**Chapter 2**

**DUTY OF CARE AND ETHIC OF CARE: IRRECONCILABLE DIFFERENCE?**

*Jenny Steele[[1]](#endnote-1)\**

**INTRODUCTION: FEMINIST PERSPECTIVES AND THE DUTY OF CARE**

The particular focus of this chapter is the legal category labelled ‘duty of care’. One might have expected the duty of care to have been the subject of some close feminist critique in its own right, given its centrality and its core features (including abstraction, boundary-drawing, an emphasis on rights and duties imbued with moral rhetoric, and a conflation of ‘care’ with being reasonably careful). [[2]](#endnote-2) To the extent that such critique has been lacking, [[3]](#endnote-3) it may be partly because feminist scholars, like others, are at risk of being attracted by the surface morality of the duty of care. Where the concern of feminist tort scholars has been to show the failure to recognise particular harms the prescription, without an accompanying critique of duty of care, is at least implicitly to extend the reach of duty. There is a risk that feminism, alone among critical approaches, will regard the duty of care in terms of ‘promise unfulfilled’, [[4]](#endnote-4) rather than as more deeply suspect. It might be argued that feminist scholarship is legitimately uninterested in artificial classifications such as ‘tort’ or ‘negligence’ in any event, preferring to look across various dimensions of legal systems to expose law’s gendered practices as a whole.[[5]](#endnote-5) And yet, if key legal categories thereby remain unexplored, some of the broader potential of feminist legal theory will remain unrealised.

It has been suggested that to adopt a feminist perspective is ‘first and foremost, to bring a gendered perception of legal and social arrangements to bear upon a largely gender-neutral understanding of them’ (Conaghan 2000: 359, drawing upon Lacey (1998)). This embraces gendered analyses of legal arrangements generally, rather than confining feminist critique to analysis of ‘gender issues’. Importantly, it also refers to a ‘largely gender-neutral *understanding*’ of social and legal arrangements. It is essential to be aware that the mainstream (ostensibly gender-neutral) understanding of legal arrangements is to be found not only in legal institutions, but also in the academy. Indeed I find it strongly arguable that in recent years the academy has been narrower and more ‘mainstream’ in its understanding of the law of tort in particular – and especially the duty of care - than have legal institutions. The fact that the exercise in restriction of duty has come from the courts does not alter this, to the extent it is accompanied by greater complexity and a recognised need to look to more detailed relationship factors. Indeed greater restrictions upon the duty of care have been accompanied by a greater attention to the context of particular categories of case, and by a recognition that tort law does not provide the only or necessarily the most appropriate way of analysing relationships. The exercise in attention to categories of case inevitably incorporates a substantial degree of abstraction (the creation of categories), but it also allows a much greater role for contextual and outcome-based analysis than the universalising abstraction of a relationship *consisting of* the doing of harm by one party to another.[[6]](#endnote-6) Ultimately, perhaps this is not surprising. Academic law tends to prioritise the ordering of material and the discernment of general principles for the purpose initially of exposition, and I would argue increasingly with exclusionary intent,[[7]](#endnote-7) while legal institutions (courts, legislatures, legal advisors, and so on) have to grapple with the diversity of legal relationships – even if their rhetoric is sometimes designed to achieve the appearance of certainty (for a variety of reasons) rather than to acknowledge these tensions.[[8]](#endnote-8)

Further, and returning to the broad encapsulation of a feminist perspective above, to the extent that any feminist perspective takes gender as the key to its reading of social and legal arrangements (and to its perception of what is missing in other presentations of them), a feminist perspective will be a *distinctive* form of critical perspective. The problem of course is in identifying what a ‘gendered’ perspective might legitimately and productively consist in, in the light of more recent waves of anti-essentialist feminist thinking.[[9]](#endnote-9)

The next section of the chapter turns for inspiration to feminist contract scholarship. Some important features of feminist analysis of contract are identified, and the question is raised of whether these same features can be brought to bear on the law of negligence. In particular, feminist contract scholarship has drawn upon cultural feminism to intensify the impact of relational analysis of contracting. Using these insights, and moving to the next section, I reflect on the neglected role of the ‘legal’ in one of the key sources of cultural feminist legal theory, namely Carol Gilligan’s *In a Different Voice* (1982). In both these sections, I draw on the work of Mary Joe Frug, who applied her distinctive postmodern feminism to the law of contract and its elucidation in academic debate and student texts. More generally, Frug’s analysis of Gilligan’s work suggests a route to questioning not only the ‘ethic of care’, but also the ‘ethic of right’, without losing the potential of both. There is space for a potential relational perspective which does not fall into what Frug referred to as ‘crude Gilliganism’ (which might also be called crude essentialism) (1992: 38).

Finally, and armed with this, I turn to the duty of care itself. Clearly the duty of care purports to deal with interactions between parties, but is it ‘relational’ in any meaningful sense? Here I seek to place the resurgent rhetoric of individualism within a broader context. It is suggested that the position of the abstract and universal duty of care as a hallmark of the most mature legal thinking, as liberal theorists have tended to present it,[[10]](#endnote-10) is no more justified than the position of the ‘ethic of justice’ or ‘ethic of right’ as a hallmark of the most mature moral thinking, as the giants of developmental psychology appear to have thought it was. In fact, courts on the whole realise that responsibility is not the same as duty, and that responsibility in tort is not the full extent of responsibility in law or anywhere else. The difficulty arises with the persistent attraction of individualist rhetoric which appears to use the idea of rights and duties as definitive of responsibilities. Both the idea of maturity, and the idea of the respective roles of responsibilities and rights, are core to Gilligan’s work and would in my view be appropriately highlighted by a ‘progressive’ reading of Gilligan .[[11]](#endnote-11) Indeed in the last chapter of her book, Gilligan argued that ‘To understand how the tension between responsibilities and rights sustains the dialectic of human development is to see the integrity of two disparate modes of experience that are in the end connected’ (1982: 174). There is a *dialogue* between ‘fairness’ (the abstract standard, giving rise to rights and duties) and ‘care’ (the connected standard, giving rise to more far-reaching responsibilities).[[12]](#endnote-12)

