



Masselot, A., & Russell, R. (2020). Why do we care? The shifting concept of care in New Zealand and in the United Kingdom. *International Journal of Comparative Labour Law*, 36(1), 81–106. <https://www.kluwerlawonline.com/JournalArticle/International%20Journal%20of%20Comparative%20Labour%20Law%20and%20Industrial%20Relations/36.2/40485>

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Why do we care? The shifting concept of care in New Zealand and in the United Kingdom

Roseanne Russell and Annick Masselot

Abstract

In recent years, there has been increased activity on the part of legislators and policy-makers as they attempt to reconcile paid work and unpaid care. This paper explores the different approaches adopted by two common law jurisdictions: New Zealand and the United Kingdom. These case studies attempt to take a more expansive approach to the concept of care by purportedly disentangling the act of caring from traditional conceptions of motherhood. In the UK, this has been done by permitting mothers to transfer entitlement to caring leave to fathers but is underpinned by implicit assumptions that the primary responsibility for care will remain with the mother. In New Zealand, there has been a departure from historic reliance on gender identities to take a more gender-neutral approach by providing caring leave to whoever is a primary carer for a child regardless of biological connection. One unintended consequence of this has been that biological mothers have been left with the barest health and safety protection post-birth. These case studies reveal how difficult it is for legislators and policy-makers to devise care-giving protections that are not in some way tainted by the legacy of traditional care/home/women and work/market/men dichotomies and demonstrate the need for new models based on ungendered assumptions of universal care.

Introduction

In recent years and across jurisdictions, there has been considerable legal evolution in relation to the concept of care within the context of the family. While the biological process of childbearing is largely unchanged,¹ and the needs of new-born children have remained constant, what has altered are societal expectations of who should provide care, and how these fit with shifting constructions of the family. Traditionally, there existed a strict dichotomy between work and family lives with, as Olsen has observed, men being associated with the former and women with the latter.² This legacy of associating women with unpaid labour in the home meant that 'the social construction of the male breadwinner'³ emerged as a model for determining wages and often devalued women's earnings as ancillary income. While the social reality has moved considerably beyond the male breadwinner paradigm to an economic and welfare model premised on 'the adult worker', the historical treatment of women's labour as being confined to the domestic sphere has meant that the very idea of what it means to be a worker has been moulded in highly gendered terms.⁴ For Pateman,

¹ We discuss the unique situation of surrogacy below and there have, of course, been significant developments over recent decades in assisted forms of reproduction. See, in particular, A. Masselot and R. Powell (eds.), *Perspectives on Commercial Surrogacy in New Zealand: Ethics, Law, Policy and Rights*, Centre for Commercial and Corporate Law, 2019.

² FE Olsen, 'The Family and the Market: A study of Ideology and Legal Reform' (1983) 96 (7) *Harvard Law Review* 1497.

³ J. O'Reilly, M. Smith, S. Deakin and B. Burchell, 'Equal Pay as a Moving Target: International perspectives on forty years of addressing the gender pay gap' (2015) 39 *Cambridge Journal of Economics* 299, 328.

⁴ On the shift from a male breadwinner to adult worker model of the family see J. Lewis and S. Giullari, 'The adult worker model family, gender equality and care: the search for new policy principles and the possibilities

“...the construction of the ‘worker’ presupposes that he is a man who has a woman, a (house)wife, to take care of his daily needs. The private and public spheres of civil society are separate, reflecting the natural order of sexual difference, and inseparable, incapable of being understood in isolation from each other”.⁵

Such an environment has encouraged men to perform as breadwinners unencumbered by caring responsibilities albeit that ‘the ideology of fatherhood has also evolved so as to include an element of nurturing’,⁶ while the paradigm of a good mother is bound up with notions of ‘saintly self-denial’.⁷ These ideologies of what it means to be an ideal mother, ideal father and ideal worker have become strained as, in recent decades, women and men both increasingly participate in the paid labour market and in the unpaid labour of care. For James, the transition in family-economic models from ‘male breadwinner’ to ‘adult worker’ has in part been a response to wider structural changes in the labour market necessitating increased and more flexible labour⁸ but also reflects shifts in individual identities. The image of the self-sacrificing and nurturing ‘ideal’ mother for example fails to resonate in the contemporary paid labour market in which women are active participants.⁹

Despite the shift to an adult-worker family-economic model, structural change of our institutions and social policies have lagged behind. Strict gender divisions are arguably necessary for the survival of an out-dated economic model of ‘male breadwinner’, which affords a central place to paid work in the market. Reliance on these divisions is problematic as it not only entrenches troubling and restrictive ideologies of motherhood and parenting but also continues to separate life into distinctly private (care) and public (work) spheres. Policy-makers have attempted to grapple with the complexity of addressing the reconciliation of paid work and care but have been hindered by a failure to unravel these gendered ideologies. Strategies that have encouraged women’s participation in a paid labour market based on these gender divisions demand ‘only that women be allowed to participate in the current discriminatory system in which males have access to gender privilege that women lack’.¹⁰ Meanwhile, caring policies that have typically been modelled on providing special treatment for women, such as the right to paid maternity leave, have been accused of being grounded on a claim that ‘they can’t live up to societal standards designed without them in

and problems of a capabilities approach’ (2005) 34 (1) *Economy and Society* 76; J. Lewis, ‘The adult worker model family, care and the problem of gender equality’ (2006) 14 (1) *The Journal of Poverty and Social Justice* 33; C. Annesley, ‘Lisbon and social Europe: towards a European “adult worker model” welfare system’ (2007) 17 (3) *Journal of European Social Policy* 195; and R. Guerrina, ‘Socio-economic challenges to work-life balance at times of crisis’ (2015) 37 (3) *Journal of Social Welfare and Family Law* 368.

⁵ C. Pateman, *The Sexual Contract* (Polity Press; Bristol, 1988), 131.

⁶ G. James, ‘Mothers and fathers are parents and workers: family-friendly employment policies in an era of shifting identities’ (2009) 31 (3) *Journal of Social Welfare & Family Law* 271, 274. On the pressures on men see J. Williams, ‘Jumpstarting the Stalled Gender Revolution: Justice Ginsburg and Reconstructive Feminism’ (2012) 63 *Hastings Law Journal* 1267.

⁷ J. Williams, *Reshaping the Work-Family Debate: Why Men and Class Matter* (Harvard University Press; Cambridge, Mass., 2010), 150.

⁸ James (2009), 271. On the consequences for women of the shift to increased precariousness in the labour market see J. Fudge and R. Owens (eds) *Precarious work, women, and the new economy: the challenges to legal norms* (Hart Publishing; Oxford, 2006).

⁹ James (2009), 272-4.

¹⁰ J. Williams, ‘Dissolving the Sameness/Difference Debate: A Post-Modern Path Beyond Essentialism in Feminist and Critical Race Theory’ (1991) *Duke Law Journal* 296, 303-304.

mind'.¹¹ Neither strategy tackles the structural problem of the continued gender segregation of work and family life.

In this paper, we argue that the reconciliation of paid work and unpaid care requires a regulatory framework that is built upon the premise of universal caring responsibilities and that moves beyond the current preoccupation of equating care with womanhood. We examine recent developments in caring leave in two common law jurisdictions, *Aotearoa*/New Zealand (NZ) and the United Kingdom (UK). Both countries have sought to extend paid caring leave on the arrival of a child into a family to those who are not biological mothers. The particular cultural contexts of these two jurisdictions have led to different models being adopted. In NZ, leave is now given to the 'primary caregiver' regardless of biological association. In the UK, 'shared parental leave' allows a child's parents to decide how to share care over the first year. In both cases, the legislators appear to have adopted a far more expansive notion of caregiving than was previously the case with caring leave no longer being the sole preserve of the biological mother. Despite the apparent progress that these enhanced entitlements suggest, these new rights are informed both explicitly and implicitly by gendered notions of ideal parenthood and confusion over the precise purpose of caring leave. In both cases, statutory leave may be transferred to others, but this is conditional on the biological mother giving up her primary entitlement to maternity leave, thereby endorsing the close association between care and ideal motherhood. In the UK, mothers who do transfer their entitlement to care leave and, in NZ, women who give birth but do not go on caring for their offspring, risk being left with the barest health and safety protections. In the UK, enhanced payments for care are denied to those other than the biological mother. The result is a somewhat messy patchwork of well-intentioned policy goals that lack any theoretical coherence around what care leave is for.

