

Liability for consequences, duty of care and the limited relevance of specific reliance: New insights on *Bhamra v Dubb*

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Abstract

The purpose of this article is to examine two issues central to the tort of negligence: the role of reliance in establishing a duty of care; and the relationship between the harm-within-risk rule and the rule excluding liability for coincidental harm as tests for legal causation. I will use the unusual facts of *Bhamra v Dubb* in which the defendant caterer was under a duty not to serve eggs for religious reasons, and the guest suffered from a known egg allergy and ultimately died, as a platform for this analysis.

While the Court of Appeal was correct in establishing a duty towards Bhamra on Bhamra's reliance that eggs would not be served, it erred in limiting the duty to those aware that they suffer from egg allergy. Assuming there are reasons to avoid imposing a general duty on caterers towards those who are foreseeably people of ordinary susceptibility, guests avoiding a product for religious reasons have informational and medical susceptibilities which justify that a duty be owed to them. More generally, reliance on misrepresentation that a food served is 'free from' could justify duty and liability even in the absence of a claimant's knowledge of his egg allergy.

As a matter of legal causation, I defend the position (recently challenged in the literature) that the rule against liability for coincidences is different from the harm-within-risk rule. The injury suffered by a (hypothetical) guest unaware of his egg allergy is neither coincidental nor outside the scope of the relevant risk. It is not a coincidence, since the risk of suffering an allergy injury is typically increased by a 'free from' misrepresentation. The harm is within the relevant risk, since the guest's informational vulnerability is one of the reasons which makes serving him with eggs negligent – the fear he would suffer also a physical injury.

Keywords: negligence, duty of care, legal causation, coincidental harm, liability for consequences, reliance.

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Introduction

The purpose of this article is to examine two issues central to the tort of negligence: the role of reliance in establishing a duty of care; and the relationship between the harm-within-risk rule and the rule against liability for coincidental harm as tests for legal causation. I will use the unusual facts of *Bhamra v Dubb*¹ as a platform for this analysis.

Bhamra attended a Sikh wedding in a Sikh temple at which food was served by the caterer Dubb, himself a Sikh himself. Observant Sikhs do not eat food containing eggs. Bhamra was aware that he had an egg allergy (I will return below to the significance of this fact). Some of the ras malai served contained eggs, probably since the defendant purchased ras malai during the wedding from an outside source (since the number of guests exceeded expectation) not being aware that it contained eggs. Bhamra had an allergic reaction, was taken to the hospital and eventually died.² The trial Court dismissed his widow's personal injury claim which was based on a breach of contract and found in favour of Ms Bhamra on her claim in negligence. On appeal, only the negligence claim was litigated with the result that the defendant was found liable for Bhamra's death.

The Court of Appeal's point of departure was 'that a restaurateur or caterer who is providing food for people who, as far as he is aware, are of no more than ordinary susceptibility does not owe them a duty to take reasonable care to prevent their suffering harm through eating egg', since the incidence of egg allergy is not high enough.³

Stripped to its essence, the Court's analysis seems to make two propositions. First, that the defendant owed Bhamra a duty of care not to offend his religious beliefs by negligently serving food containing egg.⁴ I leave examination of the soundness of this proposition⁵ to another occasion and will only mention here that I support it.⁶ However, crucially for the purposes of my

¹ [2010] EWCA Civ 13.

² (n 1) [2], [10], [12], [25], [29].

³ (n 1) [19]. In assessing the risk, the Court ignored the risk to children (2% see AT Clark et al, 'Egg Allergy' <http://www.bsaci.org/Guidelines/egg-allergy> (17 March 2015)) which is higher than the risk to adults (0.1%). While an adult was injured, the correct assessment is of the total risk to guests, which presumably included children. Note also the Court's conflation of breach considerations (magnitude of risk) with duty considerations (should a duty be owed).

⁴ (n 1) [19], [25].

⁵ Characterised as 'preposterous' by Janet O'Sullivan, 'From snail to egg: duty of care, fault and food allergies' (2010) 69 CLJ 435, 437.

⁶ See T Keren-Paz, 'Compensating Injury to Autonomy: Conceptual and Normative Analysis' xx and 'Compensating Injury to Autonomy: Three Sets of Confusions xx. In short, descriptively, autonomy has already been recognized as a stand-alone actionable damage in *Rees v Darlington* [2003] UKHL 52 (albeit protected only by a conventional award) and in *Chester v Afshar* [2004]

argument here, one can support the court's result that Dubb should compensate Bhamra for his physical injury, even if one believes that negligence law, or indeed private law, should not provide a remedy for unreasonably offending his religious sensitivities by serving food containing eggs.

The court's second proposition is that the duty not to serve eggs to Bhamra in order not to offend his religious feelings could be extended under the circumstances to a duty to avoid personal injury from allergy. The reasons for such extension are examined further below, but they revolve around Bhamra's reliance—who knew he was allergic to eggs—that eggs would not be served, so he did not need to inquire whether the food served contained eggs.⁷ The Court went on to conclude that Dubb was negligent in not ensuring that the ras malai bought did not contain eggs.⁸ This part of the decision also raises interesting questions, but I will not address them in this article.

The critique of *Bhamra* offered here examines the Court's analysis on its own terms (ie does not challenge the correctness of the Court's point of departure and first proposition). It is the combination of the two propositions that brings to the fore the relevance of reliance, the relationship between duty and liability for consequences as a matter of legal causation and, to a lesser extent, the relevance of legal causation to the analysis of this case. *Bhamra* is amenable to more traditional analysis (which partially overlaps with my analysis below of coincidences) if one accepts, contrary to the Court's point of departure, that a caterer owes a straightforward *Donoghue v Stevenson* duty to warn against the use of eggs, since egg allergy is prevalent enough a condition.⁹ If so, Dubb was under a duty, which he breached, to warn the guests that the food served contained eggs. Since Bhamra was aware of his allergy he would have avoided the ras malai had he been warned so his damage is the factual and legal result of the breach. The more interesting question is the position of guests unaware of their egg allergy, who would have avoided the food, if

UKHL 41 (albeit protected by a wrong measure of the physical injury). See n 63 below. Prescriptively, the importance of autonomy as a value, and the similarity between violations of bodily integrity in the contexts of non-consensual touching (protected by battery) and involuntary consumption of food justify recognizing mere injury to autonomy, at least in *Bhamra*-like situations, as actionable damage.

⁷ (n 1) [25]. Note that Dubb probably was not aware at the time that the ras malai served contained eggs ([27]-[29]), so even had Bhamra inquired, and received a negative answer, Bhamra would still have suffered the same injury.

⁸ Dubb denied he bought ras malai from external sources but the trial Judge, followed by the Court, while refusing to make a finding Dubb lied (*id* [37]), based his breach of duty analysis on the assumption that external purchase was the explanation for the existence of eggs in the ras malai. (n 1) [27]-[42].

⁹ The new Food Information Regulation 2014 No 1855 (based on The European Food Information to Consumers Regulation No 1169/2011) specifically identifies egg as one of the 14 allergens that a food business operator has to warn his customers against. Today, then, a duty to warn of eggs in order to prevent egg allergy would have been recognized.

warned, since they observe religious rules forbidding them from consuming the food served ('observant guests'). For reasons explained below, their injury should not be considered as coincidental and it is foreseeable that the breach might cause them physical injury, so the defendant should be liable to them as well.

