarios. See J Plunkett *The Duty of Care in Negligence* (Oxford: Hart Publishing, 2018) p 141.
[99][2000] 2 AC 59 at 77 per Lord Steyn.

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that the police are on their way.[100] On the other hand, there was an assumption of responsibility by the defendant solicitor to the disappointed beneficiary under a will in *White v Jones*[101] despite the defendant having never met or spoken to the claimant. Indeed, in *Smith v Bush* it was held that a defendant can assume responsibility to the claimant despite explicitly stating that they are not assuming such responsibility.[102] Even judges have doubted the utility of this concept. In *Smith*, Lord Griffith questioned whether it was a useful yardstick and stated that the concept can 'only have any real meaning if it is understood as referring to the circumstances in which the law will deem the maker of the statement to have assumed responsibility to the person who acts upon the advice'.[103]

Despite this ambiguity, the editors of *Clerk and Lindsell* have expressed the view that psychiatrist-patient is a relationship where a duty of care will exist.[104] It is therefore likely that professional therapists will owe a duty of care when they cause their 'patients' to suffer psychiatric injuries. It is also possible that amateurs will owe a duty of care when they cause the same form of damage: the relationship is likely to be one where there is an assumption of responsibility and some of the case law could be interpreted as imposing a duty when a defendant, regardless of their professional status, delivers false distressing news. This will be important for many claimants, given that conversion practices are often performed in a non-professional setting by religious groups. It is therefore likely that a duty of care could be established against conversion therapists.

(c) The standard of care: negligent treatment

In addition to demonstrating that a conversion therapist owed them a duty of care, claimants must also show that the duty was breached. Healthcare professionals' duties encompass diagnosis, advice and treatment.[105] We will begin with diagnosis and treatment, as the approach to negligent advice cases has altered since the case of *Montgomery v Lanarkshire Health Board*.[106]

In diagnosis and treatment cases, 'therapists' must meet the standard of the reasonable person placed in their position.[107] If conversion therapists hold themselves out to be psychiatrists then they will have to meet the standard of the reasonable psychiatrist; if they present as unqualified faith healers, then the standard will be that of an unqualified faith healer.

Let us consider the standard of care for those who hold themselves out to be psychiatrists or qualified counsellors. Professionals must comply with the *Bolam* test and *Bolitho* 'gloss', which requires that they follow a responsible body within that profession and that opinion must be capable of withstanding logical analysis.[108] What does this mean for a professional providing conversion therapy? In the not-too-distant past they would have escaped liability. There used to be specialist clinics for the 'treatment' of homosexuality in London, Birmingham, Manchester, Glasgow and Belfast.[109] Electric shock therapy, chemical castration, aversion therapy and pharmaceutical treatment (including the prescription of oestrogen to reduce libido in men), in addition to talking therapies, were considered orthodox curative regimes in the 1960s and so would have complied with responsible medical opinion at the time.[110] *C v Cairns*[111] provides a stark illustration of this point. There, it was held a doctor did not

[100] *Michael v Chief Constable of South Wales Police* [2015] UKSC 2 at [138] per Lord Toulson.
[101] [1995] 2 AC 207.
[102] [1990] 1 AC 831.
[103] Ibid, at 862. For a recent discussion see D Nolan 'Assumption of responsibility: four questions' (2019) 72 CLP 123.
[104] Jones, above n 80, at [8–88].
[105] *Sidaway*, above n 50, at 881 per Lord Scarman.
[106] [2015] UKSC 11.
[107] *Phillips v William Whiteley Ltd* [1938] 1 All ER 566.
[108] *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582 at 587 per McNair J and *Bolitho v City and Hackney HA* [1998] AC 232, 242 per Lord Browne-Wilkinson.
[109] King et al, above n 52, at 429.
[110] Ibid.
[111] *C v Cairns* [2003] Lloyds Med Rep 90.

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breach his duty of care to the claimant in failing to report domestic child abuse to the authorities in 1975. It was accepted practice at the time to prioritise the stability of the family.[112]

Now, the vast majority of professional organisations are opposed to conversion therapy and it cannot be commissioned on the NHS.[113] This provides evidence that it is negligent.[114] Furthermore, conversion therapy is probably illogical as it falls outside the therapist's professional role. In this respect, *Brayshaw* may assist claimants. Many people find comfort from religion and praying but it is not the doctor's role to inculcate patients into a religion. Such behaviour fails to meet the standard of care of reasonable medical practice.