**LEARNING FROM FEMINIST CONTRACT SCHOLARSHIP**

What are the key features of feminist contract scholarship which will assist the enquiry in this chapter?[[13]](#endnote-13) One such feature is that much of it draws inspiration from other critical literature on contract and therefore takes an identifiable place in the critical legal family.[[14]](#endnote-14) As Lacey has argued, other critical theories too are concerned to dig beneath the surface of social and legal arrangements to illuminate their deeper logics.[[15]](#endnote-15) In contract theory, there is a general identification of surface rhetoric with the classical model of contracting, in which the will of the parties is key. Although it has been understood for many years that a shift to more ‘objective’ standards had the effect of injecting a considerable degree of fiction into the law of contract (suggesting that the courts were seeking the will of the parties when in fact they were imposing their own standards of reasonableness), the ‘freedom of contract’ model still provides much of the language of contract law.[[16]](#endnote-16) The objective ‘reasonableness’ standard in contract has much in common with tort’s objective standards and employs much of the same language. Although it was initially much clearer that the tort approach involved a standard imposed by the court, significant complexity is added through concepts such as ‘assumption of responsibility’ and, more generally, proximity in the law of tort. These tend to be attacked by mainstream tort scholars, missing their point I think, as lacking in clear content and predictability. These ideas are really just a way of structuring the idea of ‘reasonableness’ with a bit more specificity, pointing to relationship factors, which is to say to features of the relationship between parties other than the doing and suffering of harm.[[17]](#endnote-17) Equally important is a debate about the *function* of the law of contract, where a dichotomy is recognised between theorists who consider the role of the law of contract to be the facilitation, regulation, and good ordering of contract and exchange;[[18]](#endnote-18) and those who consider the point of the law of contract to be the correction of wrongs, particularly breaches of contract, for moral reasons.[[19]](#endnote-19) To the extent that the second approach has tended to involve a search for morality inherent to the idea of a contract, similar to the idea of an inner morality to tort law structured around the doing and suffering of harm, the first of these has amounted to a more contextual reading. ‘Relational’ contract theory is connected to this ‘contextual’ side of the divide.

Relational contract theory has proved attractive to feminist contract scholars (and vice versa) for a number of reasons.[[20]](#endnote-20) One of these is undoubtedly that its prescriptions are light on abstraction compared to standard models, descending to the level of particular parties and their relationships. It is also premised on the need for cooperation in achieving the parties’ goals; puts legal concepts in their place by suggesting that they may be more or less (ir)relevant to the parties’ practice; and emphasises the significance of long-term relationship between parties in many contexts. This, of course, raises its own issues about power and vulnerability within the context of extended relationships of different sorts. In fact, tort claims may themselves arise in the interstices of such relationships. But in short, relational contracting raises to the surface the relationships between actual parties, and their attempts to achieve their goals, rather than placing legal standards and remedies at the core, with a consequent focus on the morality of rule-breaking and the legal response to such breaches.

A much closer connection with the idea of ‘the legal sense’ as envisaged by developmental psychology could be attempted here, particularly the way in which the developmental psychology addressed by Gilligan had associated ‘legal’ sensibility with the rules applied to games typically played by boys, in which the rules are seen as ways of continuing the game provided they are applied in an even-handed and impersonal way. Adjusting the rules to suit particular parties would undermine their even-handed nature. In the games played by girls, rules were more often adapted or set aside, and in the event of conflict a game may simply be abandoned – relationships were more important, but also harder to escape (1982: 9).[[21]](#endnote-21) If empirical work on contracting is correct (Beale and Dugdale 1975),[[22]](#endnote-22) it seems that the issues emphasised by cultural feminists while not at the forefront of legal doctrine are much more in evidence in the social (economic) sphere that private law seeks to regulate. In particular, in the changed conditions of today, we might question the broad generalisation that Gilligan draws, that the ‘male’ standard observed ‘fits the requirement for modern corporate success’ (1982: 10). One lesson is that law needs to be responsive to the complexity of relationships; another is that the status of law (including legal rules and principles) in the practice of contracting may have been overestimated. Parties to contracting might take a much more pragmatic approach to legal rules and might prioritise the continuation of the relationship over the application of the rules; and indeed it is possible that law should and can develop to respond to this rather muted status for its principles. These insights do not of course provide the answer to all problems, and as Mulcahy and Brown have both argued they raise a whole host of new challenges for feminist analysis. The point is however that these challenges are inherently related to some of the core insights of feminism in respect of law and its intervention in human relationships. Feminist analysis thus becomes a potential source of constructive theory in respect of contracts, and a healthy exchange between feminist and other contextual approaches becomes possible.

Relational contract theory remains vibrant, but it is by no means new. Indeed it is about as old as the ‘old big three’ feminist legal theories,[[23]](#endnote-23) and contributed one of its texts to an exercise in textual analysis by Frug (see also Brown 1996). Frug’s analysis as a whole is well worth revisiting not only because of its analysis of contract literature, but because of its application of the same method to a reading of Gilligan’s work on difference. Here I want to point out some of the nuances of this method. Post-modern feminism is listed by Dixon as one of the ‘new three’ feminisms, and has the potential to evade crude essentialism (‘crude Gilliganism’), whilst maintaining a gendered reading of a wide variety of narratives – an acceptance, so to speak, that ‘complex Gilliganism’ might illustrate some important *human* truths.[[24]](#endnote-24) I would also point out that Frug’s analysis is as occupied with academic interpretation and exposition of contract law as with the law itself, and is interested in the rhetoric both of the law and its surrounding literature as well as (or as a route to finding clues as to) its deeper nature. ‘Feminine’ qualities in published work pressing a relational analysis of contracting were contrasted by Frug with classically ‘masculine’ language and qualities in an economic analysis –both, as it happened, written by men (Frug 1992: chapter 7, discussing Posner and Rosenfield 1977 and Hillman 1983).