Under the Court's point of departure—that there is no need to warn people with ordinary susceptibility against the use of eggs—whether Dubb should compensate Bhamra and (hypothetical) observant guests with unknown allergy raises two questions: one normative and one analytical. The normative question is whether there should be liability for physical injury. Here I will argue that while the Court was correct to hold that Bhamra should be compensated for the physical injury it erred by establishing liability on Bhamra's awareness of his allergy. Accordingly, I argue that liability should be extended to all observant guests who suffer from egg allergy, whether or not they know about it, as well as to all guests who are aware they are allergic to eggs and rely on Dubb not to serve eggs, whether or not they are observant Sikhs. This analysis of *Bhamra* is contrary to the common wisdom which is divided between two views. One view is that the result is mistaken, since it ignores the fact that the harm caused (physical injury) is outside the scope of the risk which made the behaviour a breach of duty (religious offence). The other view is that the result is correct, since Bhamra's reasonable and foreseeable reliance on being served only egg-free food at a Sikh wedding makes the allergic reaction one of the risks that rendered the serving of food containing eggs a breach of duty.¹⁰

The analytical question is whether liability or its absence is a matter of duty of care (as the Court saw it) or a matter of legal causation – the scope of liability for consequences. My position is that, since the physical injury risk is locked-in with the spiritual injury risk, the focus of the inquiry should be one of duty of care rather than legal causation. At the same time, the analysis suggests that even if the issue is viewed as one of legal causation, the allergic reaction should be considered as materialization of one of the risks which made the conduct a breach of duty. The risks of allergic reaction and spiritual injury are interdependent; therefore the allergic reaction is not a coincidence of the breach of the duty not to serve food with eggs and is within the scope of the risk that made the defendant's behaviour a breach of duty.

¹⁰ Surprisingly, *Bhamra* did not receive any sustained academic analysis and hardly any analysis at all. In addition to a few descriptive practitioner case notes it received a short critical attention in O'Sullivan (n 5). The case did receive, however, extensive attention in the Obligations Discussion Group. Between 21 January and 9 February 2010, 37 views were posted. Andrew Tettenborn, in several posts, was the most vocal proponent of the 'harm is out of the scope of duty' camp. See e.g., Post 22 January, 2010 10:38. Others, eg Steve Hedley, 22 January 2010 10:49, were of the view that reliance justified the result. None of those intervening in this debate suggested that the duty should be extended to observant guests who were unaware of their allergy.

Section A examines the relevant reliance required for establishing a duty and concludes that a duty should be owed to observant guests allergic to eggs but unaware of their allergy, notwithstanding the Court's starting point of no duty to people with ordinary susceptibility. This is so due to two types of vulnerability these claimants have: informational and medical.

Section B is dedicated to defending this conclusion as a matter of legal causation. It begins by clarifying the relationship between the way a defendant's duty is defined and the scope of liability for consequences. It then examines the rules excluding liability for coincidental loss and for harm outside the risk which made the conduct wrongful, and clarifies that these requirements are distinct, contrary to recent suggestions in the literature.¹¹ Finally, it explains why the injury suffered by both Bhamra himself, and (hypothetical) observant guests unaware of their allergy is neither coincidental nor outside the scope of the relevant risk.

A. Duty of care analysis: limited relevance of specific reliance

The four reasons given by the Court for the existence of duty are (1) Dubb's pre-existing duty to Bhamra not to serve eggs for religious reasons; (2) his knowledge that some people are allergic to eggs so would suffer harm if consumed them; (3) that guests, including those who happened to suffer from egg allergy, would expect the food to be completely free of eggs and that they would therefore be free from egg-allergy injury; and (4) the reasonableness of Bhamra's reliance, who knew he was allergic to eggs, of not inquiring about the possibility of food containing eggs being served.¹²

The Court is correct that guests' reliance on eggs not being served is a sufficient reason to hold Dubb under a duty to take care to avoid personal injury from egg allergy. It should be noted that, contrary to point (1) in the Court's reasoning above, the reasonableness of such reliance does NOT hinge on the existence of any private law duty towards Bhamra (either in negligence, or based on the combined provisions of consumer protection and contract law¹³) to avoid inflicting on him a spiritual injury by serving him eggs. What matters is that Bhamra's reliance was foreseeable and reasonable under the circumstances since, as a guest in a Sikh wedding, he could expect not to be served eggs. It is foreseeable that people with egg allergies (and, as will be clarified below, whether or not observant Sikhs) would rely on the fact that it is safe to assume that the wedding meal at the wedding is egg-free. They would therefore be off guard as to the possibility of eggs being served during the meal. Such reliance is reasonable under the circumstances, since the best (if not only) strategy to avoid the allergic reaction is to avoid the allergenic food. For this, they need to rely on the presentations made by

¹¹ Tamsyn Clark and Donal Nolan, 'A Critique of *Chester v Afshar*' (2014) 34 OJLS 659.

¹² (n 1) [25].

¹³ See Consumer Protection from Unfair Trading Regulations 2008 (No. 1277); Contracts (Rights of Third Parties) Act 1999 (Ch 31).

providers of food. Finally, both the reliance and the consequent injury if reasonable care is not taken are foreseeable.

1. The (limited) relevance of reliance: duty to non-observers

The limited relevance of reliance and the irrelevance of an independent duty owed to the claimant to avoid eggs for religious reasons can be illustrated by looking at the following hypotheticals:

W is a non-Sikh with a known egg allergy. She attends the wedding and suffers the same injury as Bhamra.

Y is a non-Sikh with an unknown egg allergy. He attends the wedding and suffers the same injury as Bhamra.

Z is a non-Sikh with an unknown egg allergy. He consumes food that contains eggs in a restaurant and suffers the same injury as Bhamra.

Dubb should be liable to W, but not to Y. Likewise, the defendant who sold the food to Z should not be liable. That W is owed a duty shows that duty could be justified on reasonable reliance, and that such reliance is independent of the duty to avoid serving food contrary to religious beliefs. W, of course, cannot sue for religious offence. She did not suffer such a loss and the duty to avoid religious offence was not owed to her. However, W could have reasonably relied (and had) on the fact that the food should be egg-free and therefore should be compensated for her physical injury. Even if no private law remedy were available to any guest for the injury to their religious beliefs, W could still reasonably rely on the (implicit) representation that a caterer in an observant Sikh wedding would not serve eggs. This example also illustrates the appeal of analyzing the problem as one of duty, rather than of (merely) legal causation. W, due to her reasonable reliance, is owed an independent duty not to be carelessly caused physical injury despite the fact she was not owed a duty not to be carelessly caused religious offence. There is no issue, therefore, of the harm being of a different type from that which made the conduct a breach of duty: the duty is imposed on Dubb to protect W from risk of physical injury, since her reliance on Dubb not serving food containing eggs is reasonable, and the harm which eventuated is within the scope of the relevant risk.

Let us now turn to Y and Z.¹⁴ Recall that, according to the Court's point of departure, there is no general duty to warn that a certain food contains eggs. Moreover, even if there were such a duty, warning would not have prevented the injury to Y and Z *as a matter of but-for causation*, since they are unaware of their allergy. It is clear that Z is not owed a duty.¹⁵ But Y's case is no different from Z's in any relevant way. Y does not rely on the fact that the food

¹⁴ I return to discuss Y in Section B4, making the observation, and explaining its significance, that Y is an unlikely claimant since he should have found out prior to the wedding that he is allergic to eggs.