This paper is structured as follows. In Part 1, we set out the right to care leave in NZ following the adoption of the Parental Leave and Employment Protection Amendment Act in 2017. Part 2 outlines the right to caring leave in the UK with a focus on the Shared Parental Leave Regulations 2014. Turning to Part 3, we advance the central argument of this paper, which is that there persists a fundamental lack of clarity on the part of legislators and courts about the purpose of leave connected to the arrival of a child into the family. Part 4 outlines the dire consequences linked to the lack of clarity underpinning care leave. From a feminist perspective, the lack of clarity with regards to the aims of maternity and other forms of leave results not only in the prejudicial treatment of the relevant workers, but also affects the employability of all women regardless of whether they become a mother or not. In Part 5, we argue that a more expansive concept of care leave has the potential to unsettle the problematic notions of ideal parenthood and ideal worker at play in this area, but that this requires a more deep-seated structural reform, not just of the structure of care leave but with the organisation of the paid labour market. We suggest that giving a more central place to 'caring' and questioning the law's assumption of autonomous legal subjects provides a helpful starting point for future work. A brief conclusion proposes a radical shift in untangling the public/private divide underpinning care-policies by starting from a care perspective.

¹¹ *Ibid.*, 305.

Part 1: The New Zealand law on the right to leave following the birth of a child

The Parental Leave and Employment Protection Amendment Act, adopted on 4 December 2017, follows a pledge to improve parental leave legislation by the newly elected Labour-led coalition government. It amends the NZ Parental Leave and Employment Protection Act 1987 (“PLEPA”) to provide qualifying employees who care for a child with the right to primary carer leave from work and parental leave payment, from about the time of the birth, adoption order, or the start of the caring period.

Prior to the 2017 amendments, the leave, then referred to as ‘parental leave’, was exclusively granted in two situations: either the female worker had given birth to a child, for whom she and her partner were caring or following the formal adoption of a child under the age of five.¹² The statute did not consider any other situations such as circumstances in which a woman would give birth to a child but would not go on caring for him or her. There were at least two situations of family formations relevant to the NZ context that were ignored and which resulted in the prejudicial treatment of the relevant workers. These two situations are those of surrogacy¹³ and *whāngai* arrangements under Māori customary values and practices. In both cases, the child is cared for by someone who is not his/her biological parent.¹⁴ Māori customary values and practices, or *Tikanga Māori*, have developed over time and are legally recognised in NZ legislation. *Whāngai* arrangements under the indigenous Māori custom are comparable to formal adoption under the Adoption Act 1995.¹⁵ However, traditional Māori understandings of the concept of family are much broader than that of many Europeans, which is often restricted to parents and children; the so-called nuclear family.¹⁶ The conceptualisation of the family in European legal tradition is moreover characterised by legal rights based on a notion of formal attachment between child and parents and an idea of ‘possession’.¹⁷ In contrast, Māori children are part of an extended family group or *whānau*, through *whakapapa* (genealogy). *Whānau* comprise the bottom tier of a social hierarchy that embraces both the idea of a living entity and extended family that can extend back three generations and to which members are bound. The social hierarchy is comprised of *whānau*, *hapū* and *iwi*. *Hapū* is the middle tier and consists of a number of *whānau*; a modern definition often used for *hapū* is ‘sub-tribe’. *Iwi* describes the top tier of this hierarchy and consists of

¹² PLEPA, s 71A (as before 1 July 2018).

¹³ In surrogacy cases, a woman (the surrogate) gives birth to a child but does not go on to care for that child, who is then looked after by the intended parent(s) (D. Wilson ‘Surrogacy in New Zealand’ (2016) *New Zealand Law Journal* 401). The intended parent(s) are individuals, who intend to become the legal parents (mothers and/or fathers) of a child produced as a result of a surrogacy agreement, adoption, foster or other agreements. Under NZ law, the woman who gives birth to a child is the legal parent of that child (and her partner is the other legal parent), until the intended parents have formally adopted the child. Status of Children Act 1969, s 17. See A. Masselot and R. Powell (eds.), *Perspectives on Commercial Surrogacy in New Zealand: Ethics, Law, Policy and Rights* (Centre for Commercial and Corporate Law 2019).

¹⁴ See generally A. Masselot and I. Schelp, ‘Parental Leave and Surrogacy: Caring is Everything’, in A. Masselot and R. Powell (eds.), *Perspectives on Commercial Surrogacy in New Zealand: Ethics, Law, Policy and Rights* (Centre for Commercial and Corporate Law 2019) 137-153.

¹⁵ J. Ruru, ‘Kua Tutū Te Puehu, Kia Mau: Māori Aspirations and Family Law Policy’ in M. Henaghan and B. Atkin (eds) *Family Law Policy in New Zealand* (4th ed LexisNexis, Wellington, 2013).

¹⁶ J. Trost, ‘Do we mean the same by the concept of family’ (1990) 17 (4) *Communication Research* 431.

¹⁷ K. Fiona, ‘Conceptualising the child through an ‘ethic of care’: lessons for family law’ (2005) 1 (4) *International Journal of Law in Context* 375; L. Hantrais and M.T. Letablier, *Families and family policies in Europe* (Routledge, 2014).

multiple related *hapū*. *Iwi* is associated with a regional territory and is often used interchangeably with the word 'tribe'.¹⁸ The entire *Whānau*, which are typically multi-layered, flexible and dynamic as well as being based on a Māori and a tribal worldview, are committed and involved at different stages in the growth and development of children.¹⁹ *Whānau* is the key unit for raising a child, in addition to the parents. Therefore, the rights associated with raising children are not exclusive to the parents. *Whānau* relationships include those with *whāngai* (foster/adopted children) and those who have passed on.²⁰

Family, in the Māori context, is therefore a far wider conception than that envisaged in the UK context discussed below. Prior to the 2017 amendment of the PLEPA however, intended parents did not have a right to parental leave until they had formally adopted the child,²¹ which process would typically take a year. Under Māori customs, it is normal for someone besides the biological parents of the child to play a significant role in that child's life. Although the concept of *whāngai* parents in traditional Māori customs has been interpreted broadly by the NZ courts, they have struggled to find a way to deal with diverse concepts of family. It had long been argued that parental leave should be granted to those who cared for young children regardless of their biological ties to the child and indeed, the PLEPA has, at times but not consistently, been interpreted in a way that extends paid parental leave to parents in cases of *whāngai* and customary adoptions.²²

Against this backdrop, the 2017 statutory amendment to the PLEPA introduces the concept of *primary care giver leave*, which focusses on the requirement of care rather than on gestation.²³ The primary carer leave replaces the former right to parental leave. The definition of a primary carer is set out in Section 7(1) of the PLEPA. A primary carer is either a female (the *biological mother*) who is pregnant or has given birth to a child; or the spouse or partner of the biological mother, if she dies²⁴ or if she transferred all or part of her entitlement to parental leave payment to that spouse or partner²⁵ and if the spouse or partner becomes the person who takes primary care of the child and meets the parental leave payment thresholds test; or a person, other than the biological mother or her spouse or partner, who takes permanent primary responsibility for the care, development, and upbringing of a child who is under the age of 6 years. Arguably, the primary carer leave represents a wide understanding of the concept of family as it embraces a broad spectrum of family constellations. Section 7(1)(c) includes formal adoption, *whāngai* arrangements under Māori custom,²⁶ Home for Life

¹⁸ R. Benton, A. Frame and P. Meredith *Te Mātāpunenga: A Compendium of References to the Concepts and Institutions of Māori Customary Law* (Victoria University Press: Wellington, 2013) at 521, 100; A. Cooke, 'The Children, Young Persons, and Their Family Act and Māori Children' (2015) 8 *NZFLJ* 121, 121.

¹⁹ K. McRae and L. Waimarie Nikora 'Whāngai: Remembering, Understanding and Experiencing' (2006) 1 *MAI Review* 1, 3.

²⁰ A. Mikaere 'Māori Women: Caught in the Contradictions of a Colonised Reality' (1994) 2 *Waikato Law Review* 125.

²¹ *Bell v Ministry of Business Innovation and Employment* [2013] NZERA Wellington 68 5402282.

²² *Toroa v Department of Labour* 2007 WA 148/07 5087663 at [14].

²³ The Parental Leave and Employment Protection Amendment Act 2016, s 16 replaced s 7 with the meaning of primary carer.

²⁴ Section 72B PLEPA.

²⁵ Section 71E PLEPA.

²⁶ In contrast to the European nuclear concept of family, which strongly relies on the formal attachment between the child and parents and adopts an idea of 'possession', under traditional Māori understandings, a child belongs

carers²⁷ and grandparents caring for their grandchildren but excludes foster parents and child minders.

There can only be one person entitled to primary carer leave. Section 7 of the PLEPA states, that in the case of two or more persons meeting the criteria for parental leave, those persons must jointly nominate which one of them is to be the primary carer and only the nominated person is entitled to primary carer leave and parental leave payments under the Act.²⁸ Intended parents, in cases of surrogacy, are therefore able to secure their right to a period of leave from the time they care for the infant, which usually starts immediately at birth.