Neither this, nor the measured critique of Gilligan explored in the next section, means that women disappear from Frug’s postmodern analysis of law and its literature. But some of the uses to which she puts the presence of women in a contract case-book are both illuminating and important. At one point, having noted the lack of cases involving women for the most part (consistent with an ‘authoritarian neutrality’ of tone), Frug argued that the selection of four out of five cases with women claimants in the section of the casebook dealing with standard term contracts, raising issues of their enforceability, led to a particular sense that standard term contracts are *generally* acceptable, and that the qualifications to their enforceability are something to do with an exceptional category of case, namely those where gender is in issue (Frug 1992: 98-9).[[25]](#endnote-25) To similar effect is the prevalence of cases involving women in the section on equitable remedies, particularly given the authors’ clear view that the expectation measure of damages provides the dominant remedy. Frug’s reading of the place of women in the contract case book therefore suggested that women were associated with exceptions to general rules, those general rules being particularly associated with freedom of contract and the will of the parties. Where there were women there was legally relevant ‘context’, but this was the exception not the rule. And while this might (or might not) show us something about the way in which the law approaches women, it does show us something about the way that the case book writers approached the law. General lessons about the prioritising of one side of a potential dichotomy can be drawn from the representation of cases involving women. And here is the most general point: feminist readings can indicate that vibrant ideas within the law and legal discourse are relegated to the status of ‘exceptions’, because of the adoption of a standpoint from which one particular approach is regarded as the general rule. This is reflected in the progressive reading of Gilligan’s work.

I would agree with Frug that a reading of the rhetoric of the law can show us much about the underlying thought processes of the law. For example, there are numerous cases in the law of tort where judges have declared that some principle or other is not a ‘touchstone’ of liability (and no cases, to my knowledge, where any concept or principle has been described as *being* a touchstone of liability). This could be seen as a sort of nervous habit, using a metaphor because the precise language for translating reasons into legal principles are lacking,[[26]](#endnote-26) and because of a reluctance (though a patchy one) to appeal directly to the alternative, which is a response to all the features of the particular relationship.

Arguably, the most overtly post-modern of authorities on the duty of care is *Caparo Industries plc v Dickman* [1990], given its frank admission that terms such as ‘foreseeability’ and ‘proximity’, previously thought to be determinative of the existence of a duty, were merely ‘labels’ used to present or explain the courts’ pragmatic judgments. *Caparo* has been quite badly reviewed in mainstream legal analyses, and rejected by the Australian courts (*Sullivan v Moody* (2001) [[27]](#endnote-27)), on the basis that it doesn’t perform the role of a precise legal test. Nor, in fact, does it purport to do so, preferring to offer some structure to a multi-faceted exploration of the relationship between the parties.[[28]](#endnote-28) It was also, like quite a few negligence cases, one where a corporate claimant tried to get cover from another commercial party for free, though this was dealt with more politely, less visibly, and much less rhetorically than the case of an injured *individual* trying to pass responsibility to others in cases such as *Tomlinson v Congleton Borough Council* [2003]. The parallels between these cases are not generally mentioned for they are thought to fall into different ‘categories’: personal injury, which the law is thought to prioritise (another academic exercise in prioritisation), and economic losses, which the law of tort is conventionally thought not to prioritise.[[29]](#endnote-29) Indeed the perception that economic losses are marginal may explain the greater freedom to use pragmatic, rather than moralistic, terminology: the boundary-drawing exercise is thought to require greater justification. In *Caparo*, Lord Bridge actually declared that duties of care were arrived at ‘pragmatically’ and that all of the concepts applied in determining duty questions were really ‘convenient labels’ to apply to pragmatic decisions. The point is that there *is* no ‘touchstone’ of liability, because the point of a touchstone is to tell the difference between true or false gold. Since duty propositions are not true or false but subject to pragmatic determination by the court, there is no job for a touchstone to perform, and it is not surprising that all the judicial references are to ideas which are *not* touchstones. Analysis of the rhetorical strategies – direct, evasive; cautious, certain; abstract, situated – deployed in judgments can reveal underlying tensions and lead to consideration of their causes.

**THE ‘LEGAL SENSE’ OF *IN A DIFFERENT VOICE***

*In a Different Voice* was not, of course, a work of legal theory, but was concerned to challenge the treatment (or absence) of the female voice in developmental psychology. Gilligan’s identification of the feminine – and of women – with an ‘ethic of care’ has captured the imagination and been subject to critique in equal measure. Gilligan did not invent difference nor was she the first psychologist to attempt a positive rendition of what had been seen to be the failure of women to reach the male norm of adulthood. She was also by no means the first to associate the dominant norm of moral development with the sense of ‘justice’ or, more directly ‘the legal sense’. This latter term Gilligan ascribes to Piaget (1932), explaining that Piaget identified ‘the legal sense’ (‘essential to moral development’) with the application of rules and development of fair procedures for adjudicating conflicts, particularly through the development of games. Girls, Gilligan reports, were regarded by Piaget as much more ‘pragmatic’ when it came to rules, and much more willing to make exceptions to them. This, he thought, meant that the ‘legal sense’ – and thus moral sense - was less developed in girls than in boys (Gilligan, 1982: 10). Gilligan challenged the idea that the legal sense, read in this way, was central to moral development, by positing a different, and equally sophisticated, moral sense associated with the feminine. The universalisation of this ‘different voice’ has been widely debated. But neither she, nor (more importantly) those who have commented on her work, seem to have wondered directly whether the legal sense, described in this way, is any more definitive of what is involved in the law, than of what is involved in moral development. Does Piaget’s ‘legal sense’, identified with the ethic of right, represent only one interpretation of the legal – based moreover, on a sense that the role of the legal is analogous to the resolution of conflicts between opponents in a game, rather than between parties in a wide range of different relationships (some of cooperation, some of dependency, and so on)? A richer sense of the legal is a corollary to a richer sense of relationship.

I argue that the ‘ethic of right’ is as questionable as a statement of law’s development as it is of moral development. Frug’s progressive reading of Gilligan is helpful, just as her reading of the contract casebook was helpful, and (importantly) for much the same reasons. Her suggestion is that we ‘ground the sex differences Gilligan identifies in the context of the moral development theory she sought to change, overlooking the many instances where Gilligan seems to speak of sex differences as if they are universal’ (Frug 1992: 40). Similarly, I suggest we ground the ‘ethic of rights’ in certain theories or representations of law, rather than treating it as universal for law. The position of the ethic of rights can be challenged in the same way for law as for moral development. To the extent that the abstract duty of care shows all the hallmarks of the ethic of rights, it too can be challenged. This would swim against the tide of academic opinion, which has tended to praise the abstract duty of care, and decry pragmatic attempts to reduce it to the level of more specific relationships (which is to say, relationships not defined solely in terms of the harm done by one of the parties to the other, nor according to broad brush categories).