¹⁵ See n 3 above.

should be egg-free (since he is not aware of his allergy) and is not owed a duty not to be served eggs on religious grounds. Again, the denial of Z and Y's claim has nothing to do with the harm-within-risk principle (nor with actionable damage). The harm suffered is the harm against which the claimant wishes to establish the defendant's duty. But even though the risk is foreseeable,¹⁶ Y and Z cannot show any special factor which makes their relationship with the defendant proximate or makes it fair just and reasonable to impose liability.¹⁷

2. Informational vulnerability: dependence on 'permissible' food

While Bhamra's reliance (in the narrow sense of claimant's awareness that he has an allergy) is sufficient to establish a duty, it should not be considered necessary. Consider *X, a Sikh with unknown egg allergy who attends the wedding and suffers the same injury as Bhamra*. For reasons explained below, X relies (in a weaker sense) on the correctness of representations that the food is egg-free to protect her from physical injury. This is true, even under the Court's assumption that the incidence of egg allergy among the invitees to a Sikh wedding is identical to that of the general population.¹⁸ But, as we shall see, there are reasons to believe that both susceptibility to allergy and the potential seriousness of allergic reaction are higher in populations which avoid the allergenic product for religious reasons. Consequently, the spiritual injury is correlated with a higher allergy risk, and therefore a duty to avoid the allergy injury should be imposed.

At the outset, I would like to highlight a conundrum that was not addressed by the Court. Bhamra was aware of his egg allergy despite the fact that, according to his religious belief, he was never supposed to eat eggs. This fact is important; most observant Sikhs with egg allergy are not likely to be aware of it. So, unlike Bhamra 'who knew himself to be allergic to eggs,' they would not have 'every reason to rely without inquiry on Mr Dubb to supply food which did not contain egg', so are likely not to be owed a duty, according to the Court's reasoning.¹⁹ If the duty of care is limited to those aware of allergies to food they are unlikely to consume anyway, the significance of the ruling in *Bhamra* is very limited, since very few claimants would be able to sue successfully.

The analysis offered in the previous section contrasting W with Y seems to suggest that X, like Y, should not be owed a duty: seemingly X (like Y) did not rely on the religious character of the event to protect her from allergy-based injury and, while she (unlike Y) was owed a duty not to be carelessly subject

¹⁶ The existence of guests suffering from egg allergy is foreseeable, *Bhamra* (n 1) [25]. According to the same incidence assumption (n 1 [23]), egg allergy suffered by non-observant guests is also foreseeable.

¹⁷ According to the alternative analysis (n 9 and accompanying text) there would be liability towards W but not towards Y and Z. See also n 71 below.

¹⁸ (n 1) [23].

¹⁹ (n 1) [25].

to religious-based distress, she was not owed a duty to take care not to cause her allergy-based injury.²⁰ Nevertheless, on closer examination we shall see that X should be owed a duty with respect to the allergy. I will begin the discussion under the assumption (held by the Court²¹) that the incidence of allergy among Sikhs is identical to that in the general population. I will later argue that this assumption is mistaken, and that this provides a further reason to support liability towards X.

Adults with no religious-based dietary restrictions ('religious restrictions') are likely to be aware of any allergy to commonly-used products. But the same is not true for individuals who avoid consuming several products for ethical reasons. This is especially true for religious restrictions which often run for generations, so a child growing up in an observant family is not likely to be exposed to the 'forbidden' food throughout their life. So, regardless of whether the 'same incidence' assumption is correct, an observant Sikh is not likely to be aware of her egg allergy; an observant Jew, of seafood allergy; and so on.

The person following a restricted diet for religious reasons cannot know whether she is allergic to food she does not eat; usually that possibility would not even cross her mind, and for good reason. As long as she follows her religious beliefs by not consuming the avoided food, she is free from the risk of physical injury from allergy. But this means that her only way of guarding herself against the allergy risk is by adhering to the belief-based dietary restriction and, concomitantly, by relying on the accuracy of representations, even in cases where these representations are made for religious reasons.

Those adhering to religious restrictions are vulnerable. They cannot find out whether they are allergic to the forbidden food and therefore cannot take steps to hedge against the risk of allergy, other than sticking to the dietary restriction. In this sense, they rely on representations made principally for religious reasons (and the fact the representation by Dubb was implicit does not make it any less conspicuous, nor the reliance on it any less reasonable). The vast majority of observant Sikhs with egg allergy would not even be aware of the possibility that they have egg allergy, so for them there is no reliance in the strong (and common) sense that they change their behaviour (in deciding whether to consume a certain food) based on the misrepresentation in order to avoid the risk of being physically injured. But they too rely in a weaker sense,²² recognized by tort law as sufficient to

²⁰ This could also be phrased as a legal causation issue: while X was owed a duty not to be carelessly subjected to religious-based distress, the additional harm she suffered is outside the scope of the relevant risk.

²¹ (n 1) [23].

²² This weaker form of reliance is sometimes termed 'general reliance' but its scope, normative status and relationship with the rationale of 'total control over the situation' are all matters of debate. See *Stovin v Wise* [1996] AC 923, 953-955; *Pyrenees Shire Council v. Day*, (1998) 192 CLR 330, 369-371, 385-388 (HCA); MK Woodall, 'Private Law Liability of Public Authorities for Negligent Inspection and Regulation' (1992) 37 McGill LJ 83, 121-122. Arguably, the reliance posed by observant claimants unaware of their allergy

establish proximity and duty, by being subject to the defendant's control over the situation and not having alternative ways of protecting themselves.²³ Put differently, observant people are vulnerable to injuries from allergies since they do not have a means of knowing whether they suffer from an allergy.

In *Watson v British Boxing Board of Control Ltd* the claimant, a professional boxer, suffered an injury which would arguably have been prevented had he received proper treatment immediately. The Court of Appeal based its decision that the Board owed a duty to the boxer—to take reasonable care in making regulations ensuring that injuries sustained in fights are properly treated—on such weak reliance. Strikingly, like the unaware observant guest (and unlike Bhamra), boxers 'would not be in a position to know whether the provisions that the Board required to be put in place represented all that it was reasonable to provide for [their] safety [...and] could reasonably rely upon the Board to have taken reasonable care in making provision for their safety ... professional boxers would be unlikely to have an innate or well informed

of not being served eggs is stronger than mere 'general reliance' and is similar to Bhamra's reliance.