Emphasising their professional status will make conversion therapists appear more authoritative but will make it more likely that they fail to meet the standard of care. Yet not all conversion 'therapists' will be professionals. As Jack Drescher notes, 'Many of today's reparative therapists work within a faithhealing model'.[115] This may not always take place in a traditional 'therapy' setting and could take the form of group prayers and exorcisms.[116] This is reflected in a report survey from the Ozanne Foundation, which found that the vast majority of people seeking to change their sexuality had approached religious leaders (47%) and only a small minority of people had sought advice from medical professionals.[117]

This may offer a lifeline to those facing a negligence action, as they will be subject to a lower standard of care. In *Shakoor v Situ*[118] the claimant died as a result of taking a herbal remedy for a skin complaint. The defendant, who administered the remedy, practised traditional Chinese medicine. The High Court held that the defendant should not be held to the same standard as a practitioner of orthodox medicine. Instead, he had to meet the (lower) standard of someone practising traditional Chinese medicine. In meeting this standard, he would have to ensure that the remedy is not actively harmful and keep up to date with orthodox journals (but this would be achieved if a professional association kept him up-to-date).[119]

The result of this case is that pseudo-science is held to a lower standard of care than orthodox medicine. Such defendants will be judged by their 'own art'. A lack of evidence that conversion therapy works does not mean that such practitioners will fail to meet the standard of care. After all, the same is true of many 'alternative' or 'complementary' therapies. People who think that homeopathy works or that a rhino horn can treat gout may, among other things, be deluded but administering such complementary therapies is not necessarily negligent. One might, though, distinguish practices which are futile or ineffective (but carry a small risk of injury) from those which are obviously harmful. It is possible that the courts would regard conversion therapy as falling into the latter category.

Regardless, conversion therapists will be placed in a difficult position. If they hold themselves out to be professionals then they may attract more clients but it will be more likely that any 'consumers' will be able to demonstrate that the conversion therapists have failed to meet the standard of care. If they brand themselves as faith-healing practitioners of alternative therapies then they will be subject to a lower standard of care but this would 'at least warn the potential client that the conversionist would be operating out of the psychotherapeutic mainstream'[120] and thus discourage some 'consumers' from engaging with the therapy.

[112]Ibid, at [33] per Stuart C Brown QC. This may partly explain the lack of reported cases against conversion therapists. It might have been thought that they were doomed to fail.

[113]UKCP et al, above n 5, p 3.

[114]*Baker v Quantum Clothing Group Ltd* [2011] UKSC 17 at [82] per Lord Mance.

[115]Drescher, above n 57, p 88.

[116]UN General Assembly, above n 5, at [53].

[117]Ozanne Foundation, above n 18, p 15. After religious leaders, 33% sought advice from 'no-one' and 28% sought advice from close friends.

[118][2001] 1 WLR 410.

[119]Ibid, at 417 per Bernard Livesey J.

[120]Cruz, above n 12, at 1369.

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Ultimately, it may not make much difference in establishing breach if the judge deciding the case regards conversion therapy as overly risky. As Jean McHale has argued, 'Safe and competent practice is key, whether this be conventional medicine or complementary and alternative medicine'.[121]

(d) The standard of care: negligent advice

In cases of negligent advice, the test is no longer what the reasonable doctor would disclose to the claimant.[122] Instead, *Montgomery v Lanarkshire Health Board* states that the defendant must disclose the material risks and reasonable alternatives in treatment to the claimant.[123] The test of materiality is whether 'a reasonable person in the patient's position would be likely to attach significance to the risk, or the doctor is or should reasonably be aware that the particular patient would be likely to attach significance to it'.[124] Assessing breach from the patient's perspective means that a doctor will not be able to escape liability by relying on peer opinion.

One might question whether conversion therapy is a treatment that can even be offered to claimants, regardless of whether the 'therapist' proceeds to disclose the risks. As Jonathan Montgomery states, 'Health care law in England is predicated on an implicit and quasi-contractual structure under which professionals offer treatment options to patients and patients choose whether to accept them' but there may be constraints on what treatments can be offered to patients.[125] He states that there is limited judicial authority on 'whether health professionals can offer experimental therapies without being vulnerable to a malpractice suit'.[126] Although the test for disclosure is from the patient perspective, whether it is permissable to offer the treatment is judged by the *Bolam* standard (discussed above). It may therefore be inappropriate to even offer conversion therapy.

