

## In-House Memorandum

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### Women and Torts Law

Broadly speaking, a tort is a form of injury or wrong. Its meaning stems from the Old French word *'tort'* meaning a 'wrong', 'injustice' or 'crime'<sup>1</sup>. In common law systems, a tort is considered to be the breach of a duty imposed by law<sup>2</sup>. Where a breach of duty can be shown to exist, a person ('the Plaintiff') acquires a right of action for damages.

Since the late 1970s, torts law became an item of interest for feminist legal thinkers. Feminism is understood broadly as a collection of ideologies and movements aimed at defining, establishing and defending equal or different<sup>3</sup> rights for women. Feminist jurisprudence can be understood, "as encompassing the entire corpus of feminist writing about law"<sup>4</sup>. Torts law is seen by many feminist thinkers to provide significant and flexible avenues for recognition of gender imbalance, the effects of which are unique to women. Torts law is:

*"On the one hand, a historical repository of gendered legal norms which situated women almost exclusively in terms of their formal relation to men; on the other hand, a potential tool for redressing the kinds of 'gendered' harms which law has traditionally overlooked"*<sup>5</sup>.

Our interest in the topic is informed not only by the fact that our principal is a woman lawyer, but because we recognise the importance of critical social and legal thinking in remaining alert to future directions in law. Critical thinking requires unpacking of assumptions, sometimes deeply held, about the structure of society. Feminist torts law thinking has such potential.

*"...feminist theory has gone beyond the needs of women to offer structures of thought and questioning that can benefit many [minority] groups"*<sup>6</sup>.

Feminist critiques tend to turn around issues including valuing women's work in assessing damages, the nature of a "reasonable" person and notions of rationality within society generally as well as the types of harm seen as foreseeable and compensable<sup>7</sup>.

Feminist scholars argue that the legal principle of "psychological harm" evidences gender-bias because those claiming damage for psychiatric injuries tend to more frequently be women:

*"...psychiatric harm remains likely to be seen as fraudulent or imaginary and that allowing a duty of care to arise in respect of it is something to be vigilantly guarded against. The continuing distrust of and special requirements to establish the cause of action for negligently causing nervous shock have their roots in a gendered approach to categories of harm which continues to sustain cultural responses to psychiatric harm. The feminist critique has not yet been rendered obsolete."*<sup>8</sup>

One key case referred in this dialogue is *Tame v New South Wales* [2002] HCA 35 in which Mrs Tame sued for negligence when police mistakenly recorded her blood alcohol limit and this affected her insurance. From this, she developed an irrational and obsessive fear that any delay of insurance payments was related to her

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<sup>1</sup> Source: etymonline.com, 2014, 'Tort'.

<sup>2</sup> Source: Halsbury's Laws of Australia, 'Tort', accessed December 2013.

<sup>3</sup> On the use of the word 'different' see Irigaray, Luce, 1993, *Je, Tu, Nous: Toward a Culture of Difference*, Routledge: New York.

<sup>4</sup> Thornton, Margaret, 1999, 'The Development of Feminist Jurisprudence', (1998) 9 *Legal Educ Rev* 171

<sup>5</sup> Richardson, Janice and Rackley, Erika (eds.), 2012, 'Feminist Perspectives on Tort Law', Routledge: London.

<sup>6</sup> Sappideen, C. Vines, P. and Watson, P., 2012, *Torts: Commentary and Materials*, Thomson Reuters: Sydney, p18.

<sup>7</sup> *Ibid*, pp18-19.

<sup>8</sup> Vines, San Roque and Rumble, 2010, 'Is "nervous shock" still a feminist issue? The duty of care and psychiatric injury in Australia', 18 *Tort L Rev* 9, p9.

perceived drunkenness and that everyone around her thought she was drunk all the time. It was diagnosed that this obsession was the cause of the depression that followed her discovery of the police mistake.

The High Court unanimously held that Mrs Tame's psychiatric injury was not reasonably foreseeable, either by applying the normal fortitude test<sup>9</sup> or simply taking Mrs Tame's particular susceptibility into account. The police officers involved were held to have been simply preparing a road accident report for their superiors. As such, they were found to owe no duty to participants in the accident.

The evolution of feminist thinking is yet to become fully apparent. Nevertheless, the questions asked by these thinkers will pose challenges to the law into the future. There is still work to be done to establish a body of case law that not only represents the diversity of women's experiences, but revisits underlying assumptions in legal thinking generally.

Cameron Algie  
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<sup>9</sup> The 'normal fortitude' test was stated by Gibbs CJ in *Jaensch v Coffey* [1984] HCA 52 as follows: "It may be assumed (without deciding) that injury for nervous shock is not recoverable unless an ordinary person of normal fortitude in the position of the plaintiff would have suffered some shock."