One important contribution of the recent ‘feminist judgments project’ (Hunter, McGlynn and Rackley 2010) is that it demonstrates that legal judgment, like moral judgment, can be ordered so that underlying contextual features of the parties’ lives are recognised. Equally to the point, in ordering social relationships, the law in Piaget’s sense does not always take a central role. For example, Gilligan attributes to Lever (1976) a finding that girls, in particular, were inclined to abandon a game in the face of conflict, rather than to devise a series of rules for resolving disputes: ‘girls subordinated the continuation of the game to the continuation of relationship’ (Gilligan, 1982: 10). It is therefore not only Gilligan’s ‘ethic of care’ which strikes a chord with relational theory. It is also present in the work she set out to criticise and to supplement,[[30]](#endnote-30) so that her chief contribution lies in challenging the received hierarchy, and revealing neglected narratives.[[31]](#endnote-31) The same exercise can be applied to the nature of law as to moral development, or indeed to the law of contract or tort.

**DUTY OF CARE THROUGH A RELATIONAL PERSPECTIVE: ANTITHESIS OR NOT?**

A more difficult question is whether relational theory can be applied successfully to the duty of care at all. There are two sides to this question. One is that the duty of care might be taken to be ‘relational’ enough as it stands. This, I will suggest, is not true, and certainly not true of the received understanding of Lord Atkin’s version. The other is to question whether the duty of care can be anything other than the law of duties between strangers – the antithesis of relational responsibility in the feminist sense. Once again there is much of interest in Gilligan’s review of her predecessors’ work. Drawing on the work of Janet Lever (1976), Gilligan reports a contrast in what boys and girls learn from their play:

‘… boys learn both the independence and the organizational skills necessary for coordinating the activities of large and diverse groups of people. By participating in controlled and socially approved competitive situations, they learn to deal with competition in a relatively forthright manner – to play with their enemies and to compete with their friends – all in accordance with the rules of the game. In contrast, girls’ play tends to occur in smaller, more intimate groups, often the best-friend dyad, and in private places. This play replicates the social pattern of primary human relationships in that its organization is more cooperative. Thus it points less, in Mead’s terms, toward learning to take the role of “the generalized other”, less toward the abstraction of human relationships. But it fosters the development and sensitivity necessary for taking the role of the “particular other” and points more toward knowing the other as different from the self’.

Gilligan 1982: 10-11.

Taking the first of these two questions, has the duty of care been largely exempted from direct feminist critique because it already seems to be a counter to the rigidity of established legal rules (specifically, privity of contract), thus increasing the responsibility of perpetrators of harm through malleable conceptual categories such as foreseeability and proximity? This may have been its initial effect although arguably, Lord Macmillan’s acknowledgement of the potential for overlapping analyses – narratives? – of the same situation was the more ‘relational’ approach. It says something about the mainstream liking for abstract general rules (or in this case principles) that the Atkinian version was taken as the beacon for the unified tort of negligence (and the most abstract aspects of his judgment have been elevated).[[32]](#endnote-32) Taking Lord Macmillan’s judgment as pre-eminent might have given the very different impression that all relationships can be approached in more than one way – and would not have encouraged thinking about negligence to drift so far from its origins in contractual relationships. But thinking again about the surface rhetoric of Lord Atkin’s judgment, it could be said to show multiple hallmarks of gendered jurisprudence. It proceeds using abstract categories; is clearly oriented to relationships between strangers (the subject of the Good Samaritan parable); and is overtly moralistic but deliberately limits the need for altruism in law. ‘Duty’, it might be said, is premised on the morality of strangers, and could not be more clearly distinct from ‘responsibility’ as a feminist relational theory might see it.[[33]](#endnote-33) Duty of care is as much about the entitlements of potential injurers as of claimants, and can be seen as a legal branch of the rules of interaction, strongly reminiscent of the idea of rule-application in boys’ games summarised above. The rhetoric involved is abstract, universal, definitive, moralistic, and rights-based.

The duty of care is also predominantly a line-drawing exercise, so the idea of injury free from responsibility to compensate is as inherent to it as the idea of duties to take care (and to compensate for harm). Though not necessarily in accord with what Lord Atkin had in mind, the duty of care is also much more cautiously applied to cases of omission, and here feminist analysis has sometimes picked it up. But more generally, the neighbour principle is inherently about the delineation of categories of people to whom there is (and is not) responsibility if one fails to take care. Care here is about ‘being careful’, and is only ‘other regarding’ in the sense that I need to be careful of certain interests of certain people. I do not have to have anyone else’s interests at heart, though the later idea of assumption of responsibility may begin to introduce such a positive need to care. Although ostensibly focused on relationships, the *Donoghue* instantiation of the neighbour principle is not relational in a contextual sense, but seeks to be definitive of rights and duties arising between parties conceived of essentially as strangers, setting out the rules of interaction. Those rules in place, competition which accords with the rules is fair and healthy and injuries though of course regrettable are not the concern of those who inflict them.

Here is part of the problem for torts scholarship. Approached from a relational perspective, contracting has clear potential as a human activity, and what is in issue is the desirable role of law in relation to this activity. But from the same relational perspective, what is tort law actually about? It appears to be about ‘correcting’ harms, which is to say largely through awards of monetary damages. This is not inherently a particularly cooperative enterprise. Where a harm caused by a breach of duty is established, money is moved from the one side to the other, matching the harm.[[34]](#endnote-34) Even if we try to extend the range of harms recognised by the law of negligence (and perhaps of tort more generally), we cannot get around the fact that success in an action does not lead to any enhanced cooperation, unless perhaps we are willing to think about torts as one part of a much bigger picture where things tick along in distributive or enterprise liability terms – an enormous yet single-minded undertaking which does not fit well with the idea of particularity in relationship. For those who are interested in using feminist legal methods for constructive development of the law beyond reform of particular legal rules, tort does not provide a particularly appealing model. Oddly (or perhaps not?) the duty concept is at its more appealing when applied to those losses around the edges of contract, at the margins of tort according to the abstract model (more particularly since they tend to respond to economic losses), and not generally at the heart of legal gender studies either. Here the law of negligence has been more cautious, more contextual, and more responsive to the nature of the parties involved, acting as a supplement to contractual duties. Arguably, this is where *Donoghue* also should be situated, were it not for the temptation of abstract generalisation.