Assuming it can be offered, conversion therapists would have to inform consumers of the harms associated with conversion therapy and that such therapy is opposed by the psychiatric mainstream. Defendants would also need to inform patients of reasonable alternatives, such as gay affirmation therapy, which involves using therapy to accept one's sexuality. Forcing conversion therapists to inform people of the risks and alternatives, or face a negligence action, may reduce the number of people who undertake such therapy.[127] As David Cruz states:

> Requiring disclosure of such skewed perspectives on homosexuality held by conversionists would diminish the aura of authority surrounding the conversionist's professional position that might otherwise lend to a misleading and potentially harmful representation. The client then would be less likely to seek conversion out of a mistaken belief that the entire psy-profession believes a les/bi/gay person's only hope for health is to 'get het,' as it were.[128]

Cruz believed that conversion therapists would be unlikely to meet their duty:

> It would be difficult if not impossible for a conversionist who sincerely believes that homosexuality is a mental disorder and client motivation a key, if not the primary, factor in 'successful' reorientation to explain effectively to a client that the psy-professional's conversion efforts may cause depression and harms to the client's self-esteem by the psy-professional's blaming the client for not trying hard enough should conversion prove elusive.[129]

[121]JV McHale 'Legal frameworks, professional regulation and CAM practice in England: is CAM "the special one"?' in NK Gale and JV McHale (eds) *Routledge Handbook of Complementary and Alternative Medicine* (London: Routledge, 2015) p 57.

[122]Departing from *Sidaway*, above n 50.

[123][2015] UKSC 11 at [87] per Lords Reed and Kerr.

[124]Ibid.

[125]J Montgomery 'The "tragedy" of Charlie Gard: a case study for regulation of innovation' (2019) 11 Law, Innovation and Technology 155 at 160.

[126]Ibid, at 164.

[127]C Sandley 'Repairing the therapist – banning reparative therapy for LGB minors' (2014) 24 Health Matrix 247 at 277.

[128]Cruz, above n 12, at 1368.

[129]Ibid, at 1376.

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Conversion therapists might be aware of such requirements. The CORE Issues Trust website states 'Clients have the right to integrate their personal values, spiritual beliefs, or religious faith into their therapy and their individual growth process' and includes information about the possible strengths, limitations, and risks of 'gay affirming therapy' and 'change oriented therapy'.[130] Change-oriented therapy includes the following downsides: 'overselling the likelihood and degree of change', 'offering reductionistic explanations for homosexuality' and 'may be ethically questionable'.[131] By way of contrast, gay affirming therapy is said to be 'consistent with professional ethics codes'.[132] In this respect, conversion therapists have included several of the risks associated with gay conversion therapy and may be complying with the law. This reflects the fact that conversion therapy is nowadays justified on the basis of autonomy rather than illness.[133] As one consumer of such therapy has stated, 'The ex-gay movement turned the rhetoric of gay rights against itself: Shouldn't ex-gays be able to pursue therapy and live the lives they want without facing discrimination?'[134]

Of course, perceiving the choice to undergo conversion therapy as a free and informed choice among valuable alternatives is far from unproblematic. Doing so fails to take account of the 'anti-gay social forces'[135] that influence an individual's decisions. These forces will be particularly acute in a religious setting. At the heart of conversion therapy lies a status-based judgement of contempt or disdain for non-heterosexual identities, which are openly considered less valuable, eg abnormal, sinful, disgusting etc,[136] compared to heterosexuality. This judgement maintains that non-heterosexual identities can and ought to be resisted or changed, and conversion therapists offer individuals – often coercively – the vehicle to do so.[137] Thus, as Timothy Murphy states, '[t]he motives which prompt people to seek conversion therapy are not the results of any disinterested analysis of the best possible sexual orientation'.[138] Rather, they are often the result of widely understood messages about sexuality norms, viz heterosexuality is 'normal' and desirable, whereas other identities or expressions of sexuality are not.[139]

Besides, CORE have not included the chances of success and have not listed many of the reported harms that have occurred with conversion therapy.[140] And they are only one group. Conversion therapists often fail to provide accurate information about homosexuality, informing consumers 'that their homosexual orientation was a psychological or developmental disorder'[141] and that gay people's lives are 'undesirable, unhealthy, and unhappy'.[142] In their study, Shidlo and Schroeder found that only 9% of clinicians informed patients of possible negative effects of the intervention and that many misrepresented the scientific evidence.[143] By not properly disclosing the risks and alternatives of such therapies, conversion therapists may be breaching their duty of care.

[130]See https://www.core-issues.org/change-oriented-therapy.

[131]Ibid.

[132]See https://www.core-issues.org/gay-affirming-therapy.

