

The Denning Law Journal 2013 Vol 25 pp 265-272

BOOK REVIEW

FEMINIST PERSPECTIVES ON TORT LAW

Janice Richardson and Erika Rackley (eds), Routledge 2012, ISBN 978-0415619202 Price £80.00 hb

*Carol Brennan**

Because it is the area of civil law with a distinctly human face, students often initially find tort law accessible; sometimes deceptively so. Early on, they are introduced to the importance of policy in the development of case law. Often this policy is not articulated, so a skill must be developed of reading between the lines, in order to discern the influence upon judicial decision-making of concerns such as those about the ‘floodgates’, or perhaps defensive practice. But additionally, both students, their teachers and users of the tort system, must be appraised that explicit assertions about ‘policy’ are premised upon much more fundamental and elusive assumptions about the way society does or should operate.

When these assumptions are gender-based, it is contended, women using the tort system are frequently disadvantaged on both an individual and collective basis; and this is all the more serious because of the insidious means of operation. This collection of writings by prominent feminist tort scholars from around the common law world sets out to expose, explore and criticise these hidden gendered underpinnings across a spectrum of torts from negligence, through personal torts such as rape, on to novel ways of looking at privacy and nuisance law.

The ‘feminist perspectives’ of the title must be clearly identified if the collection is to be assessed on its own terms. For Joanne Conaghan, the feminist legal endeavour is: ‘first and foremost to bring a gendered perception of legal and social arrangements to bear upon a largely gender-neutral understanding of them’ (p 14). When aspects of the legal system apparently ignore or under-value 50% of the population, a message is being sent to the wider society.

In addition to the dissection of gendered perceptions, the other key critical stance pursued by the contributors is the feminist view of the world, and thus law, in relational terms; that is human connectedness and interaction. Arguably, the tort system itself is premised on an individualistic or atomistic

* LLB, MA, PhD, Barrister.

BOOK REVIEW

model of harm and of remedy; but damage can be visited upon a community, as in nuisance cases, and a collective response may often be more empowering for the vulnerable in society, among whom there will be a strong female representation. Conaghan asserts that where, 'tort law, as traditionally presented, presupposes the essential separateness of individuals from each other, feminist perspectives recognise, from the very outset, our necessary connectedness' (p 66).

Some contributions focus on particular torts: negligence, nuisance, privacy, or trespass to the person. But they all contain, to some degree, analyses of gendered conceptions of harm and their consequent impact on both development of tort doctrine and the calculation of damages. Negligence, and its fundamental component duty of care is an obvious starting point, with Jennifer Steele examining the strengths and weaknesses of current judicial approaches. She elucidates the way in which individualist rhetoric has influenced the inevitable line-drawing, which abstract conceptions of duty of care require. Carol Gilligan's seminal ideas on moral psychology and her feminine 'ethic of care' support Steele in her advocacy of a more relational and contextual approach to duty.

In 'Endgame: On Negligence and Reparation for Harm' Nicky Priaulx explores historical assumptions that determine how harm is conceptualised for the purposes of damages calculation. She posits a form of 'psycho-social' or hybrid damage - not generally compensable due to the 'bright line' which has favoured physical injury in order to restrict the spread of negligence, (with narrow exceptions for serious psychiatric injury). Too often, damage suffered by women, whether emotional or related to reproduction, is consigned the category of mere 'vicissitudes of life', which are not compensable. The evolution of duty of care is characterised by incrementalism; which, while bringing a degree of equality within the tort system, can also be criticised as somewhat arbitrary.

Her argument goes much farther, however, and she casts doubt upon the whole 'damage principle'. Stepping outside of the tort system, which 'reaches a rather small (and privileged) community of injured beneficiaries' (p 45), Priaulx questions the contribution of negligence law to humanity. She reappraises the 'taken-for-granted' notion that physical injury is '*especially harmful*' (author's italics). When research on hedonic psychology indicates that people often adapt to misfortune, including the physical, should we consistently regard disability in only negative terms? Ultimately, she suggests that lack of consensus over where to draw boundaries to the reach of negligence could lead to 'a no-win situation in attempting to establish a fair and inclusive means of providing redress for harm' (p 51).