**THE DISINTEGRATION OF DUTY AND THE MISLEADING RHETORIC OF INDIVIDUALISM**

The direction of change in the duty of care in English law could be seen as indicating that the problem of the *point* of tort law has been noticed by the courts themselves, most particularly at the highest level. Core to this recognition is the damages remedy, and its impact. There is no evidence that this was a primary concern of Lord Atkin’s in *Donoghue*, but subsequent developments have magnified the economic impact of his exercise in generalisation. Road traffic claims were in their infancy in 1932, and the influence of these claims (and attendant compulsory insurance) has been highly significant, arguably contributing to the growth of damages awards in general and certainly influencing the reform of contributory negligence (Steele 2012). Injuries at work were largely dealt with outside the tort system in 1932, but the abolition of Workmen’s Compensation and of the remnants of common employment in 1948 brought these claims firmly into the common law fold. Statutory duties accompanied by civil liability have since grown exponentially under the influence of European law, the measure of liability being premised on the tort measure. State liability was effectively created by the Crown Proceedings Act 1947, leading, ultimately, to some of the most complex jurisprudence in all of negligence law; and there has been an exponential growth in the welfare state, in regulation, and in public law generally. Where relationships are in issue, where do negligence liabilities fit in relation to these other developments?

The response of the courts has been to shift away from broad abstract principles concerned with foreseeability and proximity. For example, courts now seek out assumptions of responsibility, placing the emphasis on special relationships (the particular other, rather than the general other, we could say), and raising pertinent questions about the relationship between ‘responsibility’ and ‘duty’. Of course, those assumptions are a matter for the court to try to discern, not for the parties to choose. But that too is no particular problem from a relational perspective. We have multi-factoral approaches to duty, particularly concerned with vulnerability (in Australia) and pragmatic approaches dependent on all facets of particular relationships (in the UK). But most dramatically, we have restriction in the categories of duty, leaving many foreseeable harms outside the reach of the tort of negligence at all.[[35]](#endnote-35) New variants of legal theory may bubble up to justify ‘principled exclusions’ from the duty of care, but the truth is more pragmatic than that. Relational legal theory can help to explain why criticism of such restrictions as either ‘policy-driven’ or unpredictable miss the mark. Particularity is not the same as ‘policy’ (the forbidden opposite to principle in some core variations of liberal legal theory), but about sensitivity, and the reverse of abstraction.

That being the case, feminist theory also has the resources to contribute to a critique of the new individualist rhetoric with which some of the current restrictions to duty of care have been laced. This is a form of appeal to the rules of the game, or perhaps just a playing to the public gallery. Its proponents could equally well think tort law’s remedies, in particular, have minimal potential for positive reconciliation. The route taken is to revert to the archetypal ‘ethic of rights’: to address the duty concept in a manner which reinforces its exclusionary elements and its moral overtones, its individualism and its abstraction – also its appeal to fair play. In other words, all the elements which both difference feminism, and in a more measured sense post-modern feminism with its eye on rhetoric, would count as ‘male’.

But current restrictions on the duty of care also need to be addressed in terms of the pragmatic concerns which lie beneath, and in terms of the search for alternative remedies, which are common at the present time to other cases at the limit of the duty of care. ‘No duty’ cases are currently definitive of the very priority of ‘duty’. ‘Duty’ and ‘right’ contrast with ‘responsibility’ and ‘care’ in that they are abstract and clear cut in their limits. They have to have these limits partly because they are so bound up with economic consequences, itself a consequence of the damages remedy. This is partly why the courts are currently engaged in differentiating between the rights of private law, and the rights of the European Convention and the Human Rights Act 1998: there is no wish to attach an economic imperative to the idea of rights in this context. This economic connection, and the effect of it on legal development, has not yet been fully analysed by feminist tort theory.[[36]](#endnote-36)

There is a more pernicious effect of all of this however, which is that the rhetoric has power of persuasion over the user. The habit of limitation in duties of care, combined with individualist rhetoric, shows signs of infecting areas other than negligence. There are areas where liability has a stronger or more particular purpose connected with the nature of the relationship between the parties, and these are increasingly infected with a sense that it is not ‘fair’ to impose stricter liability. Here I take a brief look at individualist rhetoric and of less easily recognised counter-currents. First, and most noticeable, are cases where individual responsibility of injured parties is emphasised while defendants are declared to be free from duties. Second are cases where tort claims give way to alternative logics (including cases where there is an alternative remedy). These cases raise issues around the relationship between torts and welfare provision, particularly in a context in which the Human Rights Act 1998 is having a considerable impact. Third, and least satisfactory, are those cases where the habitual rhetoric of bounded responsibility and fairness to defendants has begun to affect the law of employer and employee, particularly in cases where women are strongly represented among the claimants.

The most renowned exercise in individualist rhetoric asserting the absence of duty was the decision of the House of Lords in *Tomlinson* [2003]. Here a young adult who suffered severe paralysis after diving into shallow water in a disused quarry was found not to have been owed a duty by the occupier of the premises, a local authority. The rhetoric of the decision, particularly emphasising that the danger was obvious (the claimant should have avoided it himself), drew attention not only to the absence of duty, but also (as part and parcel of this) to the claimant’s need to take responsibility for himself. There is a section of the judgment headed ‘Free Will’ (*Tomlinson* [2003], para [44]), and a suggestion that ‘there is an important question of freedom at stake’ – the freedom ‘of responsible parents and children with buckets and spades’ seeking ‘harmless recreation’ on the beaches, which would be disrupted should there by liability to an ‘irresponsible’ visitor in these circumstances (*Tomlinson* [2003], para [46].[[37]](#endnote-37) The House of Lords even named others whose claims had already been rejected in lower courts, pointing out that these individuals were actually more irresponsible (even stupid) than the claimant in the present case.