Under the amended legislation, the primary carer of a child under the age of 6 years old is entitled to a continuous period of up to 22 weeks of primary carer leave.²⁹ To qualify for primary carer leave, an employee must have worked for the same employer for at least an average of 10 hours a week over the immediately preceding 6 or 12 months.³⁰ In addition, primary carers are entitled to unpaid extended leave³¹ – either 26 or 52 weeks, depending on whether s/he meets the 6-month continuous employment test (which qualifies to 26 weeks of unpaid extended leave), or the 12-month test, qualifying for 52 weeks. Following the period of leave, the employee is entitled to return to work under the same conditions as prior to taking the leave.

During the 22 weeks of primary carer leave the person, who meets the parental leave payment threshold test, is also entitled to receive parental leave payments.³² Self-employed persons who are the primary carer of a child under the age of 6 and who met the parental leave payment thresholds test are also eligible to up to 22 weeks parental leave payments.³³ It should be noted that parental leave payment is managed by the government and is set at a level under that of the minimum wage,³⁴ prompting criticisms that productive activities are more valued than reproductive ones.³⁵

to an extended family group or *whānau*, through *whakapapa* (genealogy). The entire *whānau* are committed and involved at different stages in the growth and development of the child (A. Mikaere 'Māori Women: Caught in the Contradictions of a Colonised Reality' (1994) 2 Waikato Law Review 125 at 129-130. The Māori term for *whānau* also means 'to be born' and 'give birth' (J. Moorfield *Te Aka Māori-English, English-Māori Dictionary* (Pearson, Auckland, 2011)).

²⁷ Permanent care, or Home for Life as it is known, involves a legal process to enable a person to be a child's permanent caregiver. This happens when a decision is made by the Family Court that a child cannot be cared for by their own family and a permanent caregiver is designated for life. See A. Jackson and A. Gibbs, 'New Zealand's Home for Life Policy: Telling Children they Matter but only for Three Years' (2016) 30 *IJLPF* 322.

²⁸ PLEPA, s 7(2).

²⁹ PLEPA, ss 7-16. The primary carer leave will increase to 26 weeks from 1 July 2020.

³⁰ PLEPA, s8(1). See Rudman *supra*, 265.

³¹ PLEPA, s 23.

³² PLEPA, S71A. An employee meets the test if they will have been employed as an employee for at least an average of 10 hours a week for any 26 of the 52 weeks just before the due date of the baby or the date they or their partner becomes the primary carer of the child under 6 permanently. The employment for this test can be with more than one employer and does not have to be continuous employment.

³³ PLEPA, s 71CB.

³⁴ In 2019, the employee's weekly parental leave payment was set at the maximum amount of \$585.80 gross per week compared to \$708 for the minimum wage.

³⁵ A. Masselot, 'Gender Implications of the Right to Request Flexible Working Arrangements: Raising Pigs and Children in New Zealand' (2015) 39 (3) *New Zealand Journal of Employment Relations* 59.

Primary carer leave and extended leave can be shared with the partner of the primary carer³⁶ if the partner has a 6-month or 12-month continuous period of employment and is intending to assume the responsibility for the care of the child.³⁷ If the partner meets the parental leave payment threshold test, then s/he is also entitled to receive parental leave payments.³⁸ Extended leave and partner leave are available only if the primary carer initially meets the eligibility criteria.

The partner of the primary carer is moreover entitled to a continuous period of partner's leave³⁹ of 1 week partner's leave where the employee meets the 6-month employment test or 2 weeks when meeting the 12-month employment test.⁴⁰

Finally, Section 15 of the PLEPA regulates special leave for pregnant employees. Pregnant female employees are entitled to take a total of up to 10 days of special leave without pay for reasons connected to the pregnancy.⁴¹ This section is a special form of maternity leave applicable to pregnant employees only.⁴² The special leave is exclusively applicable to the gestational connection between mother and child,⁴³ and would therefore apply to a pregnant surrogate.

The NZ legislator's construction of the family for the purposes of care leave has sought to neutralise gender as an organising concept. Going significantly beyond traditional heteronormative ideas of the family, primary care giver leave recognises the diversity of family units and focuses on the emotional labour of care rather than value-laded assumptions about the gender of the care-provider. In contrast to the UK developments we discuss in Part 2, the NZ model provides an example of how it is possible to develop protections for care-givers based on a more realistic and less gendered image of the family. Yet, by moving to a more gender-neutral conception of care, the risk is that biological mothers become disadvantaged. Section 15 of the PLEPA is the only provision which is based on health-related considerations for the pregnant worker. In the majority of cases, the mother who gave birth is also the woman who cares for her infant. Therefore, the same person will need both recovery and time to care for her infant. However, as the right to leave has been made gender neutral and focussed exclusively on care, it no longer provides this health and safety function. As the leave is granted on the ground of care, the woman who gives birth receives no protection in cases such a surrogacy and *whāngai*. The new NZ legislation has therefore increased the vulnerability of those women who give birth but do not go on caring for the child. These women are only entitled to 10 days' special leave (unpaid) for reasons connected to the pregnancy.⁴⁴ Whether 10 days' special leave for a gestational mother is sufficient is an important (medical) issue especially for women, who act as surrogate mothers or for mothers who lose their child during birth. The question is compounded by the fact that the 10 days special leave is to cover needs both during pregnancy and post-birth. The usual postpartum

³⁶ PLEPA, ss 28 and 29.

³⁷ PLEPA, s 17.

³⁸ PLEPA, 171D.

³⁹ PLEPA, s 17.

⁴⁰ PLEPA, s 19.

⁴¹ P. Kiely, *New Zealand Guide to Holidays and Leave* (4th ed, CCH Wolters Kluwer, Auckland, 2016), 121-150.

⁴² PLEPA, s 15.

⁴³ Not yet providing for the rare case of gestational fathers as it is only limited to female employees.

⁴⁴ PLEPA, s 15.

recovery period after giving birth is recognised to be around six weeks.⁴⁵ Although the intention is to minimise costs of maternity cases, it seems unjustified to overlook the medical needs for recovery of birthing mothers when they are not eligible to primary carer leave. When the gestational and intended mother are not the same, as in surrogacy cases, there is a risk that the needs of the gestational mother may not be met. Moreover, as the 10 days special leave are unpaid, low paid women will likely be tempted to compromise their health and safety to minimise the number of unpaid days. The fact that the leave is unpaid further shows that women's unique and essential reproductive ability remains entrenched in the private sphere and invisible to the market.

Part 2: Shared Parental Leave in the UK

The UK offers a helpful comparison with the NZ context. While both common law jurisdictions have recently grappled with the dilemma of how to resolve the care-work conundrum, each has taken a different approach. As discussed above, the NZ model is premised on care. It goes considerably beyond traditional heteronormative concepts of the family and separates the act of childbirth from the subsequent act of caring. One criticism that may be made of it, however, is that the health and safety concerns of the biological mother are given insufficient attention under this new gender-neutral model. In contrast, the UK has tried to unsettle the gender division of work and care labour but continues to rely too heavily on these gender distinctions. Weldon-Johns has described three clear stages in the development of 'work-family rights' in the UK: rights for mothers, gender-neutral rights for carers and, the current stage, 'expanding these rights to working fathers, specifically recognizing their role and enabling them to address their work-family commitments'.⁴⁶ Although the entitlement to paid caring leave has changed dramatically in recent years due to the introduction of Shared Parental Leave ("SPL") for children born on or after 2 April 2015,⁴⁷ this entitlement is predicated on eligible mothers opting to bring their entitlement to statutory maternity leave to an end in order to allow the father to take leave.⁴⁸ As the UK Government's technical guidance on SPL makes clear, mothers may 'choose' to curtail their maternity leave. But, as Mitchell argues, this merely 'continues to prioritise the caring role of mothers even though the long period of transferable leave symbolically recognises the caring role of other parents',⁴⁹ a development that James has described as 'unfortunate'.⁵⁰

⁴⁵ Maternity care under the NZ health system provides for up to six weeks of health visits by midwives, see Ministry of Health "Maternity care" <<https://www.health.govt.nz/your-health/pregnancy-and-kids/services-and-support-during-pregnancy/maternity-care>>; The World Health Organisation and the ILO convention 183 recommend a minimum of 14 weeks. A normal postpartum period, which is the time after birth during which the mother's body returns to a non-pregnant state, is believed to take six to eight weeks. See P. Simkin et al., *Pregnancy, Childbirth and the Newborn: The Complete Guide* (Meadowbrook, 1984), 199-202. However, it has been pointed out that, for some women, adaptation to motherhood and recovery from childbirth may take longer. See, for example, S. Macdonald and J. Magill-Cuerden, *May's Midwifery* (Bailliere Tindall, 2011), 725.