²³ See *Perret v Collins* [1999] PNLR 77, 91 (CA) (proximity is satisfied since the defendant had a 'measure of control over and responsibility for a situation, which, if dangerous, will be liable to injure the claimant'); *Watson v British Boxing Board of Control Ltd* [2001] QB 1134, [77],[78], [85],[87] ('complete control', absence of an alternative measure of protection and reasonable reliance both satisfy proximity and make the imposition of liability fair, just and reasonable); *White v Jones* [1995] 2 AC 207, 236, 259 (absence of alternative measures of protection as a reason to impose a duty); J Stapleton 'Duty of Care: Peripheral Parties and Alternative Opportunities for Deterrence' (1995) 111 LQR 301 (same); *Rogers v Whitaker* (1992) 175 CLR 479 (claimant's vulnerability as a reason to impose duty of care); J Stapleton, 'The golden thread at the heart of tort law: the protection of the vulnerable' (2003) 24 Aust Bar R 1 (same); E Peel & J Gouldkamp, *Winfield and Jolowicz Tort* (Sweet and Maxwell, 19th ed, 2014) 95 (same); T Keren-Paz, *Sex Trafficking: A Private Law Response* (Routledge, 2013) 154-6 (victims' vulnerability and defendant's control over the risk as considerations to impose duty); A Robertson, 'Policy-Based Reasoning in Duty of Care Cases' (2013) 33 Legal Studies 119, 123 (defendant's control over risk and victim's vulnerability as considerations – around others, including knowledge of the risk, foreseeability and reliance – in establishing proximity); C Witting, 'Duty of Care: An Analytical Approach' (2005) 25 OJLS 33, 49 (control over risk as creating sufficient proximity). A peer reviewer suggested that vulnerability in the sense defined above is only sufficient to generate proximity where a positive action is at stake or where the intervening act of a third party is not relevant. That distinguishes *Michael v South Wales Police* [2015] UKSC 2. However, the claim in *Michael* did not fail for lack of proximity, but rather for the (in my opinion, questionable) policy considerations supporting police immunity. Indeed, *Watson* and *Michael* are hard to distinguish in terms of positive action (which existed in neither case) and voluntary act of third party (which existed in both cases, although was only illicit in *Michael*).

concern about safety'.²⁴ Observant guests, too, would be unlikely to have a well-informed concern about their safety, but they should nevertheless be owed a duty.²⁵ I term this reliance weak since, by definition, if boxers do not have well informed concern about their safety, they are not likely to decide to compete based on a belief that the Board took sufficient measures to protect their safety. Nonetheless, their vulnerability, in the sense of the Board's control over the risk and the absence of alternative means of protecting themselves, justifies the imposition of a duty on the Board. Similarly, the fact that observant guests are unlikely to be aware they have egg allergy, and therefore could not show that the assurance against allergic reaction is what made them eat the food at the wedding, should not deny Dubb's duty to act with reasonable care to avoid such injury.

If we return to the four reasons offered by the Court as justifying a duty, the first three – pre-existing duty not to offend, knowledge that some guests might be allergic to eggs and of guests' expectation not be to served eggs – are compatible with extending the duty to all those who suffer from egg allergy but are unaware of this fact. If at all, it is more foreseeable that some observant guests have allergies of which they are unaware, than that there are observant guests who are aware of their allergies. As was explained above, that Bhamra was aware of his egg allergy is a conundrum. The fourth factor, focusing on Bhamra's reliance (due to his awareness of being allergic to eggs) is neither here nor there. To begin with, it is already redundant to factors (2) and (3). Bhamra was an unknown but foreseeable guest with egg allergy who would expect not to suffer from an egg allergy-based injury. The reliance is not limited to guests who are aware of their allergy. For the reasons explained above, the physical safety of those allergic to food they avoid for religious reasons depends on adhering to the restrictive diet. Therefore, observant Sikhs rely on a 'no-eggs' presentation to be protected also from physical injury (in addition to spiritual safety) even if (unlike Bhamra) they are unaware they are allergic to eggs.

3. Medical vulnerability: increased susceptibility to allergy

So far, the argument assumes that adherence to religious-based dietary restrictions does not render the claimant more *medically* vulnerable to physical injury from allergy. The vulnerability which justifies liability in *Bhamra* is based on the claimant's inability to know whether she has allergy and her

²⁴ Watson, (n 23) [85].

²⁵ This is not to deny that important differences exist between the regulatory role of the Board and the position of Mr Dubb. But it is equally important to notice that the content of Dubb's duty is more limited than that of the Board. He is not required to arrange for medical assistance against risk which was directly created by a third party. Rather, he is required not to negligently create a risk of physical injury from food he serves, in circumstances where the claimant can expect that eggs would not be served, where the allergy risk is foreseeable and the claimant has no alternative way of protecting herself from this risk, rather than relying on representation that the food served is egg-free.

dependence on continuing to adhere to the religious diet in order to be protected from allergy-based injury. If it is true that medical sensitivity to allergy is positively correlated with adherence to religious dietary restrictions, there are even stronger reasons to hold defendants liable for the allergy injury.

One can think of two reasons for such increased medical vulnerability. The first reason is that, contrary to the court's assumption, we have reason to believe that the incidence of egg allergy is higher among observant Sikhs relative to the general population. In the Sikh population there are no evolutionary pressures against mutations which create this allergy.²⁶ In the general population which has no dietary restrictions, those who were genetically prone to egg allergy (at least in its lethal version) had less opportunity to procreate and transfer these genes. But such evolutionary pressures do not operate on those avoiding eggs. In such populations, mutations which would be lethal, were the individual carrying them to consume eggs, do not reduce in the slightest the life expectancy of their bearers and their ability to procreate, and are therefore likely to be more present in the Sikh genome.

Such medical vulnerability is likely to be more relevant to religious-based dietary restrictions relative to other ethically-based restrictions. Evolutionary pressures require a long period of consistent adherence to make a genetic difference. Religious-based adherence may or may not be long enough to make a difference, but other ethical beliefs (such as vegetarianism on grounds of animal welfare or sustainability) are highly unlikely to be held a sufficiently long time to make a genetic difference.

Adherence to religious dietary restrictions might make the claimant more sensitive to allergy in a second way. Often, allergic reactions in children are more common but less severe than in adults.²⁷ It is therefore better to be exposed to the allergenic product at a young age and avoid it later on. A first exposure at a later age is more dangerous and is potentially more lethal.

²⁶ A classic example of evolutionary (also called selective) pressure is that created by malaria leading to the selection of the sickle cell hemoglobin gene mutation (HbS)—causing sickle cell anaemia—in areas where malaria is a major health concern, because the condition grants some resistance to this infectious disease. See Ruwende et al, 'Natural selection of hemi- and heterozygotes for G6PD deficiency in Africa by resistance to severe malaria.' *Nature* 376:246-249 (1995).

²⁷ See Toral A Kamdar et al, 'Prevalence and characteristics of adult-onset food allergy' (2015) 3(1) *The Journal of Allergy and Clinical Immunology: In Practice* 114-115.e1 (The older a patient is when diagnosed with food allergies, the more likely that person is to have a severe reaction); Laura E Derr, 'When Food Is Poison: The History, Consequences, and Limitations of the Food Allergen Labeling and Consumer Protection Act of 2004', (2006) 61 *Food Drug LJ* 65, 71 (at least 8% of children less than 3 years of age and 2% of the adult population in the United States have food allergies of varying degrees of severity).

Adherence to religious diet increases the chance that the first exposure to the allergenic product would be at an older age, either because upon becoming an adult, the person ceases to observe, or because the exposure is accidental and as such might happen at any point during one's life course. In contrast, those not adhering to religious dietary restrictions are likely to be exposed to the product at young age. For this reason, adhering to religious diet, by significantly increasing the chances of exposure at an older age, renders the allergic person more vulnerable to a serious reaction.