[133]MC Tye 'Spitzer's oversight: ethical-philosophical underpinnings of "reparative therapy"' (2003) 32 Arch Sex Behav 452, 452.

[134]G Arana 'My so-called ex-gay life' (*American Prospect*, 11 April 2012) https://prospect.org/article/my-so-called-ex-gay-life.

[135]Cruz, above n 12, at 1339.

[136]M Nussbaum *From Disgust to Humanity: Sexual Orientation and Constitutional Law* (New York: Oxford University Press, 2010) p 1.

[137]On the status-based, demeaning messages conveyed by sexual orientation discrimination see D Nejaime and RB Siegel 'Conscience wars: complicity-based conscience claims in religion and politics' (2015) 124 Yale LJ 2516 at 2574–2578.

[138]Murphy, above n 4, at 134.

[139]These messages are intelligible to their recipients because *they* are part of the same community of shared meanings as those who try to 'convert' them. On that point see eg L Melling 'Religious refusals to public accommodations laws: four reasons to say no' (2015) 38 Harvard Journal of Law and Gender 177.

[140]B Rind 'Sexual orientation change and informed consent in reparative therapy' (2003) 32 Arch Sex Behav 447, 449.

[141]Schroeder and Shidlo, above n 56, at 141.

[142]Ibid, at 143.

[143]Ibid, at 146.

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The above discussion on breach has assumed that the defendant will be a professional. Amateur defendants in a religious setting might not be caught by *Montgomery* as, although the case extends beyond the disclosure of medical risks,[144] it is not clear that it applies to non-professionals. If it does not, the defendant will be required to meet the standard of the reasonable person. The test is an objective one that 'eliminates the personal equation and is independent of the idiosyncrasies of the particular person whose conduct is in question'.[145] This may mean that the reasonable person is not imbued with the defendant's religious beliefs. As Calabresi states, 'the loss is likely to be put on the injurer if he or she holds "odd" beliefs, but is likely to be left on the victim if the injurer's belief is non-idiosyncratic or when the belief, though idiosyncratic, is part of our establishment'.[146] Given that that conversion therapy is not supported by a number of major religious groups,[147] it is possible that support for it will be considered an 'odd' belief. Despite developing a number of factors that should be balanced when determining how the reasonable person would behave,[148] the standard of care really 'represents little more than the subjective viewpoint of a particular judge'.[149] Judges have readily acknowledged this with Lord Macmillan stating it 'involves in its application a subjective element' and that 'there is room for diversity of view… What to one judge may seem far-fetched may seem to another both natural and probable'.[150] This gives judges significant leeway when determining whether conversion therapy is reasonable and, to return to the legal realism perspective outlined earlier in this paper, successful litigation may depend upon the predilection of the individual judge.

(e) Causation

Claimants need to establish that the defendant's breach caused their injury. One difficulty is that people who undergo conversion therapy are likely to have experienced homophobia from other sources such as their family, religion, or community.[151] Were it otherwise, they would probably not be attempting to change their sexuality in the first place. With mental harm, claimants might struggle to show that it was the defendant's breach, and not the homophobia, that caused their damage.[152]

This is not necessarily fatal to a claim. Claimants need not demonstrate that the defendant's breach of duty was the sole, or even the main, cause provided it made a 'material contribution' to their injury.[153] In other words the defendant's breach need only be a partial cause. This has been possible in stress at work cases: claimants can succeed if they can demonstrate that their employer's breach of duty contributed to their mental collapse. They do not have to demonstrate that they were living stress-free lives before the employer's breach of duty.[154]

Brayshaw may also be helpful. The claimant had already suffered from mental health problems before the defendant's religious inculcation, but the defendant's breach still 'caused or contributed to the deterioration in the claimant's mental health'.[155] It is, therefore, possible that those who suffer psychiatric injury as a result of undertaking conversion therapy will be able to establish causation. In cases where a defendant has merely *contributed* to the defendant's injuries, damages will be apportioned if the injury is divisible.[156] Conflict existed in the case regarding whether damages for

[144]*O'Hare v Coutts & Co* [2016] EWHC 2224 (QB) at [206] per Kerr J (applied to banking).

[145]*Glasgow Corpn v Muir* [1943] AC 448 at 457 per Lord Macmillan.

[146]G Calabresi *Ideas, Beliefs, Attitudes, and the Law: Private Law Perspectives on a Public Law Problem* (Syracuse, NY: Syracuse University Press, 1985) p 64.