⁴⁶ M. Weldon-Johns, 'The Additional Paternity Leave Regulations 2010: a new dawn or more 'sound-bite' legislation?' (2011) 33 (1) *Journal of Social Welfare & Family Law* 25, 25.

⁴⁷ Regulation 2(1) of The Shared Parental Leave Regulations 2014 SI 2014/3050 ("SPL Regulations").

⁴⁸ Father may include the child's father or the husband, partner or civil partner of the mother at the time of the child's birth: Regulation 3(1) SPL Regulations.

⁴⁹ G. Mitchell, 'Encouraging Fathers to Care: The Children and Families Act 2014' (2015) 44 (1) *Industrial Law Journal* 123, 124.

⁵⁰ G. James, 'Mothers and fathers as parents and workers: family-friendly employment policies in an era of shifting identities' (2009) 31 (3) *Journal of Social Welfare & Family Law* 271, 276.

Maternity leave

The rights to statutory ordinary and additional maternity leave are set out in section 71 and 73 of the Employment Rights Act 1996 (ERA) respectively. Maternity leave is for 52 weeks divided into 26 weeks' ordinary maternity leave,⁵¹ followed by 26 weeks' additional maternity leave.⁵² This is irrespective of how long the employee has worked for her employer, a change introduced by virtue of the Work and Families Act 2006. It is compulsory for two weeks of maternity leave to be taken.⁵³

UK domestic law in the area of maternity rights has been heavily informed by the European Union (EU) Pregnant Workers' Directive.⁵⁴ One important requirement of the Directive is that an 'adequate allowance' is paid to women during maternity leave so that women are able to enjoy the health and safety protection that the Directive aims to ensure.⁵⁵ This allowance should guarantee 'income at least equivalent to that which the worker concerned would receive in the event of a break in her activities on grounds connected with her state of health, subject to any ceiling laid down under national legislation'.⁵⁶ In *Gillespie and others v Northern Health and Social Services Boards*,⁵⁷ the Court of Justice of the EU (CJEU) ruled on the question of whether a woman on maternity leave was entitled to receive the full pay she would have received had she not been on leave. While the CJEU held that there was no requirement for a woman to continue to receive full pay in these circumstances,

'the amount payable could not, however, be so low as to undermine the purpose of maternity leave, namely the protection of women before and after giving birth. In order to assess the adequacy of the amount payable from that point of view, the national court must take account, not only of the length of maternity leave, but also of the other forms of social protection afforded by national law in the case of justified absence from work.'⁵⁸

In the UK, the regulation of statutory maternity pay is governed by the Social Security Contributions and Benefits Act 1992 and the Statutory Maternity Pay (General) Regulations 1986.⁵⁹ There are several conditions upon which statutory maternity pay is dependent. These include both an employment and earnings test. In respect of the former, the woman must have been employed by her employer 'for a continuous period of at least 26 weeks ending with the week immediately preceding the 14th week before the expected week of confinement'.⁶⁰ In respect of the latter, that she earned more than a prescribed amount in the 8-week period ending with the week immediately preceding the 14th week before the expected week of confinement.⁶¹ This amounts to earning on average at least £118 per week

⁵¹ Regulation 7(1) of the Maternity and Parental Leave etc. Regulations 1999 SI 1999/3312 ("MPL Regulations").

⁵² Regulation 7(4) MPL Regulations.

⁵³ Section 72(1) ERA; Regulation 8 MPL Regulations.

⁵⁴ Directive 92/85/EEC.

⁵⁵ Article 11(1) of Directive 92/85/EEC states that 'the employment rights relating to the employment contract, including the maintenance of a payment to, and/or entitlement to an adequate allowance...must be ensured in accordance with national legislation and/or national practice'.

⁵⁶ Article 11 (3) of Directive 92/85/EEC.

⁵⁷ Case C-342/93, ECLI:EU:C:1996:46.

⁵⁸ *Ibid*; paragraph 20.

⁵⁹ SI 1986/1960.

⁶⁰ Section 164 (2)(a) SSCBA 1992.

⁶¹ Section 164(2)(b) SSCBA 1992.

at the current rate. If eligible for statutory maternity pay, it is payable for 39 weeks. The first 6 weeks is paid at 90% of normal weekly earnings.⁶² The remainder is paid at a Government-prescribed weekly rate (currently) £148.68 or 90% of weekly earnings, whichever is lower. For James, the lack of earnings-related pay for the duration of maternity leave is problematic. She asserts that few women are 'able to take advantage of long term maternity leave entitlement when pay is so low...This is especially true at a time when dual earner households are the norm...'.⁶³ Writing in 2006 she also lamented the failure to provide 'equivalent rights for fathers [which] perpetuates the ideology of motherhood'.⁶⁴ Although the introduction of paternity leave and pay has to an extent addressed this concern, as will be argued below, the system of paid care leave in the UK remains steeped in the ideology of mothers being privileged as primary carers.

Paternity leave

In an attempt to disrupt the gendered patterns of caring and allow partners to participate in childcare, paternity leave was introduced by the New Labour Government but there were significant issues raised about the paucity of the right as it was originally enacted.⁶⁵ The right to paid paternity leave (paid at the same Government-set rate for statutory maternity pay) was initially limited to two weeks' leave, which must be taken within 56 days of the child's birth. Moreover, as Caracciolo di Torella observed, '...the legislation rather obscurely states that fathers can use the leave 'to care for the child and to 'support the mother', implying that the father is to play a secondary supporting role rather than being the primary carer.'⁶⁶

A new, somewhat short-lived, right to additional paternity leave was introduced by the Additional Paternity Leave Regulations 2010.⁶⁷ These allowed fathers to take up to six months' additional paternity leave if the mother returned to work but were abolished by the Children and Families Act 2014 and replaced with the current entitlement to shared parental leave.⁶⁸ What the Additional Paternity Leave Regulations gave fathers was 'the opportunity of leave' but the 'real choice' rested, argued Weldon-Johns, with mothers.⁶⁹ It was working mothers who remained gate-keepers to a family's caring arrangements.

Shared Parental Leave

Shared parental leave was introduced as a way of providing more flexibility to parents to arrange care to suit their personal circumstances. Apart from the compulsory two-week period of maternity leave that a mother must take to recover from the birth of the child, the remaining entitlement of 50 weeks' leave and 37 weeks' statutory pay can be split between parents.

⁶² Section 166(1) SSCBA 1992.

⁶³ G. James, 'The Work and Families Act 2006: Legislation to improve Choice and Flexibility?' (2006) 35 (3) *Industrial Law Journal* 272, 273.

⁶⁴ *Ibid.*

⁶⁵ Employment Act 2002; The Paternity and Adoption Leave Regulations 2002 (SI 2002/2788).

⁶⁶ E. Caracciolo di Torella, 'New Labour, New Dads – The Impact of Family Friendly Legislation on Fathers' (2007) 36 (3) *Industrial Law Journal* 318, 322.

⁶⁷ SI 2010/1055.

⁶⁸ Section 125 of the 2014 Act.

⁶⁹ Weldon-Johns (2011) *supra*, 34.

The entitlement is governed by the Shared Parental Leave Regulations 2014. The SPL Regulations also apply to adoptive parents.⁷⁰ 'Father' will be used as short-hand but this includes the child's father or the mother's husband, partner or civil partner at the time of birth.⁷¹ A number of conditions are specified in the SPL Regulations to be able to access the benefit. These include the requirements that the employee has been continuously employed for a period of not less than 26 weeks ending with the week immediately preceding the 14th week before the expected week of birth,⁷² and 'remains in continuous employment with that employer until the week before any period of shared parental leave taken by the employee'.⁷³ She also has to have the main responsibility (apart from the father) for the child's care at the date of birth⁷⁴ and is entitled to statutory maternity leave in respect of the child.⁷⁵

For the father to claim SPL, he must also show that he has the main responsibility for the child's care (apart from the mother)⁷⁶ and must satisfy the employment and earnings test set out in Regulation 36. In summary, this requires that he will have been employed or self-employed for at least 26 of the 66 weeks immediately preceding the expected week of birth and has average weekly earnings of not less than the current prescribed amount (around £30 per week).⁷⁷ For the leave to be transferred to the father, the mother has to be entitled to statutory maternity leave, pay or allowance and must have ended/curtailed her right to this.⁷⁸ Provided that the qualifying conditions are met, the parents are entitled to share the balance of statutory maternity leave between them.⁷⁹

Part 3: Why it matters *why* we care

The recent experiences of NZ and the UK show that legislators are increasingly alive to the shifting composition of family life and its associated impact on who provides care for a newborn child. In both jurisdictions, caregiving has the potential to become disassociated from the biological mother in a way that offers the opportunity for partners, or wider family members in the NZ experience, to assume responsibility for the care of a child. In attempting to develop policies that shape a better and fairer access to care, there is a risk that the NZ legislator has moved too far in favour of gender neutralisation and left insufficient protection in place for women who have given birth.⁸⁰ In part, this result may be explained by the continuing debates around what caring leave is for, which we discuss in this Part. Put simply, the UK framework with its (over)reliance on gender categories upholds a conception of parenting leave predicated on mixed ideas of childcare and recovering from the effects of childbirth. The NZ model, in its attempt to adopt a wider conception of family and thereby escape traditional gender binary models of mother (carer) and father (breadwinner), has yet

⁷⁰ Regulation 2(2) SPL Regulations.