‘It is a terrible tragedy to suffer such dreadful injury in consequence of a relatively minor act of carelessness. It came nowhere near the stupidity of Luke Ratcliff, a student who climbed a fence at 2.30 am on a December morning to take a running dive into the shallow end of a swimming pool (see *Ratcliff v McConnell* [1999] 1 WLR 670, or John Donoghue, who dived into Folkestone Harbour from a slipway at midnight on 27 December after an evening in the pub: *Donoghue v Folkestone Properties Ltd* [2003] QB 1008. John Tomlinson's mind must often recur to that hot day which irretrievably changed his life. He may feel, not unreasonably, that fate has dealt with him unfairly. And so in these proceedings he seeks financial compensation: for the loss of his earning capacity, for the expense of the care he will need, for the loss of the ability to lead an ordinary life. But the law does not provide such compensation simply on the basis that the injury was disproportionately severe in relation to one's own fault or even not one's own fault at all. Perhaps it should, but society might not be able to afford to compensate everyone on that principle, certainly at the level at which such compensation is now paid. The law provides compensation only when the injury was someone else's fault. In order to succeed in his claim, that is what Mr Tomlinson has to prove’.

(Lord Hoffmann, *Tomlinson* [2003]: [4])

One purpose of this blunt pronouncement was undoubtedly to draw a line for future cases of obvious danger, and to remove such cases from litigation. But through the rhetoric of the judgment, something more than certainty was secured: responsibility was moralised and the general message conveyed was one of ‘tough luck’, and of ‘tough but fair’, clear rules, illustrating the rhetorical force that can be attached to the idea of ‘no duty’.[[38]](#endnote-38)

Arguably, the strength and unapologetic clarity of the line-drawing in this case – which even named and humanised the victims while denying a duty – also reflect the strength of the perceived need to justify a denial of duty to a seriously injured claimant. Taking out the individualist aspects of the rhetoric however, we see other features even of this particular case. The comments of Lord Hoffmann could also be read as containing a *refusal* to allow tort damages to offer the last word on social responsibility. Citizens are cared for (to one level or another) through state welfare and the voluntary actions of others.[[39]](#endnote-39) Duties to take care, and to compensate in the event of harm, are a more limited category, and not to be confused with the care that is shown for vulnerable members of society generally. This aspect of the rhetoric tries to disentangle negligence and its remedies from the sense of solidarity between citizens, so that shortcomings in solidarity are not to be made up by courts deciding negligence cases generously. The explicit reference to the generous nature of damages awards might be underlined. But the distinction between solidarity and negligence duties is overshadowed by the emphasis on free will and responsibility of the claimant.[[40]](#endnote-40)

Subsequent cases have of course followed the *Tomlinson* lead and exonerated occupiers, even in cases involving child claimants. In the latter cases though, courts tend to underline the adverse effects on other members of the public of having to take precautions to avoid liability, rather than the fecklessness of the claimants (See for example *Baldacchino v West Wittering* [2008] (involving a beach) and *Keown v Coventry Healthcare Trust* [2006] (hospital grounds where members of the public could take recreation)). However, there are also stronger counter-currents at the rhetorical level. So for example, parents whose toddler drowned at a holiday park were not to conclude that they themselves were in any sense being held to blame when a court decided that no duty had been owed to warn them of a danger: the determination of legal duties and no duties should *not* always be taken to set out a moral conclusion about the parties (*Bourne Leisure Ltd v Marsden* [2009]).[[41]](#endnote-41) In another ‘no liability’ case where the rhetoric was restrained and decidedly sympathetic to all parties, parents who hired a bouncy castle on which another couple’s child suffered catastrophic injuries were not to be expected to be as aware of significant risks based on official documentation as would a commercial operator or employer (*Perry v Harris* [2008]).[[42]](#endnote-42) Here the lesson is not the opposition of legal and moral expectations, but their connection: the legal standard to be applied in this context is that of the reasonable parent, and no more. These last two cases concern those who are *expected* to care, namely parents. There is a difference in the rhetoric compared to that applied to adventurous young risk-takers, as in *Tomlinson*. This rhetoric can be treated as gendered. Since all the cases involve the perils of leisure activities, it might well be asked what ‘game’ the law is here regulating, and whether its rhetoric changes with the characters involved.[[43]](#endnote-43)

Another source of insight into the role of individualism at the margins of the duty of care is in those cases where tort comes up against alternative legal frameworks applicable to the situation. As already explained, the availability of overlapping *legal* (as well as other) narratives is familiar from *Donoghue v Stevenson* itself, but the complexity and innate uncertainty of an approach in which the duty of care coexists with other potential routes to legal responsibility has not made this a popular understanding. The key case, analogous to *Tomlinson* and from the same era in the House of Lords, is *Gorringe v Calderdale Metropolitan Borough Council* [2004], which blocked any derivation of duties of care from broad public law duties. In another exercise in line-drawing, clearly intended to preclude a wide range of cases from being argued, the attempt by the claimant to shift blame onto a local authority was again inherently disparaged by the terms of the decision.[[44]](#endnote-44)

Like *Tomlinson*, *Gorringe* has achieved its intended effect. Numerous restrictive decisions concerning tort in the context of positive duties of the state and regulatory agencies to benefit claimants have followed, and the introduction to the scene of a new legal status for Convention rights has only intensified the effect. This has happened in part because the new and more limited remedies available under the Human Rights Act are thought more appropriate than tort’s full compensatory remedies where complaints essentially turn on violations of rights by public authorities. The impact on tort needs some interpretation but may turn out to be profound, positively encouraging the question referred to in *Tomlinson*, of whether tort’s damages are really an appropriate response to a wide range of harms. Examples of this can be found in *Marcic v Thames Water* *Utilities Ltd* [2003], *Home Office v Mohammed & Others* [2011], and *Murdoch v Department for Work and Pensions* [2010](where the alternative remedy was a civil debt for recovery of sums owed, the allowable claim being for non-payment). The rhetoric of *Home Office v Mohammed* is particularly significant because it was far from protective of the State and yet tort’s role in protecting rights was subordinated even to that of the Parliamentary Ombudsman. This illustrates that the rise of a public law frame for considering the claims of individuals to be cared for (benefited, or protected), has had a significant impact on the perceived importance of tort. Where once the existence of such duties was thought to justify a *progressive* expansion in the duties owed to individuals by the state, growing scepticism about the relevance of a damages remedy has led to the restriction of tort in favour of a multitude of other responses.