B. Legal causation analysis: injury from allergy is within the risk of religious offense

While foreseeability of damage and of intervening causes is an important aspect of legal causation,²⁸ our concern here is with the harm-within-risk rule which limits defendants' liability to harms materializing from the risks which made the defendant's conduct a breach of duty. The rule is referred to as loss within the scope of duty,²⁹ harm within risk,³⁰ risk principle³¹ and wrongful risks limitation,³² but its meaning is the same. The rule is also explained as excluding liability for coincidental harm³³ ('causal link' in Calabresi's terminology³⁴). After clarifying that the harm within--risk rule and no liability for coincidental harm are different requirements (Section 2), I will defend the view that the injury was neither coincidental (Section 3) nor outside of the relevant risk (Section 4). First, however, I will explain how defining the relevant duty is relevant for the question of scope of liability for consequences, which is a legal causation issue.

1. The relationship with duty

²⁸ *Wagon Mound No. 1* [1961] UKPC 1; *Hughes v Lord Advocate* [1963] UKHL 8; A conclusion that the injury or the intervention was not foreseeable could also be explained as a sensitive causal relationship which would not continue to hold in circumstances that depart in various ways from the actual circumstances. J Woodward, 'Sensitive and Insensitive Causation' (2006) 115 *Philosophical Review* 1-2. See also D Hamer, "Factual Causation" and "Scope of Liability": What's the Difference?' (2014) 77 *MLR* 155, 182-7; *Knightley v Johns & Ors* [1982] 1 *WLR* 349 (CA).

²⁹ *South Australia Asset Management Corp v York Montague Ltd*, ('SAAMCO') [1997] AC 191 (HL) 213, 222.

³⁰ *Restatement, Third, Torts: Liability for Physical and Emotional Harm* (2010) § 29 (liability limited to 'harms that result from the risks that made the actor's conduct tortious'); M Green and I Gilead, 'Maligned Misalignments' (February 27, 2012). Wake Forest University Legal Studies Paper No. 2014874. Available at SSRN: <<http://ssrn.com/abstract=2014874>> accessed 11 November 2015.

³¹ Hamer (n 28) 176.

³² A Porat, 'Misalignments in Tort Law' (2011) 121 *Yale LJ* 82, 123-9.

³³ Clark and Nolan (n 11) 667.

³⁴ G Calabresi 'Concerning Cause and the Law of Torts: An essay for Harry Kalvin Jr' (1975) 43 *University of Chicago Law Review* 69, 71.

Bhamra raises legal causation issues under alternative understandings of Dubb's duty.³⁵ Under one understanding (defended previously), the relevant duty is to act reasonably to avoid personal injury due to egg allergy. This duty hinges on guests' reliance that eggs would not be served (whether or not guests are owed a duty to avoid unreasonable religious injury) and requires a warning if the food contains eggs. The issue, then, is whether the harm to those unaware they are allergic to eggs but who avoid them for other (eg religious) reasons is coincidental. Alternatively, if the duty is only to avoid religious offence, the question is whether the physical injury, which is different from, and additional to, the religious injury,³⁶ is a harm within the risk that the duty was intended to reduce.³⁷ Under either understanding, the personal injury ought to be compensated, for the reasons explained below.

The relevance of the definition of duty to the question of the scope of liability for consequences could also be understood in terms of the distinction between a duty to warn that a certain product is used and a duty to avoid that product altogether. In the absence of special circumstances (such as food provided in a Sikh temple) the content of the duty could be at best—and contrary to the Court's point of departure³⁸—to warn against food containing eggs; the use of eggs for itself is unproblematic. But where the defendant made a 'free from eggs' representation (or gave a warranty), serving the eggs itself is a breach of duty (not merely failing to warn that eggs were used). This raises the question whether there should be liability for injury of a different type from that which the duty was purported to prevent. The flipside of this is the question whether the claimant's motivation for not eating eggs, and her lack of awareness that she has egg allergy, is relevant at all.

³⁵ For the overlap between duty and legal causation and the debate whether scope of liability for consequences is a matter of duty of care or of remoteness see D Nolan, 'Deconstructing the Duty of Care' (2013) 129 LQR 559; J Stapleton, 'Negligent Valuers and Falls in the Property Market' (1997) 113 LQR 1; L. Hoffmann, 'Causation' (2005) 121 LQR 592.

³⁶ Bhamra consumed eggs which he felt forbidden to eat on religious grounds and to which he was allergic. In principle, his estate is eligible to collect also for the spiritual harm, although such recovery depends on answering the following questions: ought the claimant be conscious of the fact that he had consumed forbidden food? If so, was Bhamra conscious of this fact? Does the claim survive death so is available to the estate? Does the size of the award depend on the length of the period the claimant was conscious of the fact he consumed forbidden food? In *Darby v National Trust* [2001] EWCA Civ 189, the main English authority (discussed below) for the harm-within-risk rule, the wrongful risk (Weil's disease) did not materialize, only the non-wrongful risk of drowning.

³⁷ For lack of appreciation that this is an issue which needs to be addressed see Shayna M Sigman, 'Kosher without Law: The Role of Non-legal Sanctions in Overcoming Fraud within the Kosher Food Industry' 2004 31 Florida State UL Rev 509, 548. Sigman assumes that any physical injury due to allergy is recoverable.

³⁸ See n 3 and accompanying text.

2. 'Coincidence' and 'harm-within-risk': two separate requirements

SAAMCO³⁹ and *Darby v National Trust*⁴⁰ are seemingly the leading English authorities for the harm-within-risk rule. In SAAMCO, the liability of the surveyor was limited to the difference between the negligent and accurate valuations and did not include the further loss from the general market fall, despite the possible satisfaction of the but-for test.⁴¹ The reason is that what made the valuation negligent is the difference between the negligent and accurate valuations at the time of valuation. The valuer was not asked to predict, and therefore was not negligent with respect to, the effect of future market fluctuations on the value of the property.

Whatever is mandated by the harm-within-risk rule (in negligence) it is clear that, at least where the loss is truly coincidental, there should be no liability. There is considerable consensus among commentators and judicial opinions that a loss is coincidental (and therefore should not lead to liability even if the but-for test were satisfied) if the breach did not increase the risk (ie probability) the injury would occur.⁴² The rationale of the rule, and its modus operandi are well explained by the *Restatement, Third, Torts: Liability for Physical and Emotional Harm* (2010) ('Restatement'): when the risk created by the actor's tortious conduct did not increase the risk of the harm suffered by the other person' so that 'greater care by the actor would not reduce the frequency of such accidents', 'the wrongful aspect of the actor's conduct is

³⁹ (n 29).

⁴⁰ (n 36).

⁴¹ See Stapleton (n 35) 7.

⁴² See Clark and Nolan (n 11); J Stapleton, 'Occam's Razor Reveals an Orthodox Basis for *Chester v Afshar*' (2006) 122 LQR 426; R Stevens, *Torts and Rights* (Oxford University Press 2007) 164; McBride and Bagshaw, *Tort Law* (Pearson, 4th ed, 2013) 306; Hamer (n 28) 177. Lord Hope in *Chester* (n 6) [81] captured the test correctly by mentioning that, although the but-for test was satisfied, the inherent risk which had materialized 'was not increased, nor were the chances of avoiding it lessened' by the defendant's failure to disclose it. § 30 of the *Restatement* (n 30) offers the following test: 'An actor is not liable for harm when the tortious aspect of the actor's conduct was of a type that does not generally increase the risk of that harm'.