⁷¹ Regulation 3(1) SPL Regulations.

⁷² Regulation 35(1)(a) and Regulation 3(a) SPL Regulations.

⁷³ Regulation 35(1)(b) SPL Regulations.

⁷⁴ Regulation 4(2)(b) SPL Regulations.

⁷⁵ Regulation 4(2)(c) SPL Regulations.

⁷⁶ Regulation 4(3)(b) SPL Regulations.

⁷⁷ Regulation 36(1)(a) and (5) SPL Regulations.

⁷⁸ Regulation 5(3)(c) and (d) SPL Regulations.

⁷⁹ Regulation 6(1) SPL Regulations.

⁸⁰ It should be noted that although recently a few men have given birth, each of them had biologically formerly been a woman. It might be necessary to include men who give birth into maternity leave eligibility with regard to equal treatment.

to find a way to reconcile the protection of a biological mother's health with the policy imperative of protecting carers. It may offer a more expansive approach to caring but ironically it has not fully moved on from the legacy of associating mothers with care. In attempting to delineate care and gender, a lacuna has developed in the law's protection where biological mothers lose out.

Closer scrutiny of these caregiving entitlements also reveals a theoretical incoherence about the precise aims of care leave. In both cases, the initial entitlement rests with the biological mother, which simultaneously reinforces the problematic stereotype of the ideal mother who takes primary responsibility for childcare, while providing much-needed protection to women in a context of widespread pregnancy and maternal discrimination.⁸¹ By extending the care to others, however, both legislators and the courts who have had to grapple with these new rights have demonstrated confusion over what the aims of this care should be. On one view, it might be said that it does not matter *why* we care; what matters is that there is support for those who care and freedom for families to choose how best to structure their own caregiving. On another view, *why* we care is of fundamental importance because it speaks to the value that we attach to care as a society and, importantly for our purposes, informs the most appropriate strategy for ensuring that those who do care are appropriately and sufficiently protected. In this Part, we analyse how the courts have framed the justification of maternity and other forms of leave, before turning, in Part 4, to how we might move beyond an over-reliance of gendered categorisation in this area to afford a more central place to universal caring in future policy developments.

Aims of maternity leave and parental leave

Traditionally, employment law protection concerning pregnancy and maternity has at least three aims. The first is to allow the mother to recover physiologically following the birth through the provision of minimum standards of health and safety for the mother and the child. The health and safety goal of pregnancy/maternity leave is reflected in a number of international⁸² and regional⁸³ provisions. This is captured by the current NZ and UK entitlements to a period of compulsory maternity leave that cannot be transferred.⁸⁴

The second aim is to provide some emotional space so that new parents are able to bond with the baby and meet its needs.⁸⁵ While the leading decision of the CJEU in *Hofmann v Barmer Ersatzkasse* had originally restricted the protection to that of mother/infant,⁸⁶ in recent times,

⁸¹ HM Government and EHRC, *Pregnancy and Maternity-related Discrimination and Disadvantage* (London, 2016.)

⁸² Eg: Preamble of the International Labour Organization's Maternity Protection Convention (n. 183) (adopted in 1919 and last revised in 2000).

⁸³ Article 1(1) of Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC), O.J. [1992] L348/1;

⁸⁴ See section 15 PLEPA 2017 in respect of NZ and section 72(1) ERA and Regulation 8 of the MPL Regulations in respect of the UK.

⁸⁵ G. Douglas and N. Lowe 'Becoming a Parent in English Law' in J. Eekelaar and P. Sarcevic (eds) *Parenthood in Modern Society, Legal and Social Issues for the Twenty-First Century* (Martinus Nijhoff Publishers, 1993) 145; R. Collier and S. Sheldon *Fragmenting Fatherhood: A Socio-Legal Study* (Hart Publishing, Oxford, 2008).

⁸⁶ In Case 184/83 *Ulrich Hofmann v Barmer Ersatzkasse*. ECLI:EU:C:1984:273, at para 24.

the CJEU has expanded the protection to include the relationship between the infant and the father.⁸⁷

The third, and perhaps most controversial aim, is to ensure gender equality although precisely what is meant by this or how to achieve it remains contested. Gender equality in the workplace is cited as a major aim of the International Labour Organization's Maternity Protection Convention (n. 183) (adopted in 1919 and last revised in 2000). In contrast, the EU has struggled to make the connection between pregnancy/maternity leave and gender equality.⁸⁸ While in the *Hofmann* case the CJEU held that the equal treatment 'directive is not designed to settle questions concerned with the organization of the family, or to alter the division of responsibility between parents',⁸⁹ in *Hill and Stapleton*, the Court explicitly stated that 'Community policy in this area is to encourage and, if possible, adapt working conditions to family responsibilities.'⁹⁰ Over the past couple of decades, EU law has evolved to recognise that the achievement of gender equality in the workplace can only be realised if gender equality is also pursued in the private sphere. Accordingly, an increasing number of laws and policies are being designed to reconcile work and family life for all.⁹¹ These policies are largely predicated on women joining in the paid labour market on equal terms to men or in being permitted sufficient flexibility in their working lives to allow them to balance caring commitments. Neither formulation of gender equality appears to tackle the structural barriers that make it difficult to combine work and family life. While the introduction of care-giving leave to family members other than the mother has the potential to disrupt these rather narrow notions of what gender equality means (by encouraging men to contribute to unpaid care and domestic work), the courts appear reluctant to embrace more substantive notions of gender equality that would require structural reform to our institutions. The recent UK Court of Appeal judgment in the conjoined cases of *Ali v Capita Management Limited* and *Hextall v The Chief Constable of Leicestershire Police* prove instructive in this regard.⁹² In these cases, the Court had to grapple with the question of whether it was unlawful sex discrimination to pay a man on shared parental leave less than what a woman would be paid on maternity leave. Like many employers, the respondents in these cases offer enhanced maternity pay beyond the statutory minimum. In *Ali*, the employer's policy provided that enhanced maternity pay would be paid for 39 weeks comprising 14 weeks on full pay and 25 weeks on statutory maternity pay ("SMP") but fathers taking shared parental leave would only be entitled to statutory pay. *Ali*, whose wife had been advised to return to work after two weeks' compulsory maternity leave, argued that it was direct discrimination contrary to section 13 of the Equality Act 2010 not to pay him enhanced maternity pay for 12 weeks. This was based on 14 weeks of enhanced maternity pay less the two weeks' compulsory maternity

⁸⁷ Case C-104/09 *Roca Álvarez v Sesia Start España ETT SA*. ECLI:EU:C:2010:561; Case C222/14 *Konstantinos Maïstrellis v Ypourgos Dikaïosynis, Diáfaneias kai Anthropinon Dikaïomaton*. ECLI:EU:C:2015:473.

⁸⁸ E. Caracciolo di Torella and A. Masselot, 'Pregnancy, maternity and the organisation of family life: an attempt to classify the case law of the Court of Justice', (2001) 26(3) *European Law Review* 239. Directive 92/85/EEC is exclusively based on Health and Safety and not on gender equality. Although the European Commission had endeavoured to amend the Pregnant Workers Directive in 2008, the project was eventually cancelled.

⁸⁹ Case 184/83 *Hofmann* ECLI:EU:C:1984:273, at para. 24.

⁹⁰ Case C-243/95 *Hill and Stapleton v. The Revenue Commission and the Department of Finance*. ECLI:EU:C:1998:298, at para. 42.

⁹¹ See for instance the adoption of Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU.

⁹² [2019] EWCA Civ 90.

leave. The appropriate comparator was, he argued, a woman on maternity leave. He claimed that there was no material difference in circumstances relating to his case and that of a woman on maternity leave.⁹³ At first instance, the Employment Tribunal agreed with him but, on appeal, the Employment Appeal Tribunal (“EAT”) did not. According to the EAT, relying on *Hofmann*, there was a fundamental difference in purpose between maternity leave and shared parental leave meaning that a woman on maternity leave was not an appropriate comparator. Regard was also had to the CJEU judgment in *Commission v Luxembourg*, where the Court contrasted maternity leave with parental leave:⁹⁴

‘Parental leave is granted to parents to enable them to take care of their child...Maternity leave has a different purpose. It is intended to protect a woman's biological condition and the special relationship between a woman and her child over the period which follows pregnancy and childbirth, by preventing that relationship from being disturbed by the multiple burdens which would result from the simultaneous pursuit of employment...’