In both these sets of cases, the rhetoric of individual responsibility and rights has proved to be rather superficial, despite its strategic success in helping to secure a more restrictive direction in the development of the law. It would be best to summarise these cases as limiting the range of relationships in which courts consider the duty of care – and, importantly, its associated liabilities – to offer an appropriate narrative, and a recognition that it does not provide the only narrative.[[45]](#endnote-45) The limitations of the duty of care itself explain its limited utility in capturing a range of responsibilities. Unfortunately, the surface rhetoric of individualism tends to work against this interpretation. The mainstream presentation of negligence as correcting harm done by one party to another in the context of no particular preceding relationship has ultimately, some decades later, made it inherently unattractive as an encapsulation of relationships. While in *Donoghue* the ‘duty of care’ narrative was powerful enough (with the help of Lord Atkin’s rhetoric) to be dominant, courts have increasingly seen it as overly simplified or plainly inappropriate.

This is not to say that an emphasis on relationships would perceive all consequent limitations in tort duties to be an appropriate response. In particular, negligence thinking exerts a considerable influence in areas where the nature of the relationship may give positive reasons for taking care beyond those applicable to strangers. Perhaps the clearest recent example is the narrow majority decision of the Supreme Court in *Baker v Quantum Clothing Group Ltd* [2011]. Overturning a decision of the Court of Appeal, Lord Mance for the majority argued that the duty in section 29 of the Factories Act 1961 should be read as analogous to a negligence duty – what could the employer reasonably have thought and done? Any more would impose an unfair burden, and an applicable industry Code of Practice in respect of protection at *higher* levels was read as providing protection to employers who did not protect employees at lower levels: it set out the rules of the game. Lord Kerr in dissent, like the Court of Appeal in this and a number of other industrial injury cases in recent years, emphasised instead the positive duty of employers not only to keep their employees safe from foreseeable dangers, but also to give positive thought to the risks associated with their employment.[[46]](#endnote-46) The decision in *Baker* encroaches into the territory of this positive duty to consider risks to employees and to ‘give thought’ to the harms which may affect them. Employment cases involving physical injury (rather than psychiatric harm) have not been an obvious focus for feminist analysis, but it is noticeable that in the three most significant recent cases in which the House of Lords and then Supreme Court have either rejected liability, or shown little enthusiasm for the principles applied, the claimants have been female employees. [[47]](#endnote-47) Women are disproportionately represented in the groups where injury was less readily foreseeable, because they were apparently the ‘softer’, less risky jobs. Gender roles were relevant to the very features of their claims which caused them to fail, or to encounter greater difficulties, where analysis is premised on the norms of negligence.

**CONCLUSION**

The allure of the duty of care is that it appears to liberalise legal remedies and to supplement the existing contractual rules with more flexible principle capable of responding to parties’ relationships. But a critical relational perspective will show that this attraction is largely misplaced. Indeed the allure of duty and its rhetoric partly explains the way that tort scholarship lags behind contract scholarship in its appreciation even of the pragmatic and limited nature of its subject. Feminist method can in my view help to reveal some of the tensions in duty of care, without collapsing into essentialism, because it can reveal the complexity of relational narratives and the shortcomings of abstract duty.

There is also however a question of history and of legal development, suggested by Gilligan’s analysis but oddly neglected to date. Legal sensibilities are surely not fixed in time. [[48]](#endnote-48) The vibrancy of relational contract theory and its connection with the most commercial of spheres suggests that relational analysis, which pre-dates Gilligan’s work, could be freed from the limitation of ‘care’ and might capture a great deal about the needs faced by legal systems in today’s societies and economies. Armed with a progressive reading of Gilligan, and with an emphasis on maturity and her questioning of hierarchies rather than on ‘difference’, we may wonder whether the generalised duty of care itself was just a phase we were going through.

**Case list**

*Baker v Quantum Clothing Group ltd* [2011] UKSC 17.

*Baldacchino v West Wittering* [2008] EWHC 3386.

*Barker v Corus UK Ltd* [2006] UKHL 20.

*Bourne Leisure Ltd v Marsden* [2009] EWCA Civ 671.

*Caparo Industries Plc v Dickman* [1990] 2 AC 605.

*Connor v Surrey County Council* [2010] EWCA Civ 286.

*Donoghue v Stevenson* [1932] AC 562.

*Fairchild v Glenhaven Funeral Services* [2002]UKHL 22.

*Gorringe v Calderdale**Metropolitan Borough Council* [2004] UKHL 15.

*Home Office v Mohammed & Others* [2011] EWCA Civ 351.

*Keown v Coventry Healthcare Trust* [2006] 1 WLR 953.

*Marcic v Thames Water Utilities Ltd* [2003] UKHL 66.

*Murdoch v Department for Work and Pensions* [2010] EWHC 1988.

*Perry v Harris* [2008] EWCA Civ 907.

*Sienkiewicz v Grief* [2011] UKSC 10.

*Smith v Northants* [2009] UKHL 27.

*Sullivan v Moody* (2001) 207 CLR 562.

*Threlfall v Kingston-upon-Hull City Council* [2010] EWCA Civ 1147.

*Tomlinson v Congleton Borough Council* [2002] EWCA Civ 309.