Dayna Nadine Scott investigates a case, novel for many British readers, where public nuisance led to collective harm in a Canadian First Nation community. In an industrial area of the Great Lakes, known as 'Chemical

Valley', environmental contamination by endocrine-disrupting chemicals ('gender benders') were said to have led to a dramatic drop in the birth of males. Additionally to the causal hurdles to be surmounted, environmental activists supporting the legal actions were aware that skewed sex ratio was novel and problematic category of damage. As with that discussed by Prialux, the harm is intangible, or 'incorporeal'. This was reproductive harm suffered at a collective level; though additionally there were individual health problems within the aboriginal community. While tort law is founded on the assumption of the separateness of individuals, 'all living things are embedded and interwoven into larger webs of being' (p 55), never more so than in the process of reproduction. The case is a paradigm of feminist relationality. Also evident here, as in many environmental cases, are issues of racial and class equality. Scott quotes a mantra: 'some of us live more downstream than others' (p 58). Again, fundamental givens are challenged, as she points out that once damage is conceived not at the 'cellular' but 'community level', we must also radically re-think what providing a remedy for this injury would actually entail. Would 'loss of a chance' be applicable? Sadly, it is possible to mention only a handful of the disturbing dilemmas presented by Scott.

In her contribution on police negligence, Kirsty Horsey interrogates the long-standing immunity of the police from claims for negligence in the function of crime prevention and investigation. Assumptions underpinning the policy arguments in cases ranging from *Hill v Chief Constable of West Yorkshire*,¹ to *Smith v Chief Constable of Sussex Police*,² are challenged. Her references are extensive and informative, including the details of many Independent Police Complaints Commission investigations as well as comparisons with Canada, where a duty to warn rape victims was recognised in *Doe v Met Toronto (Municipality) Commissioners of Police*.³ Not for the first time in this collection, an author acknowledges the potential clash of differing feminist perspectives. What is being lost or compromised if all females are regarded as inherently vulnerable and thereby in need of extra protection from the police? The title of Horsey's piece, 'Police Negligence, Invisible Immunity and Disadvantaged Claimants' accurately reflects that the issues involved in this developing area range far beyond those of gender.

In 'Drug Products Liability Actions and Women's Health' Patricia Peppin describes biases which impact on women as consumers of pharmaceuticals in their reproductive life. She presents as vivid 'lessons from mass tort litigation' three products which impacted directly upon women: thalidomide, the Dalkon Shield and Diethylstilbestrol (DES). They illustrate the profound harm done to women and their children by inadequate testing and cavalier marketing, harm

¹ [1989] AC 53.

² [2008] UKHL 50.

³ (1998) 160 DLR (4th) 289 (Supreme Court (Can)).

BOOK REVIEW

compounded by the inability of the tort system to provide adequate recompense. It was revealing to consider the possible effects of bias in drug advertising, where women are overrepresented as patients requiring psychiatric drugs and under-represented as cardio-vascular patients (except in the carer role). The instilled 'diagnostic image' may then unconsciously bias practitioners, so that they are prone to over-diagnose psychiatric illness in women, but fail to recognise cardio-vascular symptoms which, to complicate matters, do not conform to those of males. When pharmaceuticals are tested and marketed, the default patient is taken to be the adult male. The resultant knowledge deficit puts women at risk from being treated with inadequately tested drugs. One key demographic which is excluded from clinical trials are of course pregnant women, but no viable alternative is suggested. Peppin concludes that '...feminist activists may drive the movement for social change' (p 122). However, it must not be forgotten that elderly men (and women), as well as children, continue to be regarded as 'therapeutic orphans' in relation to the drugs industry.

The standard of care of in negligence is the topic of Miola's contribution, in which he reviews the post-*Bolitho*⁴ application of the common law's *Bolam* test.⁵ He sees the main issue as one of paternalism from the medical profession; often more related to power than gender. But because those at the top of the medical profession are more likely to be male, and patients are frequently female, Miola endorses Conaghan's concept of 'gendered harms' which are 'not exclusive to females in any biological sense [but which] are risks women are more likely to incur' due to male violence and reproductive intervention. Natural empathy between male judges and male doctors reinforce this paternalism. Will gradual 'feminisation' of the medical profession (with women making up 60% of new applicants) lead to differences in the application of the 'reasonableness' test for standard of care? It is concluded that very gradually, cases such as *Chester v Afshar*,⁶ indicate the patient perspective is gaining ground. The lack of an evidential base for some of his key assertions is disquieting in an otherwise illuminating discourse on the current state of the case law.

In her chapter, 'If I Cannot Have Her Everybody Can', Janice Richardson traces the development of privacy law leading to the growing number of sexual disclosure cases. These include revelation to the press of sexual activity (*Max Mosley v News Group Newspapers*⁷), and the technologically-enabled spreading of (usually hetero-) sexual imagery. She begins by exploring four different theories of privacy: non-intrusion (Warren and

⁴ *Bolitho v City and Hackney Health Authority* [1998] AC 232.

⁵ *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582.

⁶ [2005] AC 134.