Relying on this earlier jurisprudence, the UK Court of Appeal reiterated that the ‘predominant purpose’ of maternity leave as set out in the Pregnant Workers’ Directive and *Hofmann* ‘is not childcare but other matters exclusive to the birth mother resulting from pregnancy and childbirth and not shared by the husband or partner’.⁹⁵ The proper comparator for Ali was therefore a female employee on shared parental leave who would also have received the lower statutory rate of pay. As such, there was no direct discrimination.

In *Hextall*, the argument was framed as one of indirect rather than direct sex discrimination. There, Hextall’s employer paid enhanced occupational maternity pay at 18 weeks’ full pay with the remainder at SMP rates. Only statutory pay was available during shared parental leave. Hextall took 14 weeks’ shared parental leave and was paid at the statutory rate. He claimed that his employer’s practice of ‘paying only the statutory rate of pay for those taking a period of shared parental leave’ put men at a particular disadvantage and was indirectly discriminatory contrary to section 19 of the Equality Act 2010. His employer argued that the claim should be properly characterised as falling under section 66 of the Act, an ‘equal pay’ provision that provides for a ‘sex equality clause’ to be imposed into a contract of employment so that men and woman are paid equally for equal work. The Court of Appeal agreed that Hextall’s claim should more appropriately be characterised as an equal terms claim rather than an indirect sex discrimination claim but, in any event, both claims would fail. The Court’s view was that this case turned on an argument that men were disadvantaged by the ‘whole statutory scheme, in turn derived from EU law, under which special treatment is given to birth mothers’.⁹⁶ Even if Hextall could show that he was placed at a disadvantage, this could be justified as a proportionate means of achieving a legitimate aim, ‘namely the special treatment of mothers in connection with pregnancy or childbirth’.⁹⁷

Ali and *Hextall* have raised complex issues which ultimately turn on what we regard as the purpose of paid leave and how we value care. On one view, privileging the enhanced protection for mothers should not be diminished particularly when many pregnant women

⁹³ Section 23 Equality Act 2010.

⁹⁴ Case C-519/03 *Commission of the European Communities v Grand Duchy of Luxembourg*. ECLI:EU:C:2005:234, at paragraph 32.

⁹⁵ At paragraph 72.

⁹⁶ Paragraph 116.

⁹⁷ Paragraph 121.

and new mothers in the UK and in NZ continue to report negative workplace experiences.⁹⁸ Demanding equivalence of treatment between women on maternity leave and men on shared parental leave runs the risk that employers will ‘level down’ thereby reducing the amount paid to women, which would be a regressive step. Yet it is difficult to see how the gendered division of caring labour can be disrupted without giving fathers enhanced pay. This is especially the case when men are typically the higher earners in a relationship. Indeed, Rubery and Grimshaw have highlighted how intimately care is bound up with the gender pay gap.⁹⁹ Recognising that work is ‘a broader social activity, not purely an economic one’¹⁰⁰ factors contributing to the pay gap have been found to:

“...include the under-valuation of women’s work and norms reinforcing women’s position as economic dependents. Workplace characteristics and sex segregation of women into low value-added jobs...especially in sectors that lack union representation also play an important role. *Many of these factors can also be traced to the unequal division of unpaid labour in the home shaping patterns of segregation, working time schedules and access to promotion*”.¹⁰¹

Families are therefore caught in a vicious circle where the father will typically earn more and so it makes better economic sense for mothers to take extended leave from work unless fathers are entitled to enhanced payments. The Court of Appeal, however, has refused to see the lack of enhanced payments as an issue of unlawful sex discrimination. Although the SPL Regulations offer the promise of shared care-giving between parents, they are proving ill-equipped to unsettle the deep-seated and out-dated idealised norms in this area based on the caregiving mother and breadwinning father.

Part 4: Reconciling paid work and care in the pursuit of substantive equality

How do we reconcile paid work in the market and unpaid care in the home? The discussion of the NZ and UK case studies offers two contrasting examples of how legislators and policy-makers have sought to protect carers. The UK model relies on traditional gender divisions and offers protection to mothers who may choose to transfer some entitlement to fathers; the NZ model breaks the link between childbirth and childcare but, in adopting a gender-neutralised vision of care, leaves biological mothers with little protection.

Issues around pregnancy, maternity and the care of young children highlights the enduring feminist paradox regarding the way to achieve greater equality between men and women.¹⁰² Historically this debate was conceptualised around two opposing frameworks: equality-as-

⁹⁸ For the UK, see HM Government and EHRC, *Pregnancy and Maternity-related Discrimination and Disadvantage* (London, 2016). For NZ, see A. Masselot ‘Gender Implications of the Right to Request Flexible Working Arrangements: Raising Pigs and Children in New Zealand’, (2015) 39 (3) *New Zealand Journal of Employment Relations* 59.

⁹⁹ J. Rubery and D. Grimshaw, ‘The 40-year pursuit of equal pay: a case of constantly moving goalposts’ (2015) 39 *Cambridge Journal of Economics* 319.

¹⁰⁰ J. Browne, ‘Resolving Gender Pay Inequality: Rationales, Enforcement and Policy’ (2004) 33 (4) *Journal of Social Policy* 553, 567.

¹⁰¹ O’Reilly et al. (2015), 301. Emphasis added.

¹⁰² See generally, E. Caracciolo di Torella and A. Masselot, *Caring responsibility in EU law and policy: who cares?* (Routledge 2020).

sameness and equality-as-difference.¹⁰³ Ultimately, the choice of a framework leads to the question of whether law should be instrumental towards the search for equality or whether, on the contrary, it should recognise differences. Those who worked from an equality-as-sameness position¹⁰⁴ saw women as equally capable as men of participating in the labour market¹⁰⁵ and concentrated their efforts on abolishing the barriers that prevented women's full participation in that sphere. This argument lined up nicely with the dominant economic model, which is based on growth and the promotion of women into the paid workforce. The application of this doctrine to the issue of pregnancy and maternity has resulted in the adoption of provisions allowing women to take time off work in relation to pregnancy and maternity and anti-discrimination rules preventing the dismissal of pregnant workers and workers on maternity leave. If there is agreement on this general goal, the main debate within this school of thought has been on the best method for achieving gender equality by using formal and/or substantive equality.¹⁰⁶

Supporters of equality-as-difference put emphasis on the differences between men and women, especially when women are considered in their role as mothers and carers. Under this model, biological differences (such as the right to bear children) and socially constructed differences (such as the equation of women with care) are recognised in order to achieve equality in practice.¹⁰⁷ The principle of equality, which is criticised as being based on male norms and encouraging women to assimilate into a socially-constructed man's world, is therefore considered to undervalue actual (childbearing) or perceived/constructed (childrearing) unique female attributes. This is problematic when the majority of the caring work (especially for young children) is carried out by women¹⁰⁸ and has typically been undervalued.¹⁰⁹

¹⁰³ J.A. Sohrab, 'Avoiding the "Exquisite Trap": A Critical Look at the Equal Treatment/Special Treatment Debate in Law' (1993) 1(2) *Feminist Legal Studies* 141-162; R. Lister, *Citizenship: Feminist Perspectives* (New York University Press 1997); E. Caracciolo di Torella and A. Masselot, 'The ECJ Case Law on Issues Related to Pregnancy, Maternity and the Organisation of Family Life: An Attempt at Classification' (2001) 26 *European Law Review* 239.

¹⁰⁴ See the discussion in N. Busby, *A Right to Care? Unpaid Care Work in European Employment Law* (Oxford University Press 2011).

¹⁰⁵ J. Evans, *Feminist Theory Today: An Introduction to Second-Wave Feminism* (Sage 1995); V. Munro, *Law and Politics and the Perimeter: Re-Evaluating Key Debates in Feminist Theory* (Hart 2007); V. Schultz, 'Life's Work' (2000) 100(7) *Columbia Law Review* 1881; R. Ray, J. Gornick and J. Schmitt, 'Who Cares? Assessing Generosity and Gender Equality in Parental Leave Policy Designs in 21 Countries' (2010) 20(3) *Journal of European Social Policy* 196, 197.

¹⁰⁶ J.A. Sohrab, 'Avoiding the "Exquisite Trap": A Critical Look at the Equal Treatment/Special Treatment Debate in Law' (1993) 1(2) *Feminist Legal Studies* 141.