But see R Bagshaw 'Causing the Behaviour of Others and other Causal Mixtures' In R. Goldberg (ed), *Perspectives on Causation* (Hart Publishing, 2013) 361,377 who argues that '[t]he precise specification of "the coincidence rule" in current English law is a matter of controversy' and that coincidence includes instances 'when the wrongdoing does increase the frequency of the type of harm suffered *provided that the increase is not sufficiently great to establish a basis for regarding the defendant's action as wrongful*'. In substance, I agree that insignificant increases of risk should exclude liability as a matter of legal causation. However, as explained in the text, this is so by operation of the harm-within-risk rule, not the rule against liability for coincidental loss.

merely serendipitous or coincidental in causing the harm.’⁴³ From a consequentialist perspective, imposition of liability cannot be justified on deterrence, or efficiency grounds.⁴⁴

Lord Hoffman gave in *SAAMCO* a textbook example of the harm-within-risk rule, which seems to equate this rule with no liability for coincidences. The mountaineer with a failing knee dies from an avalanche after receiving negligent advice from the physician that his knee could withstand the effort of climbing.⁴⁵ Clearly, but-for causation is satisfied; but for the advice the mountaineer would have stayed at home and would not have died from the avalanche. But the negligent advice did not increase the risk of dying from avalanche. It merely put the defendant at the time and place in which a risk which was not created or increased by the defendant materialized and injured the claimant. Under the assumption that Lord Hoffman equates the facts in *SAAMCO* (the market fall) with the mountaineer example, which is a classic demonstration of coincidence, *SAAMCO* is better understood as a modern leading authority for no liability for coincidental consequences, rather than for the harm-within-risk rule (as follows from Lord Hoffmann’s rhetoric).

Recently, Clark and Nolan viewed the harm-within-risk test and liability for coincidence as interchangeable.⁴⁶ This is a mistake I would like to dispel. The rule against liability for coincidence excludes liability for injury whose probability (or severity) is not increased by the breach. The harm-within-risk rule also excludes liability for injury from risk increased by the breach, if preventing this risk was not one of the reasons which made the conduct a breach of duty. While in many cases the two requirements overlap, they are distinct. As the discussion below will demonstrate, one could think of examples in which the harm is within the relevant risk but is still coincidental. Therefore, satisfying the harm within risk rule is neither necessary nor sufficient for satisfying the no coincidence rule and vice versa. This clarification is hardly novel or controversial. It is supported by the Restatement⁴⁷ and by many commentators including Robert Stevens,⁴⁸ Jane Stapleton⁴⁹ and David Hamer.⁵⁰

⁴³ (n 30) § 30, comment a.

⁴⁴ Calabresi (n 34) 78; Hamer (n 28) 177.

⁴⁵ (n 29) 213.

⁴⁶ Clark and Nolan (n 11) 664; Hamer (n 28) 177 refers to the exclusion of coincidental loss as ‘potentially overlapping’ with the risk principle. See also Bagshaw’s view (n 42) which seems to subsume the harm-within-risk rule into the rule against liability for coincidences.

⁴⁷ (n 30) §§ 29, 30.

⁴⁸ Stevens (n 42) 163-9 (separating the discussion between ‘coincidental loss’ and the ‘purpose of the right’ as tests for legal causation).

⁴⁹ For Stapleton (n 42), the overlap between the limitations shrinks considerably due to her very narrow definition of coincidence (critically examined below).

⁵⁰ (n 28) 177 (‘potentially overlapping’).

That coincidence and harm-within-risk are two distinct limitations to liability is captured clearly by the *Restatement*, which dedicates § 29 to the harm-within-risk rule and § 30 to exclusion of coincidental harm. As explained in the *Restatement*, coincidental loss is excluded even if the type of harm suffered by the claimant might be found to be one of the risks arising from the defendant's activity.⁵¹ The following three examples illustrate the difference between the tests.

The *Restatement* gives an example for harm outside the scope of the risk the handing over of a loaded gun to a child who drops it on her toe.⁵² Handing over the gun increases two risks: shooting and dropping. But what makes the handing over negligent is merely the risk of shooting, not the risk of dropping. Since the harm was not materialization of the risk which made the conduct negligent (shooting) there is no liability, despite the fact the risk of dropping the gun was increased by handing it over to the child.

Consider next *Darby*,⁵³ which is a classic example of correct operation of the harm within risk rule. The claimant's husband drowned in a lake in which there was a risk of contracting Weil's disease due to rats urinating in the lake. The occupier breached its duty to warn against the risk of contracting the disease from swimming in the lake. The but-for test was satisfied – had a warning existed the deceased in all likelihood would not have swum so would not have drowned. However, the Court correctly held that the injury from which *Darby* died—the drowning—was not a materialization of the risk which made the lack of warning negligent—the risk of contracting a disease.

Strictly speaking, however, this is not a coincidence. The breach in not warning against swimming in the lake did increase the risk of drowning. However, increasing *this* risk is not negligent. The breach increased two risks, one reasonable (drowning) against which there is no need to warn; the other unreasonable (contracting disease).

These two examples (rifle dropping; drowning) are different from the mountaineer example, in which the failure to warn did not increase the risk that avalanche would occur (or that mountaineers would die from avalanche). Similarly, the negligent advice in *SAAMCO* did not increase the probability of market fall, nor does speedy driving increase the chance of trees falling or of lightning hitting the car at a specific moment.⁵⁴

Finally, consider the following variation of another illustration in the *Restatement*:⁵⁵

⁵¹ (n 30) §30, illustration 1.

⁵² *Id* §29, illustration 3.

⁵³ (n 36).

⁵⁴ For these examples see Stapleton (n 42) 439-40; Clark and Nolan (n 11) 664; *Chester* (n 6) [94]; *Restatement* (n 30).

⁵⁵ (n 30) § 30, illustration 1. In the *Restatement's* illustration, a tree falls on car while the driver speeds negligently.

Jennifer is speeding at some point of her driving, then she slows down and at that moment runs over a child who burst into the road. Jennifer was not negligent at the moment she ran the child over.

Speeding does (among other things) increase the likelihood that the driver will run over pedestrians (since the driver has less time to react and braking takes longer) and the seriousness of the ensuing injury (due to increased momentum). So arguably, the child was injured from the risk (hitting a pedestrian) which made the behaviour (speeding) a breach of duty. If this is correct, liability should be excluded since the injury is a coincidence. At the moment the child was hit the driving was not negligent, therefore the risks associated with the speedy driving did not eventuate in injury. The historical event of speeding neither decreased the available time for identifying the child or for braking, nor increased the contact's impact. All it did was bring the driver into the wrong place and time, which is a pure coincidence. Note, however, that an alternative explanation could be that the injury was not a materialization of the relevant risk – so the risk which made the conduct negligent did not eventuate: the injury was neither the result of decreased time to react or to brake, nor was its impact increased due to increased momentum.

In the first two examples (gun dropped and drowning in an infected lake), the risk which materialized was not coincidental (since the breach increased the chance it would occur); however, it is still outside the scope of the risk which made the conduct a breach. In the third example (speeding, slowing and hitting a child), depending on the level of abstraction, the risk could be considered as coincidental, despite the fact it was the type of risk which makes the conduct a breach of duty.