⁷ [2008] EWHC 1777.

Brandeis's 'right to be let alone'), seclusion (physical), limitation (secrecy) and control (autonomy over use of private information). They provide the bases for trying to understand both motivations and harm in this area and are said to be constantly adapting in order to accommodate changes in modes of communication and society. Richardson considers the way that decisions involving celebrities (eg *Theakston v MGN*⁸ and *A v B Plc*⁹) would initially appear to favour the feminist cause by refusing injunctions against sexual disclosure, thus protecting the right of women in transitory relationships to profit from the sharing of 'their' information about the liaison. This leads her to analyse the impact upon notions of secrecy in intimate relationships the thinking of Charles Fried who describes an atomistic 'property in the person', and the similar, but more complex, position of Kant that the person should never be treated only as an end, but never as the means by which to perform an immoral act (eg that of disclosure). Richardson concludes that neither theory is adequate to deal with the fact that not only motivations, but also the nature of the harm must be considered by the courts in determining cases, and that the latter will be, to some extent, determined by the victim's perception of the former.

Thus, differing male motivations remains key for Richardson, some of which are revenge through humiliation ('revenge porn') and apparent macho bonding, as in the recounted criminal case in which a cadet at the Australian Defence Force Academy relayed in real time a sexual encounter with a female cadet to six male cadets in a nearby room.¹⁰ Richardson does not do justice to her argument when she fails to substantiate her assertion that, 'While there may be cases of men attempting to make money from disclosure and women motivated by revenge or more complex desires, it is the men in the case law who demonstrate these potentially darker desires'. She simply writes that these dark desires are indicated by the sexual double standards men use to humiliate women with 'revenge porn'. There is a relatively brief mention of 'sexting', which is said to be often created by girls and then used as a means of betrayal by the recipient boys. But aside from recommending that it must be sensitively regulated, not much more is done with this complex and contradictory phenomenon to promote the feminist thesis on privacy. Richardson believes that feminism must reconcile two apparently conflicting positions: the first rejects conceptions of privacy which protect violence which is hidden away in the home while the second, in which guards aspects of intimacy which are not for public consumption. Other aspects of the

⁸ [2002] EMLR 78.

⁹ [2003] QB 195.

¹⁰ J Richardson, 'If I Cannot Have Her Everybody Can: Sexual Disclosure and Privacy Law' citing S Smith, 'Interview with Fran Kelly – ABC Breakfast', Transcript, 12 April, 2011 in Richardson and Rackley 152.

BOOK REVIEW

problem she considers are definitions of public interest, psychiatric injury and the general revolution in the ‘infosphere’.

Richardson acknowledges that the feminist discourse favours analyses of privacy which give priority to the relational rather than individualistic or atomistic concerns. She approves the recognition by the ECtHR that one aspect of art 8 privacy protection is ‘the right to develop relationships with other human beings and the outside world...’¹¹ It would be interesting to construct a feminist response to the recent case of *AAA v Associated Newspapers*¹² where an injunction application on behalf of a child to prevent revelations about her paternity was denied on the basis of her own mother’s earlier ambivalent attitude to the disclosure of this information. The relational doesn’t always advantage the female or the vulnerable.

The next two chapters deal with the dubious utility of civil law actions for sexual wrongs. Nikki Godden, in ‘Tort Claims for Rape: More Trials, Fewer Tribulations?’ begins with the observation that tort claims for rape are relatively rare and then features as case studies, three that have been successfully brought (against relatively wealthy defendants), considering whether there are strategic reasons for encouraging greater use of civil law remedies by victims of sexual wrongs for egalitarian ends. The issue of consent, though challenged historically by feminists, has been interpreted to the claimant’s benefit in the few civil cases that have been examined. But case law does not reveal the reality of power, trust, and hierarchy and the use of sexual history evidence illustrates the way in which in civil law, as well as the criminal, stereotypes and misogynistic assumptions undermine complainants’ worth and autonomy. She believes, however, in an increase in judicial awareness of social consequences of rape as well as psychological and lost economic opportunity. There shouldn’t be an assumption that the purpose of bringing tort claims is measured purely by the quantum of the damages award; also relevant are vindication, punishment, and ‘legal validation’. Godden concludes that things are generally improving in civil claims for rape, while recognising that it is a wrong which generally is generally committed with impunity.

A chapter which is one of the most comprehensive and ultimately satisfying is ‘Sexual Wrongdoing: Do Remedies Reflect the Wrong?’ by Elizabeth Adjin-Tettey. She melds an imaginative critical analysis of the way harm is viewed generally in the tort system with the fact that the sexual wrong-doer often targets the most vulnerable in society, not only on the basis of gender but also age and lack socio-economic or political power. In a similar vein to Priaux, Adjin-Tettey recognises that intangible losses, as opposed to the bodily or financial, are less likely to be recognised and compensated by

¹¹ *Peck v UK* [2003] EMLR 289.