¹⁰⁷ This explains the introduction of specific employment law provisions protecting women against discrimination based on pregnancy and maternity. See S. Deakin and G. Morris, *Labour Law* (Hart publishing 2010); W. Chan, 'Mothers, Equality and Labour Market Opportunities' (2013) 42(3) *Industrial Law Journal* 224; L. Finley, 'Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate?' (1986) 86 *Columbia Law Review* 1118; R. West, 'Jurisprudence and Gender' (1988) 55 *University of Chicago Law Review* 1.

¹⁰⁸ M. Kilkey and J. Bradshaw, 'Lone Mothers, Economic Well-Being and Policies' in D. Sainsbury (ed) *Gender and Welfare State Regimes* (Oxford University Press 1999).

¹⁰⁹ J. Tolmie, V. Elizabeth and N. Gavey 'Imposing Gender Neutral Standards in a Gendered World: Parenting Arrangements in Family Law Post Separation' (2010) 16(2) *Canterbury Law Review* 302; M. Waring, *Counting for Nothing: What Men Value and What Women are Worth* (Allen and Unwin, 1988).

Navigating the dichotomy of paid work/unpaid care with its distinctly gendered divisions has led to policy outcomes predicated along similar binary lines. For this reason, more recent calls for reconciliation of the work/care dilemma have been made from a position of substantive equality.¹¹⁰ For Fredman, the solution lies in making a distinction between pregnancy and parenting (which the NZ legislation does) but adequately protecting both by ‘levelling up’ the rights for fathers and reforming the structure of working time.¹¹¹ As Fredman argues, for women to be enabled to participate in the paid labour market on the same basis as men, fathers need encouragement to engage in the unpaid caring labour in the home otherwise claims for equality are made without due recognition of these unequal starting points. ‘The traditional understanding of equality as based on the formula that likes should be treated alike requires’, observes Fredman, ‘a prior understanding of when two individuals are appropriately alike. This pushes the discourse into a sameness–difference debate which is ultimately unproductive.’¹¹² According to Fredman, substantive equality requires changing ‘gender-based roles’ so that men and women participate equally at home and in paid labour.¹¹³ It is only through men’s equal participation in the home that women will be on an equal footing to participate in the market. For this to happen, the ‘social value of parenthood’¹¹⁴ needs to be respected, which would then incentivise men to participate in care work. To bring about this ‘levelling up’ of paternal rights to the same basis as those given to mothers would require mandating men to take care leave and ensuring that this adequately remunerated¹¹⁵ although as the discussion of *Ali* and *Hextall* above showed, the courts have been reluctant to do this.

A model of substantive equality promotes changes in the socio-economic and historical structural inequalities through, in particular, the dismantlement of the public/private divide¹¹⁶ and the implementation of positive actions.¹¹⁷ Fredman’s important contribution to this debate joins with other scholars who have argued that a key part of dismantling the historic delineation between male and female norms in this area is to introduce measures aimed at correcting the unequal sharing of unpaid (domestic) work between men and women.¹¹⁸ Another way forward would be to separate entirely ideas of gender from care. Equating women with care leads to the exclusion of men from this area of life and denies men the opportunities to explore their nurturing identity. Ultimately, this also limits the ability to think further about the organisation of family life, the relationship between work and family, and the ability to break the public/private divide. In other words, linking care to women in

¹¹⁰ S. Fredman, ‘Reversing roles: bringing men into the frame’ (2014) 10 (4) *International Journal of Law in Context* 442, 442-3.

¹¹¹ *Ibid.*

¹¹² *Ibid.*, 443.

¹¹³ *Ibid.*, 457.

¹¹⁴ *Ibid.*

¹¹⁵ *Ibid.*, 458.

¹¹⁶ S. Boyd (ed.), *Challenging the Public/Private Divide: Feminism, Law and Public Policy* (Toronto University Press 1997); M. Thornton (ed), *Public and Private: Feminists Legal Debates* (Oxford University Press 1995).

¹¹⁷ H. Fenwick, ‘From Formal to Substantive Equality: The Place of Affirmative Action in European Union Sex Equality Law’ (1998) 4(4) *European Public Law* 507; A. Masselot and A. Maymont, ‘Gendering Economic and Financial Governance through Positive Action Measures: Compatibility of the French Real Equality Measure under the European Union Framework’ (2015) 22(1) *Maastricht Journal of European and Comparative Law* 57.

¹¹⁸ N. Fraser, *Justice Interruptus: Critical Reflection on the ‘Post-Socialist’ Condition* (Routledge 1997); J. Gornick and M. Meyers, ‘Institutions that Support Gender Equality in Parenthood and Employment’ in J. Gornick and M. Meyers (eds) *Gender Equality, Transforming Family Divisions of Labor* (Verso 2010) 3-64; Fredman (2014).

such an essential way limits our ability to change and challenge the organisation of society. 'Coding' care in such gendered terms fails to address the relationship between the public and the private spheres which contributes to the invisibility of care as it is not considered to be 'work'.¹¹⁹ By contrast, if care is stripped of its feminisation through this gendered coding and treated as a universal and gender-neutral responsibility on all of us, paid employment might be restructured so that it becomes open to all of us to participate in while men would be better placed to engage in unpaid care at home. For this to happen we argue for a gender-neutral concept of care to be given a more central place in policy-making.

Part 5: A way forward: Placing care as a central tenet

Substantive gender equality in the workplace cannot be achieved without a fairer redistribution of unpaid care and domestic work. As a result, a number of law and policy initiatives have endeavoured to involve men in care work. Such provisions include the gender neutralisation from pregnancy/maternity leave to parental leave, the individualisation of the right to parental leave and the limitation of the right to transfer the leave to a partner, as well as the increase of the right to paternity/partner leave. The legislation in NZ on primary carer's leave and the UK law on shared parental leave have been enacted in this context. As we have seen, in the UK model, care is primarily linked to women as the right to caring leave 'belongs' initially to the mother whereas the NZ model aspires to render gender invisible but with the unintended consequence of depriving biological mothers of important health protections. At the heart of why both policy developments might be viewed with some unease is that they seem ill-equipped to lead to a genuine reconciliation of paid work and care.

The work of Joan Williams may provide a helpful way through these dilemmas. Her work reflects her unease with the outdated and binary arguments between the sameness/difference feminists, which appears to inform policy-making in this area despite the feminist movement having long moved on from this dichotomy. The historic legacy of these debates – either calling for a strategy of assimilating women into male-dominated domains with the onus on women to conform¹²⁰ or alternatively demanding that women's differences be accommodated – have encouraged a view of gender-neutral societal institutions and workplaces despite the reality being that the paid labour market remains shaped around men's typical life patterns.¹²¹ Williams' theory of 'reconstructive feminism' is of particular relevance here. While she recognises the impact that an assimilationist strategy has had in bringing women into paid employment, she points out that 'what is required to start a revolution is often different from what is required to complete it'.¹²² She is similarly sceptical about adopting fully the reform strategies of the difference feminism school with its alleged 'conflation of women with conventional femininity'.¹²³ This is not because she is dismissive of traditional feminised work such as care, rather she argues that care work is 'too

¹¹⁹ I. Moebius and E. Szyszczack, 'Of Raising Pigs and Children' (1998) 18 *Yearbook of European Law* 125-156.

¹²⁰ I. Young, *Justice and the Politics of Difference* (Princeton University Press; Princeton, 1990).

¹²¹ P. Cain, 'Feminism and the Limits of Equality' (1990) 24 *Georgia Law Review* 803.

¹²² J. Williams, *Unbending Gender: Why Family and Work Conflict and What to Do About It?* (OUP: New York, 2000) at 40.