When the injury is not coincidental, the court needs to decide whether the purpose of the duty is to protect the claimant from the risk which eventuated. This is an inescapably normative exercise on which reasonable minds will differ, as we shall see when applying the harm-within-risk rule to the facts of *Bhamra*. It is also an exercise which necessarily goes back to evaluating which risks are unreasonable (standard) and whether the defendant should be liable to the claimant for this type of injury (duty).

To conclude: the exclusion of coincidental loss is distinct from the exclusion of harm falling outside the relevant risk. Risks that are not increased by the breach cannot by definition be part of the reason to hold the conduct a breach of duty. But the reverse is not true: risks that are increased by the breach are not necessarily wrongful; they are not wrongful if the imposition of a duty was not aimed at reducing *them*.

3. Physical harm is not coincidental

It should be clear from the analysis in the last section that the injury in *Bhamra* to the hypothetical guest unaware of her allergy is not coincidental. As we saw, the correct test for coincidence is whether the risk of the harm befalling the claimant was increased due to the breach. The answer is clearly in the

positive: the harm is a risk of physical injury resulting from an allergy. An observant claimant, whether aware of her allergy or not, would not have been exposed to that risk had Dubb served food not containing eggs. Once it is understood that among all observant Sikhs some have egg allergy, and that those allergic to eggs can suffer injury only if they consume food containing eggs (either willingly or inadvertently) it becomes clear that the spiritual offence and physical injury from allergy risks are locked in together. Increasing one risk necessarily increases the other, and therefore the physical injury cannot be considered as coincidental.

I would like to defend this conclusion in the light of the broader debate in the literature about the correct test for coincidences. Jane Stapleton defines coincidental damage as one whose ‘incidence ... is not generally increased by the breach’.⁵⁶ As several commentators correctly observed,⁵⁷ Stapleton’s application of her coincidence test to *Chester v Afshar*⁵⁸ is mistaken. Afshar negligently failed to warn Chester of a small inherent risk in the procedure she undertook and the risk materialized. There was no negligence in the way the procedure was undertaken and, had Chester been warned, she would have delayed her consent but eventually would have undergone the procedure.⁵⁹ By majority, the House of Lords decided that there should be liability for the physical injury, despite the fact that under traditional rules of legal causation the injury should have been considered a coincidence. For Stapleton, Chester’s injury was not a coincidence, since a warning can affect the total incidence of such outcomes (through decreased participation) even though its absence does not affect the degree of risk associated with the procedure.⁶⁰ But since the purpose of a warning is to give the patient the option to avoid running the risk,⁶¹ the relevant general incidence is of injuries suffered by patients who decide to undergo the procedure, and for this group of claimants (like Chester herself) the breach did not increase the incidence of injury and (in other words) its probability.

While it is true that a warning might have caused some patients to avoid the procedure altogether, this is irrelevant for Chester. Thus, *Chester* is similar to the example of speeding, slowing and injuring without negligence discussed above.⁶² Chester, too, was not injured from what made the failure to inform her a breach of duty: the risk that a patient would undergo a procedure only because she is not aware of the relevant risks. The risk that materialized - injury from a procedure to which the patient was ultimately willing to submit

⁵⁶ Stapleton (n 42) 438-39.

⁵⁷ Clark and Nolan (n 11); Chris Miller, ‘Negligent Failure to Warn: Why is it so Difficult?’ (2012) 28 PN 266, 271-72; Hamer (n 28) fn 126; Stevens (n 42) 52-53.

⁵⁸ (n 6).

⁵⁹ (n 6) [7].

⁶⁰ Stapleton (n 42) 441-4.

⁶¹ *Chester* (n 6) [18] (Lord Steyn); [31] (Lord Hoffman dissenting); [55]-[56] (Lord Hope); [98] (Lord Walker); Clark and Nolan (n 11) 666-7.

⁶² See text following n 55 above.

had she been adequately informed – is *not* increased due to failure to warn so the ensuing injury is therefore coincidental.⁶³

While Stapleton's test of coincidence mistakes an absolute increase of injuries for an increase of the relevant risk (probability), the conclusion that Bhamra's injury is not coincidental is not subject to the same critique. The opening of a supermarket on Sunday contrary to Sunday trading law—an example given by Clark and Nolan to demonstrate their critique of Stapleton's test⁶⁴—does not increase the risk of customers slipping on spilt yogurt. It only produced a setting for the accident to occur. But as long as it cannot be shown that customers are *more* likely to slip on spilt yogurt on Sunday than on other days of the week, the injury is coincidental.⁶⁵ But serving observant Sikhs with food containing eggs does not merely set the scene in which the risk of allergy injury operates independently of the breach. It is the breach itself that exposes the guests to the risk of injury from allergy, a risk that was only created due to the breach. The conclusion that the injury is not a coincidence remains valid, whatever the claimant's reasons for avoiding eggs. Consider a claimant who was avoiding eggs since being told as a child that eggs caused him wind, while being unaware that he is allergic to them. His consumption of eggs increased the risk of an allergic injury, so the injury is not coincidental.

If Sikhs are more likely to suffer from egg allergy relative to the general population the injury is even less coincidental; this might suggest that one purpose of the duty not to serve eggs to observant Sikhs is to avoid allergy injury. But this shifts us from discussing coincidental loss to discussing the harm-within-risk rule.

⁶³ Yet the purpose of the duty to fully inform the patient could (and in my opinion does) encompass the preservation of the patient's autonomy, so that failing to give adequate information violates this interest and should yield compensation. However, the physical injury is not materialization of that other risk, so should not be given as damages for the autonomy loss. See Clark and Nolan (n 11) 688-91; Stevens (n 42) 53; T Keren-Paz, 'Compensating Injury to Autonomy: Normative Evaluation, Recent Developments and Future Tendencies' (2007) 22 Colman Law Review 187; cf Chester (n 6) [34] (Lord Hoffman).

⁶⁴ Clark and Nolan (n 11) 672-3.

⁶⁵ As an aside, even if it were shown that accidents on Sundays are more likely (since, for example, fewer staff are employed on Sundays), liability might still be excluded according to the harm-within-risk rule. It might be that the purpose of Sunday trading law is only to ensure that employees rest, and does not include a purpose of protecting customers from increased risk of accidents. Indeed, the latter purpose might undermine the former, for to avoid an increased risk of injury to customers, more staff have to be employed, contrary to the purpose of Sunday trading law.

4. The harm eventuated from a risk which made the serving of eggs a breach of duty

Was the increased risk of allergy from serving eggs one of the reasons which made the serving of eggs negligent? The relevant background to answering this question is the absence of a general duty to warn against egg allergy (the Court's point of departure) and the fact that the ostensible reason for Dubb's duty not to serve eggs in the wedding was to avoid offending the religious beliefs of the guests.