[147]H Farley 'Gay conversion therapy: hundreds of religious leaders call for ban' (*BBC News*, 16 December 2020) available at https://www.bbc.com/news/uk-55326461 (*BBC News*, 18 March 2021).

[148]*Tomlinson v Congleton BC* [2004] 1 AC 46 at [34] per Lord Hoffmann.

[149]J Conaghan and W Mansell *The Wrongs of Tort Law* (London: Pluto Press, 2nd edn, 1998) p 53.

[150]*Glasgow Corpn*, above n 145, at 457 per Lord Macmillan.

[151]Gans, above n 12, at 237.

[152]Sandley, above n 127, at 254.

[153]*Bonnington Castings Ltd. v Wardlaw* [1956] AC 613. A 'material' contribution will be one that is more than de minimis.

[154]See *Hatton v Sutherland* [2002] EWCA Civ 76 at [35] per Hale LJ.

[155]*Brayshaw*, above n 86, at [66] per Martin Spencer J.

[156]*Thompson v Smiths Shiprepairers (North Shields) Ltd* [1984] 1 All ER 881.

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psychiatric injuries should be apportioned. In *Hatton v Sutherland*, Hale LJ, as she then was, observed (in obiter dicta) that damages should be apportioned in cases of psychiatric injury due to stress at work.[157] In *Dickins v O2 plc*, Smith and Sedley LJJ disagreed with this viewpoint, albeit this was also obiter. In Smith LJ's opinion, apportionment should only occur where the condition is 'dose-related'. She believed this is inappropriate in cases of psychiatric injury even where there are multiple causes of the breakdown.[158] Psychiatric injury, said Smith LJ writing extra-judicially of *Dickins*, 'is *par excellence* an indivisible injury'.[159]

In *BAE Systems v Konczak* Underhill LJ preferred the approach of Hale LJ in *Hatton*.[160] This means that even if individuals can establish that a conversion therapist contributed to their psychiatric injuries, their damages will be reduced if part of their harm was caused by other factors (such as emotional abuse by homophobic parents or bullying by religious peers).

In negligent advice cases, claimants usually must show that they would not have undertaken the conversion therapy if they had been properly warned.[161] This will be possible in many cases but the courts are wary of hindsight bias.[162] Assuming factual causation can be established, there are unlikely to be issues with legal causation (psychiatric injury will be within the scope of the defendant's liability as that type of harm is reasonably foreseeable).

(f) Defences

Theoretically, the claimant's consent to the risk of injury will be a defence but this is rarely successful.[163] In the words of Lord Denning, 'Knowledge of the risk of injury is not enough. Nor is a willingness to take the risk of injury. Nothing will suffice short of an agreement to waive any claim for negligence'.[164] This will be a high threshold for the defendant to reach. Most people undergoing conversion therapy will not have agreed to waive any claim for psychiatric injury caused by *negligence* if they have not been properly informed about the risks in treatment. Furthermore, it is doubtful that such claimants will be considered contributorily negligent as this defence is rarely successful in a healthcare setting.[165]

(g) Vicarious liability

Even if the claimant can establish that the defendant has committed a tort, it might not be worth bringing a claim if the therapist cannot pay any damages.[166] Most tort claims are brought against insured individuals or companies or organisations (who in most cases will carry insurance or at least have deep pockets).[167] Vicarious liability, which holds a person strictly liable for the torts of another, is practically important for claimants as it enables them to target a solvent party capable of paying any compensation award. In *Mohamud v WM Morrisons Supermarkets plc* Lord Toulson said,

> Vicarious liability in tort requires, first, a relationship between the defendant and the wrongdoer, and secondly, a connection between that relationship and the wrongdoer's act or default, such as

[157][2002] EWCA Civ 76 at [36] and [39].

[158][2008] EWCA Civ 1144 at [44].

[159]Dame J Smith 'Causation – the search for principle' (2009) 2 JPI Law 101 at 103.

[160][2017] EWCA Civ 1188 at [72]. See also S Bailey '"Material contribution" after *Williams v The Bermuda Hospitals Board*' (2018) 38 LS 411 at 415–417.

[161]*Jones v North West Strategic Health Authority* [2010] EWHC 178 (QB).

[162]*Smith v Barking, Havering and Brentwood HA* [1994] 5 Med LR 285.

[163]*ICI Ltd v Shatwell* [1965] AC 656 at 671 per Lord Reid.

[164]*Nettleship v Weston* [1971] 2 QB 691 at 701.