¹²³ J. Williams, *Reshaping the Work-Family Debate: Why Men and Class Matter* (Harvard University Press; Cambridge, Mass., 2010) at 135. Emphasis retained.

important' to be undervalued.¹²⁴ Instead Williams offers a model of reconstructive feminism, which:

“...defines equality as treating men and women the same *but only after deconstructing the existing norms defined by and around men and masculinity, and reconstructing existing institutions in ways that include the bodies and traditional life patterns of women*”.¹²⁵

This would require, she argues, that we ‘bump the debate up one logical level’ from the enduring dilemma that seems so present in the underlying strategic work of policy -makers:

“arguing that the gender trouble that creates work-family conflict stems not from *women* (from their likeness to men or their difference from men) but from *masculine workplace norms* that offer women only two unequal paths”.¹²⁶

For example, the default workplace norm in many institutions of progression being dependent on long and unpredictable hours is clearly detrimental to those with caring responsibilities. Leaving that structure in place but implementing a statutory right for employees to request flexible hours may address the issue but risks highlighting a perceived negative trait associated with those with caring responsibilities: a lack of flexibility. Williams’ response to this is to argue that such a proposal ‘...merely changes the shape of the gender bias, making women vulnerable by failing to pinpoint that the gender problem is with the *masculine norm not in women themselves*’.¹²⁷ If legislators and policy-makers were to take as a point of departure the centrality of care to our productive lives, workplaces might be shaped in ways that are radically different to the current norm. Indeed, there is an increasing awareness that ‘without the contribution of unpaid care, markets would not grow, economies would not prosper and capitalism would not be possible.’¹²⁸ Feminist scholars that have argued that what happens in the private sphere, far from being akin to a “leisure activity”, supports, and is the precondition of, what takes place in the public sphere.¹²⁹

As our earlier discussion showed, the law continues to grapple with the question of the purpose of caring leave and how best to protect care-givers. This has led to a somewhat messy and confused patchwork of employment protections for care-givers. These developments ‘could be read as an equality move, albeit based on something akin to a formal equality model: if anyone can make a request for care leave, then the gendering of unpaid care is apparently challenged’ yet as Grabham continues, ‘this shift is just as much to do with private law and the logic of labour market equilibrium as it is to do with shifts in conjugal work and care models.’¹³⁰ Grabham’s point that the right to request a pattern of care-giving that fits

¹²⁴ *Ibid.* at 150.

¹²⁵ J. Williams, ‘Jumpstarting the Stalled Gender Revolution: Justice Ginsburg and Reconstructive Feminism’ (2012) 63 *Hastings Law Journal* 1267 at 1280. Emphasis retained.

¹²⁶ J. Williams, ‘Correct Diagnosis: Wrong Cure: A Response to Professor Suk’ (2010) 10 *Columbia Law Review* 24, 25.

¹²⁷ J. Williams, ‘The evolution of FRd: Family Responsibilities Discrimination and Developments in the Law of Stereotyping and Implicit Bias’ (2008) 59 *Hastings Law Journal* 1311, 1324. Emphasis retained.

¹²⁸ N. Busby, ‘Unpaid Care-Giving and Paid Work within a Right Framework’ in N. Busby, G. James (eds) *Families, Care-Giving and Paid Work* (Edward Elgar 2011) 189, 203.

¹²⁹ S. Fredman, *Women and the Law* (Oxford University Press 1998); see also S. Moller-Okin, *Justice, Gender and the Family* (Basic Books 1998) and F. Olsen, ‘The Family and the Market: A Study on Ideology and Market Reform’ (1993) 96 *Harvard Law Review* 1497.

¹³⁰ E. Grabham, ‘The Strange Temporalities of Work-Life Balance Law’ (2014) 4 (1) *feminists@law* 1, 8.

around a particular set of familial circumstances is an important one because she shows how it is underpinned by the logic of the market. Parents are construed as ‘rational market actors’ who are free to bargain terms and conditions to suit them as part of a larger project of ‘economic growth’.¹³¹ It is this fundamental assumption that those engaged in the paid labour of the market are autonomous legal subjects capable of exercising free choice that arguably lies at the root of the theoretical incoherence of these latest care-giving policy initiatives. Put simply, both the law and the market assume actors devoid of caring roles when the reality is that we are all relational beings with each of us being involved, to varying degrees, in caring and being cared for.

If we take that as our starting point, it is clear that we need to re-think fundamentally how the paid labour market is structured and the assumptions upon which it is based. As Herring has argued, ‘the law for too long has been arranged around the vision of an able, autonomous and unattached adult’.¹³² The law’s assumption of autonomy has led to caring being viewed as an ‘ancillary’ activity rather than ‘central to our humanity’.¹³³ Herring calls for a ‘different vision: one which starts with recognising that our identities, values and well-being are tied up with our relationships and the responsibilities that come with them’.¹³⁴ One way of achieving this is to redesign work life around care. For Fraser this would involve taking women’s – rather than men’s life patterns – as the default norm:

“Women today often combine breadwinning and caregiving, albeit with great difficulty and strain. A postindustrial welfare state must ensure that men do the same, while redesigning institutions so as to eliminate the difficulty and strain”.¹³⁵

For Fineman, her vulnerability paradigm suggests that vulnerability is something that is inherently part of what it is to be human and is both universal and constant.¹³⁶ Our natural and inherent dependency on each other requires ‘collective or public responsibility’ with care labour being ‘treated as equally productive even if unwaged, and should be measured by its societal value, not by economic or market indicators’.¹³⁷

Conclusion

As societal conceptions of care shift, policy-makers have responded by providing more expansive protections for care-givers. This paper considered two common law jurisdictions: New Zealand and the UK. In recent years both states have grappled with the reconciliation of care and paid work yet both have taken different policy directions. In NZ, the state has differentiated care from childbirth. Adopting a more expansive notion of care-giving, leave is given to the primary caregiver. By focussing on the act of care rather than the identity of the person who has borne the child, the NZ legislation appears to be ‘gender neutral’. This offers

¹³¹ *Ibid.*

¹³² J. Herring, *Caring and the Law* (Hart; Oxford, 2013), 2.

¹³³ *Ibid.*

¹³⁴ *Ibid.*

¹³⁵ N. Fraser, ‘After the Family Wage: A Postindustrial Thought Experiment’ in N. Fraser, *Fortunes of Feminism: From State-Managed Capitalism to Neoliberal Crisis* (Verso; London, 2013), 134.

¹³⁶ See, for example, MA Fineman, ‘Care and Gender’ in Y. Ergas, J. Jenson and S. Michel (eds) *Reassembling Motherhood: Procreation and Care in a Globalized World* (Columbia University Press, 2017).

¹³⁷ MA Fineman, *The Autonomy Myth: A Theory of Dependency* (The New Press; New York, 2004) at xv. This would require far greater state involvement in care provision than is currently the case: MA Fineman, ‘The Vulnerable Subject and the Responsive State’ (2010) 60 *Emory Law Journal* 251.

considerable scope to move towards a universal care-giver model, which is removed from historical and problematic identities of ideal mothers and fathers. Yet as the NZ experience has shown, taking gender neutralisation too far has had unfortunate unintended consequences for biological mothers, whose health and safety protections following the birth are now minimal.

The UK has similarly sought to untangle the role of caring from the biological act of childbirth. Its model of 'shared parenting' has the aim of allowing families to shape their own patterns of care but is premised on the implicit assumption that caring will largely rest with the mother. The entitlement to leave belongs initially to the mother who may choose to transfer this to the father. Unlike the NZ model, the UK preserves a closer association between childbirth and childcare to the protection of the biological mother but fails to unsettle the gendered separation of domestic and market life.

Both case studies have revealed the difficulties associated with untangling care from gendered concepts of parenting, particularly when the wider economic terrain relies on these gendered divisions at home for its survival. The market relies on the unpaid reproductive labour in the domestic sphere so that workers engaged in paid labour can perform as though they are free of caring responsibilities. Moreover, central to both the NZ and UK models is the notion of choice: mothers can choose whether to retain the primary caregiving responsibility as the law assumes or they can decide to transfer that role to another. Yet for all its appearance of being a progressive shift in policy, this turn towards further embedding choice is problematic. This is not merely because of the implicit assumptions made that caregiving will typically be a role performed by a woman who can choose to hand this to another but because it further embeds the idea that law's subjects are autonomous, capable of bargaining freely, and devoid of any caring role. Reproductive labour therefore falls outside of the protection of employment law. As Conaghan has remarked 'persistent calls by feminist legal scholars...to redraw the boundaries of labour law to take proper account of unpaid caregiving work appear for the most part to have fallen on deaf ears.'¹³⁸

If legislators are serious about achieving sincerely progressive change in recognising the value of caring, it is clear that we need to re-think the very assumptions upon which our policies of care-giving protections are based. The theoretical incoherence behind initiatives reconciling care and paid labour are arguably a left-over from earlier feminist strategies, which have oscillated between assimilating women into the paid world of work or recognising biological and/or socially constructed differences. While it is now clear that substantive equality requires a more deep-seated structural reform and that the richness of feminist thought offers huge potential to shape our care policies, gendered identities have proven hard to shift particularly when it has come to policy formulation in the area of care leave. By focusing instead on the vulnerability of law's subjects (in stark contrast to its assumption of autonomy) and our universal caring responsibilities, we are provided with a radically altered starting point for future work. Rather than continuing to develop initiatives that appear blind to the fundamental and universal work of caring or which aim for gender neutrality but at the detriment of the biological-maternal health, we need to question the assumptions that underpin our policy goals. We might begin this task by asking how our institutions could look if we started from an assumption of universal caring.

¹³⁸ J. Conaghan, 'Gender and the Idea of Labour Law' (2014) 4 (1) *feminists@law* 1, 3.