Let us focus our attention first on the exposure of a *provider* of food who makes a representation that the food is egg-free. Recovery in *Bhamra* is arguably problematic in terms of the harm-within-risk rule, since the ostensible reason to avoid serving eggs was religious and not health-related. Had Bhamra purchased ras malai which contained eggs in a vegan restaurant, there would have been no doubt that the physical injury (and the religious injury) was recoverable. People follow a vegan diet for different reasons, ranging from ethical concerns (about animal welfare and sustainability), religious concerns, health concerns (eg cholesterol levels) and medical concerns such as allergy. The restaurateur cannot know the particular client's motivation for seeking vegan food, but all these motivations, and the consequent harm which might follow from a breach, are foreseeable.⁶⁶

The argument that Dubb should be treated differently from the owner of the vegan restaurant is that the ostensible reason to expect Dubb to serve egg-free food was religious and not medical. However, a 'free from' representation invites reliance that might protect a different interest from that intended by the seller. Such reliance is both foreseeable and reasonable. A kosher butcher should not be heard that the injury to the religious feelings of a Muslim consuming pork believed to be kosher is outside the scope of his duty, since his motivation was to sell kosher food to Jews, and not halal to Muslims. Similarly, if a lactose intolerant claimant buys meatballs with sauce from the kosher butcher, and the sauce happens to contain milk contrary to kosher rules (which prohibit the mixing of meat with dairy products), a physical reaction to the milk should give rise to liability. This is so despite the fact that the butcher's motivation was to provide kosher food to observant Jews, not lactose-free products, and since the claimant was reasonably and foreseeably relying on the meat being kosher, and therefore dairy-free. Dubb's knowledge that his guests would suffer religious offence from the breach could hardly serve as a reason to exempt him from liability for the allergy injury, when he had a reason to know that some guests might be allergic to eggs and that they have no other way of protecting themselves other than adhering to an egg-free diet.

⁶⁶ In this scenario, liability is likely to be contractual, so there is no need to show reliance, and possibly, liability is strict, so it would not depend on showing fault on the part of the restaurateur. If, however, the claim is still ingrained in negligent misrepresentation, then reliance by all clients, regardless of motivation, ought to, and is likely to, be considered as reasonable and foreseeable.

An attempt to exclude physical harm from the relevant set of wrongful risks is problematic for another reason - religious dietary restrictions might have been health motivated, at least partially.⁶⁷ If health concerns were one (potential) reason for the development of the religious diet, an attempt to view health risks as outside the scope of duty not to serve certain food on religious grounds ought to fail. Moreover, separating spiritual and physical injuries ignores the problem of mixed motives. The same claimant might want to consume product-free food for mixed reasons. To take one example, a vegetarian observant Jew has two different reasons not to consume McDonald's chips fried in beef fat.⁶⁸ All this suggests that it is not so simple to exclude certain types of risks as irrelevant for the creation of the duty to avoid serving certain types of product.

Let us now turn to the *consumer*. As explained in Section A, the informational vulnerability of observant people ought to lead to a conclusion that the risk of allergic reaction to eggs is one of the reasons which makes the serving of food containing eggs negligent. To understand further why this informational vulnerability justifies liability according to the harm-within-risk principle, recall Y - the non-Sikh with unknown egg allergy attending the wedding and suffering the same injury as Bhamra.⁶⁹ For Y, the harm-within-risk rationale provides a clear denial of liability because the religious offence and physical injury risks are independent. Y is not a beneficiary of the duty to avoid religious offence, and since he is not observant he has neither informational nor medical vulnerability (ie he does not rely on adherence to religious restrictions to protect him from physical injury). Y was merely exposed to the risk any member of the general public is exposed to: suffering an allergic reaction to a common product upon first encounter.⁷⁰ Like Darby, who was

⁶⁷ For claims that the development of kosher restrictions was health motivated see David Bryan, *Cosmos, Chaos and the Kosher Mentality* (1995) 144-60. Certainly, kosher restrictions were explained by some authoritative rabbinical scholars as based mainly, or partially, on health concerns; see respectively Maimonides, *The Guide for the Perplexed* (S Pines trans, Chicago UP, 1963 [1204]) Pt B, Ch 47; Ramban, *Leviticus*, ch 11, verse 13. Both scholars were 12th century Rabbis, philosophers and physicians.

⁶⁸ cf *Block v McDonald's Corporation* (No 1-03-1763, App. Ct. Ill, 2005).

⁶⁹ See Section A1.

⁷⁰ Individuals not observing religious restrictions who suffer from egg allergy are likely to find out they are allergic to eggs the first time they eat them (usually as children). Since they did take the risk of eating eggs (a common product) – ie they have neither informational nor medical vulnerability – the defendant who first exposed them to eggs should not be liable in negligence.

I have recently argued that those suffering injury from unforeseeable risk ought to be compensated based on a restitutionary theory, provided that their injury advanced scientific knowledge which would prevent harm from others; Tsachi Keren-Paz, 'Injuries From Unforeseeable Risks Which Advance Medical Knowledge—A Restitution-Based Justification for Strict Liability' (2014) 5(3) *Journal of European Tort Law* 175. But this theory cannot support

entitled to be warned against the special risk (Weil's disease) but not against the general risk which materialized (drowning), Y is not entitled to be protected from the general risk of allergic reaction, only from the special risk of being susceptible to allergy injury due to informational or medical vulnerability. Since Y was not an observant Sikh, his harm eventuated from the general, not the special, risk.

Y, like Bhamra, but for the opposite reason, is a very unlikely claimant. As a non-observant Sikh, he was supposed to have already found out about his egg allergy. If the Sikh wedding was indeed the first time he had consumed eggs, or the first time in which his body developed allergic reaction to eggs, his injury is merely a coincidence – he could just as well have been injured by eating eggs in a pub serving an English breakfast.⁷¹ Dobb's conduct of serving eggs at the wedding was not the but-for cause of Y's injury, who did not rely on the presentation, did not have informational or medical vulnerability, would not have changed his behaviour had he been warned, and was willing to take the risk of eating eggs.⁷² In contrast to Y, *an observant guest is not willing to take the risks associated with eating eggs, so the breach did increase the wrongful risk of allergy injury and this risk ultimately eventuated.*

In summary, the avoidance of allergy risk is an inevitable by-product of adhering to religious dietary restrictions, and therefore, a physical injury falls within the scope of risk which made the serving of eggs a breach of duty. This is the correct conclusion even if we were to define the duty *merely* as 'do not serve eggs in order to avoid religious offence'. In fact, as the discussion about duty of care demonstrates, the correct definition of the duty is 'do not to serve eggs in order to avoid egg allergy' (whether or not this duty is accompanied by a duty to avoid religious offence). This can be seen from the fact that a duty should be owed to a non-observant guest, aware of his egg allergy, who reasonably relies on eggs not being served at a Sikh wedding. Finally, the observant guest's injury is even more clearly within the scope of the wrongful risk if adherence to religious restriction increases the susceptibility to egg

compensation for a claimant suffering injury from an allergic reaction which is already known. The knowledge that the claimant suffers from a known source of allergy will not prevent harm from any other individual, so does not benefit anyone else. In this sense, Bhamra and X's cases are different from the one in which the patient has an unknown, or hitherto unknowable, sensitivity to a new drug. Egg allergy is foreseeable, although unknown in X's case. When the clinician has no reason to know that the patient might be allergic to the drug there ought to be no liability in negligence for the reaction to the drug.

⁷¹ Possibly, the but-for test is not satisfied either: Y would have had the same injury soon after, but-for Dobb's negligence. cf n 41 above; *Dillon v Twin State Gas & Electric Co*, 163 A 111 (NH, 1932).

⁷² Arguably, the breach involved in serving eggs to Y did not increase the risk that Y would suffer an injury (a point separate to the lack of but-for causation). But this is debatable. If correct, the situation is identical to *Chester*, in which the defendant's breach did not increase the risk to Chester, since she would still have undergone the operation even if she had been warned.

allergy – as seems to be the case – or if the religious restriction was motivated (even partially) by health concerns.