[165]J Goudkamp and D Nolan 'Contributory negligence in the twenty-first century: an empirical study of first instance decisions' (2016) 79 MLR 575 at 591. For the view that victims of gay conversion therapy could be held contributory negligent see Gans, above n 12, at 239, though Gans is discussing US law.

[166]Cf the discussion accompanying the text of n 24.

[167]Cane and Goudkamp, above n 25, p 210.

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> to make it just that the defendant should be held legally responsible to the claimant for the consequences of the wrongdoer's conduct.[168]

A claimant may be able to sue a religious organisation providing conversion therapy. Faith healers volunteering for religious organisations may be 'akin to employees' (and so the relationship requirement might be satisfied) and the attempts at conversion may be within the field of activities entrusted to the 'employee' so that it is fair that the 'employer' is liable.[169]

It might be more difficult in other settings. In *Brayshaw* it was held that the locum doctor was an independent contractor. As he was not an employee (or akin to an employee) and the torts were not committed in the course of employment, the GP practice was not vicariously liable. Among the reasons given were the fact that the religious inculcation and activities took place away from the place of employment, the promotion of Christianity was not an activity undertaken on behalf of the defendant GP practice, nor was it part of their business activities.[170] By engaging the locum GP the defendants had not created or enhanced the risk of this tort being committed.[171] The judge concluded, 'it is necessary to stand back and look at the overall fairness and reasonableness of imposing vicarious liability…I cannot see that religious proselytization can fairly be regarded as a reasonably incidental risk to the business of carrying on a doctors' surgery'.[172] Therefore if professionals administering conversion therapy are on a 'frolic of their own' then their 'employer' will not be vicariously liable. Counterintuitively, this may make it more difficult to obtain compensation from a professional than from a 'faith healer' 'employed' by a religious organisation.

3. Other tort claims

Having dealt with the law of negligence, in this section we turn to other tort law claims. As we are concerned with talking therapies, as opposed to overt acts of violence, our focus will not be on the trespass torts.[173]

(a) Intentional infliction of harm

The rule in *Wilkinson v Downton*[174] (sometimes referred to as the tort of 'wilful infringement of another's right to personal safety' or 'intentionally inflicting harm') involves intentional interferences with the person. Unlike trespass to the person it is not actionable per se and encompasses indirectly inflicted injuries.[175] The Supreme Court in *O v Rhodes* clarified that this tort has three elements: a conduct element, a mental element and a consequence element'.[176] It requires:

> (a) words or conduct directed at the claimant for which there is no justification or excuse;
> (b) an intention by the defendant to cause at least severe mental or emotional distress; and
> (c) that the claimant suffers a physical injury or a recognised psychiatric illness as a result of the defendant's words or conduct.[177]

Let us assume that the third requirement is met and the claimant suffers a physical or psychiatric injury. The first requirement might not prove to be too much of a hurdle. For example, administering emetic drugs that make the claimant ill, false words or a mock funeral[178] might all be considered

[168][2016] UKSC 11 at [1].
[169]*Various Claimants v CCWS* [2012] UKSC 56.
[170]*Brayshaw*, above n 86, at [68] per Martin Spencer J.
[171]Ibid.
[172]Ibid, at [65]–[66].
[173]There have been reports of people outside the UK being deprived of their liberty and subject to reparative rape. See UN General Assembly, above n 5, at [38]–[39].
[174][1897] 2 QB 57.
[175]*Wong v Parkside Health NHS Trust* [2003] 3 All ER 932 at [7] per Hale LJ.
[176]*O v Rhodes* [2016] AC 219 at [73] per Lady Hale and Lord Toulson.
[177]Ibid, at [88].
[178]As occurred in *Boy Erased*, a film starring Nicole Kidman and Russell Crowe about a young man undergoing conversion therapy: Joel Edgerton et al (Producers), *Boy Erased* (Focus Films, 2018). Based on the memoir by Conley, above n 1.

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'words or conduct directed at the claimant for which there is no justification or excuse'. In *C v WH*[179] the defendant had, among other things, groomed and sexually assaulted the claimant. It was held that the defendant had 'acted unjustifiably towards the laimant by emotionally manipulating her'.[180] Emotional manipulation by conversion therapists would satisfy this requirement.