¹² [2013] EWCA Civ 554.

the tort system. She asserts that harm is socially constructed and that Western thought's endorsement of a dualism: mind/body or reason/emotion, has disadvantaged women, who are traditionally associated with the latter. Bodily integrity is protected as a tangible property right whereas the less visible aspects of autonomy, breached in sexual wrong-doing, tend not to be accorded legal legitimacy. Having explored what she calls 'commodification anxiety' and the 'corruptibility' of intangible interests, she concludes that when compensation is inadequate, victims will be deterred from seeking justice through the tort system. Victims, already on the margins of society, are further marginalised. Adjin-Tettey makes the case for an enhanced state funding of compensation to such victims, thereby removing redress for sexual wrongs from the 'private sector' (the legal system) and placing it in the sphere of social responsibility.

Lastly, comes the amusingly titled 'Damages Stereotypes: the Return of 'Hoovering as a Hobby' by Regina Graycar. Personal injury damages assessment might appear to be gender-neutral but closer inspection reveals the effect of entrenched assumptions about women's roles in the workplace and the home. Depressingly, it is often the case that calculations for loss of future earnings are based upon actuarial data for the average female wage, rather than the (higher) combined male/female wage; a policy which assumes the indefinite continuation of existing inequalities. Courts are adhering to antiquated stereotypes, when they hold that a woman's loss of capacity to do domestic work is actionable only either by her husband in an action for loss of consortium, or personally under the non-pecuniary heading. By treating it as loss of amenity, much of the work that women do is thus devalued by being equated with recreational activities. More significantly, the law condones and perpetuates a failure to recognise the considerable economic value much of the work done by women.

'Brainstorming' is a term used to describe their task by more than one of the authors in this collection and the reader engaging with this book is provoked by a multitude of ideas and questions to be further pursued. As with all worthwhile critical interrogations of the law, 'normative underpinnings' are exposed and boundaries of categories and concepts challenged. Some contributions are more essentially feminist than others, and indeed the editors in their introduction observe that many of the legal reforms advocated in the collection are not part of a 'zero sum game in which men lose if women gain'. The more convincing arguments note that in many cases of injustice gender may not be the only operative determinant, but more broadly the vulnerability or lack of power in those who are poorly served by the law. Prialux asks what extensions to the operation of negligence might do *for humanity* (her italics). Adjin-Tettey admonishes that victims must be listened to in their own words and in their own terms rather than through Sutherland's 'lens of power and privilege'.

BOOK REVIEW

The editors reflect on the dilemma that when recommending tort reform, some can be said to be 'buying into' the existing discourse of the legal system, rather than taking a more objective and thus radical stance, as does for example Adjin-Tettey. A more pervasive dilemma in feminism is that many arguments are dependent upon treating the default state of the female as lacking power, status and victimhood, although this can be a reality, even in the relatively privileged sectors of society covered by common law legal systems. At the same time, as some authors point out, the situation is improving and the pitfall of Graycar's judges who assume the future will not see further change, must be avoided.

The diversity of tort itself necessarily requires the juxtaposition of very disparate types of wrong and of damage: eg the disruption of a population's sex ratio due to toxic pollution in the wilds of Canada as compared to the very different indignities of 'sexting'. Its wide scope gives this collection both its spice but some of its drawbacks. It is important for cohesion that the contributions should be linked by a strong thread: here, of feminism. In some instances, this thread is stretched rather thin. Miola's effort to fit his otherwise strong piece on the standard of care in negligence into the feminist mold seems contrived. More disquieting is Richardson's unsupported assertion that it is only the male perpetrators of 'revenge porn' who somehow demonstrate 'darker desires'. This does a disservice to her otherwise impressive analysis.

No student of medical law will forget the quietly revolutionary speech by Lady Justice Hale in *Parkinson v St James and Seacroft University Hospital NHS Trust*,¹³ in which she explicitly addressed the issue of damages for unwanted pregnancy from the female perspective. This was surely the first time a senior judge had recounted the reality of childbirth and motherhood from personal experience. Richardson and Rackley's collection of feminist scholarship makes a significant contribution, not only to 'disclosing and dislodging' the gendered norms at work in tort law, but to providing 'an agenda for change' for a future in which Lady Justice Hale is no longer a lone voice.

¹³ [2001] EWCA Civ 530 [63]-[71].