A more significant difficulty for claimants will be the second requirement. The conversion therapist may not have the intention to cause at least severe mental or emotional distress. Providers of conversion therapy are not always driven by homophobia, religion or malevolence. A 2009 study explored the attitudes of professionals who had conducted conversion therapy.[181] Some reasons given were that 'working to help the person accept their feelings but manage them appropriately may be the best approach if (the) person felt they would lose God and therefore their life was not worth living' and that the 'client knows best'.[182] Admittedly, helping someone accept their feelings might not necessarily involve conversion therapy but it could be if it encouraged a person to suppress the expression of their sexuality.[183]

It is true that some judges have been flexible in this inquiry. In *C v WH* Sir Robert Nelson held that the mental element was satisfied even though the defendant's intention was his own sexual gratification. He said:

> It was obvious that the illicit relationship would in the end cause nothing but harm to the vulnerable claimant…and those consequences must have been entirely clear and obvious.[184]

Even if a conversion therapist's main aim is not to cause severe distress, it may be so obvious that harm would result from this type of therapy that this element will be satisfied.

Contrary authority indicates that this may not be the case. Although the negligence claim in *Brayshaw* (discussed earlier) was successful, a claim under the rule in *Wilkinson v Downton* failed. With the latter, Martin Spencer J held that the defendant lacked the requisite intention to cause the claimant at least severe emotional distress:

> All the evidence suggests that the intention of the second defendant, misguided as it may have been, was the claimant's well-being and the improvement of her spiritual (and therefore mental) health. In my judgment, this case is a long way from the type of conduct which this tort is intended to catch.[185]

Conversion therapy may be considered more akin to a doctor acting unprofessionally and proselyting his religious beliefs than grooming and sexual assault. If so, the intention element may not be satisfied and a claim under the rule in *Wilkinson v Downton* will not succeed.

(b) Harassment

Might conversion therapy constitute harassment contrary to the Protection from Harassment Act 1997? This statute states that a defendant commits a tort if they engage in a course of conduct which amounts to harassment of the claimant, and which the defendant knows or ought to know, amounts to harassment of the claimant.[186]

It may assist a claimant hoping to sue a conversion therapist. The therapist may have engaged in a course of conduct that has caused distress to the claimant.[187] Yet in *Brayshaw*, the harassment claim

[179][2015] EWHC 2687 (QB).
[180]Ibid, at [89] per Sir Robert Nelson.
[181]Bartlett et al, above n 13.
[182]Ibid, at 12–13.
[183]See ch 5B of the Health Legislation Amendment Bill 2019 (Queensland), s 213F which states that conversion therapy does not include a practice that 'facilitates a person's coping skills, social support and identity exploration and development'.
[184]Ibid, at [89] per Sir Robert Nelson.
[185]*Brayshaw*, above n 86, at [58].
[186]Protection from Harassment Act 1997, s 1(1) and s 3.
[187]Ibid, s 7(2).

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was unsuccessful. Martin Spencer J held the concept of harassment required the conduct to be 'unwelcome'[188] but that the claimant 'was enthusiastic about, and embraced, the attentions of [the defendant]'.[189] If claimants seek out conversion therapy, it will be hard for them to argue that providing them with it constitutes harassment. An action under the Equality Act 2010, which protects against harassment due to certain protected characteristics (including sexual orientation), would not assist claimants for similar reasons: it too is concerned with 'unwanted' contact.[190]

(c) Deceit

In some US states, consumer protection laws have been used to bring claims against conversion therapists.[191] The National Centre for Lesbian Rights (NCLR) filed a claim against a marriage and family therapist, Willey, on behalf of a lesbian, McCobb, he had tried to convert. In a press release they stated, 'McCobb paid Willey more than $70,000 for eight years of therapy based on fraudulent, harmful lies'[192] and that this violated California's consumer protection laws. A New Jersey case resulted in the shutting down of a gay conversion organisation, JONAH (Jews Offering New Alternatives for Healing).[193] The group was found to have violated New Jersey's consumer fraud protections and ordered to pay damages to people who had undergone the therapy. A permanent injunction was also granted to prevent them undertaking such 'therapy' in the future.

In England, fraud might constitute the tort of deceit. The requirements for this tort have been summarised by Viscount Maugham in *Bradford Third Equitable Benefit Building Society v Borders*:[194]

> First, there must be a representation of fact made by words, or, it may be, by conduct…Secondly, the representation must be made with a knowledge that it is false. It must be wilfully false, or at least made in the absence of any genuine belief that it is true…Thirdly, it must be made with the intention that it should be acted upon by the plaintiff, or by a class of persons which will include the plaintiff, in the manner which resulted in damage to him…Fourthly, it must be proved that the plaintiff has acted upon the false statement and has sustained damage by so doing.[195]

An action in deceit might succeed against conversion therapists. They often make false representations to consumers, such as saying that conversion therapy is proven to work. An intention on the part of the defendant that the claimant should act in reliance of the false representation may also be present. After all, they are trying to convince the LGBT+ individual to change. Furthermore, the claimant may suffer damage as a result of relying upon the representation. For the damage requirement, Hazel Carty maintains: 'Although predominantly financial harm will be the damage alleged in this tort, physical harm (including personal injury, mental distress and even inconvenience) is covered'.[196] John Murphy agrees, stating the tort is 'grossly mischaracterised when it is portrayed as a purely economic tort'.[197]

Nonetheless, the false statement must be made dishonestly, or at least recklessly as to whether it is true or false.[198] This is a high hurdle for claimants to overcome. It will not be enough to demonstrate

[188] *Brayshaw*, above n 86, at [61].

[189] Ibid.

[190] Equality Act 2010, s 26.

[191] National Centre for Lesbian Rights 'NCLR files consumer fraud lawsuit against Berkeley therapist for conversion therapy' available at http://www.nclrights.org/press-room/press-release/nclr-files-consumer-fraud-lawsuit-against-berkeley-therapist-for-conversion-therapy/.

[192] Ibid.

[193] *Ferguson v JONAH* No L-5473-12 (NJ Super Ct Law Div 2015).

[194] [1941] 2 All ER 205.

[195] Ibid, at 211. See also Jones, above n 80, at [18-01] and H Carty *An Analysis of the Economic Torts* (Oxford University Press, 2nd edn, 2010) p 188.

[196] Carty, ibid, p 194.

[197] J Murphy 'Misleading appearances in the tort of deceit' (2016) 75 CLJ 301 at 322.

[198] *Derry v Peek* (1889) LR 14 App Cas 337.

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that the defendant was careless in making the false statement. In *Le Lievre v Gould*,[199] Lord Esher said that because a charge of fraud is a 'terrible thing to bring against a man…it cannot be maintained in any court unless it is shown that he had a wicked mind'.[200] In some cases conversion therapists will knowingly mislead clients but in others they might – misguidedly – but honestly believe that conversion therapy works. If the latter is the case then a claim in deceit will fail.[201]

Conclusion

Many forms of conversion therapy will be tortious. If a medical professional performs conversion therapy and causes a victim to suffer psychiatric injury as a result then a negligence claim is likely to be successful. In these situations, tort claims may prove useful in redressing the injuries caused by conversion therapy, vindicating people's rights and potentially deterring the practice in some cases.

In other cases, the position is more equivocal. For negligence claims, some forms of talking therapies will not cause actionable damage if the claimant does not suffer from a recognised psychiatric injury and the law is ambiguous regarding whether all forms will involve a breach of a duty, particularly if performed by an amateur 'faith healer'. Likewise, other torts may not help all victims. The rule in *Wilkinson v Downton* will not assist claimants if the conversion therapist lacked an intention to cause severe emotional distress; the Protection from Harassment Act 1997 will be ineffective if the conversion therapy was requested by the victim; and the tort of deceit will not help claimants if the therapist believes that the therapy will work. There are no reliable statistics on the number of claimants who fall into each category but it is reasonable to assume that some claimants would be unable to sue. Although we have emphasised throughout the paper that many aspects of tort law are sufficiently flexible and indeterminate that a sympathetic judge may develop the law to protect claimants, the current law may not help some victims of the practice to obtain redress.

Without a sympathetic judge, it would be possible for statutory reform to remedy some of these defects. Several areas have been subject to legislative reform to address (apparent) deficiencies in the common law. To give some examples, the Congenital Disabilities (Civil Liability) Act 1976 removed uncertainty about whether pre-natal injury claims could be brought; claims for harassment and stalking were not easily accommodated within the law of torts until the Protection from Harassment Act 1997; and occupiers' liability and product liability have also been subject to statutory intervention.[202] Legislation confirming that all conversion therapy involves a breach of a duty of care and that claims can be brought for emotional distress would reduce much of the uncertainty and help victims.[203]

[199][1893] 1 QB 491.

[200]Ibid, at 498.

[201]Criminal law is outside the scope of this paper but it is worth mentioning that fraud can also incur criminal liability: see Fraud Act 2006, s 2.

[202]Occupiers' Liability Act 1957; Occupiers' Liability Act 1984; Consumer Protection Act 1987.

[203]Alternatively, different branches of the law might help. We explore some of these in I Trispiotis and C Purshouse '"Conversion therapy" as degrading treatment' (forthcoming).

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