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1. \* Thanks are due to Janice Richardson and TT Arvind for their very pertinent comments on an earlier version. Remaining defects are of course my responsibility. [↑](#endnote-ref-1)
2. See further ’duty of care through a relational perspective: antithesis or not?’, below. In terms of centrality, there is jurisdictional variation in the common law. The ‘duty of care’ has been important in the UK, Canada, and Australia, amongst other jurisdictions, but (controversially, from some liberal points of view) it has not had the same significance in US law (Goldberg and Zipursky 2001). [↑](#endnote-ref-2)
3. This is of course a matter of degree. In particular, Bender (1989-90) has sought to rework negligence so that ‘care’ means ‘responsibility’. The outlandishness of the result and its distance from the law of tort as we know it makes the point very effectively. On the whole however, the critique of objectivity has been deployed against the standard of reasonable care (for example Conaghan (1996)), while arguments have been put forward for the expansion of categories of harm (to include gendered harms), and for reform of damages. [↑](#endnote-ref-3)
4. See for example Peppin (1996), beginning with the promise of negligence in responding to the ‘relatedness’ of people (a promise which she finds not to be fulfilled). I will take a more sceptical approach to the promise of the ‘duty concept’ itself. Note also Conaghan (2003), drawing attention to the conception of social relations viewed primarily in terms of isolated acts of individuals, which encapsulates some features of the ‘abstract’ (Atkinian) duty of care. [↑](#endnote-ref-4)
5. This is the model of Graycar and Morgan (2002), and is argued for specifically in Graycar and Morgan (1996). [↑](#endnote-ref-5)
6. This is the model expressly adopted by Weinrib (1995) as characteristic of private law. This has been immensely influential in academic private law but strikes me as the very opposite of the contextual understanding of relationships which ought to be central to feminist analysis. Notice, for example, the deliberate strategy of using the parties’ names in the various ‘feminist judgments’ in Hunter, McGlynn and Rackley (2010), and the multiplication of relevant factors drawn from the parties’ lives. This lies in contrast to lawyers’ learned skills of abstraction in order to universalise, but notably *can* be successfully incorporated into legal judgment. [↑](#endnote-ref-6)
7. The meaning of ‘principle’ has changed over the years, maybe as a consequence of Dworkinian theory and its popularity. In the first edition of his *Introduction to Contract*, Atiyah was able to juxtapose a claim to have taken a principled (as opposed to rules-based) analysis of the law with a claim that he took functions and effects as seriously as legal doctrine (Atiyah 1961: v). Principled analysis in this sense – drawing out key themes – had the potential for a critical edge, which has been lost as principles are defined by opposition not only to rules, but also to ‘policies’ or ‘pragmatism’ (the very things that Atiyah thought were illuminated by his variety of analysis, generalising from individual instances to the larger picture). [↑](#endnote-ref-7)
8. For an account of the tensions between these threads in legal reasoning in private law (specifically the law of contract), also criticising the dominance of the principled rather than the pragmatic account in liberal jurisprudence, see Waddams (2011). [↑](#endnote-ref-8)
9. How to face this problem was the key theme of Conaghan (2000), quoted above. The problem has not become any easier over the intervening decade or so. See the very useful overviews by Dixon (2008) and Chamallas (2010-11). The key problem is how to identify ‘gender’, given the influence of (for example) Butler (1990). [↑](#endnote-ref-9)
10. Dworkin has argued that the law ‘works itself pure’ as it generalises its principles more and more (Dworkin 1986). Beever (2007) has argued that tort law should revert to the principled state of negligence under *Donoghue* [1932](as he perceives it to have been), cleansed of policy considerations. A contextual relational approach, considering the nature of particular relationships as germane to the rights and responsibilities arising, is at odds with both of these. [↑](#endnote-ref-10)
11. As to which see further ‘The legal sense of *In a Different Voice*’, below. [↑](#endnote-ref-11)
12. This note, on which Gilligan’s book ends, clearly works against an entirely deterministic reading of her work. [↑](#endnote-ref-12)
13. Given the volume and diversity of feminist legal theory, I have drawn highly selectively from the available sources. [↑](#endnote-ref-13)
14. A comparison can be drawn perhaps with the work of Jennifer Nedelsky, which draws freely on non-feminist critiques of rights as well as on feminist sources in elaborating a relational view of rights: see for example Nedelsky 1993; 1999. [↑](#endnote-ref-14)
15. Lacey (1998: 13) referring to Marxist theory, critical legal theory, critical race theory and queer theory. But legal realism more generally might be thought to fit this description. [↑](#endnote-ref-15)
16. A point emphasised by Atiyah 1961: ‘Introduction’. [↑](#endnote-ref-16)
17. This draws attention to the fact that many or indeed most negligence cases outside road traffic accidents do not arise between strangers and/ or involve alternative sources of potential responsibility (including public law or statutory responsibilities). [↑](#endnote-ref-17)
18. It is important to point out that ‘regulation’ and ‘good ordering’ are intended to be malleable terms which can be understood to raise more or less procedural or substantive issues of (for example) fairness, thereby potentially justifying limitations to freedom of contracting. [↑](#endnote-ref-18)
19. Smith (2006) suggests a mixed approach. This is very different from Atiyah’s original Introduction. [↑](#endnote-ref-19)
20. Particularly useful exemplars are Mulcahy (2005); Mulcahy and Andrews (2010); Brown (1996); Wightman (2000) and Frug (2002). The links between feminism and other contextual (relational) approaches are further explored by Campbell (2005) [↑](#endnote-ref-20)
21. Early research in the role of rules had simply not included girls at all. [↑](#endnote-ref-21)
22. This is debated: see for example the exchange between Bernstein (1999), and Macaulay (2000). [↑](#endnote-ref-22)
23. Chamallas (2010-2011) lists the big three ‘older’ feminisms, drawing on Dixon (2008), as liberal, dominance, and cultural or relational feminism. The newer three are listed as partial agency or sex-positive feminism; intersectional or anti-essentialist feminism (exploring other dimensions of identity such as race and sexual orientation); and postmodern feminism. [↑](#endnote-ref-23)
24. I would relate this insight to the ambitions (and achievements) of the Feminist Judgments project (Hunter, McGlynn and Rackley 2010), since judgments to be successful must carry authority for all those subject to them. Therefore the feminist reading must seek a better reading generally, not only for women, than the ostensibly mainstream version. This is one of the ways in which a feminist approach can be argued to offer more than simply a ‘perspective’. [↑](#endnote-ref-24)
25. Frug proposes that a feminist reading might lead to the conclusion that standardized contracts can be unfair for men as well as for women (1992: 99) [↑](#endnote-ref-25)
26. One of the cases where this happened is replete with other metaphors. The difficulty here was that the Court of Appeal found it difficult to fit its preferred answer within the proliferation of ‘no duty’ mandates in the area where tort duties overlap with statutory powers and duties (*Connor v Surrey County Council* [2010]). [↑](#endnote-ref-26)
27. Ironically perhaps the High Court in this case adopted an even more open-ended ‘multi-factoral’ approach. [↑](#endnote-ref-27)
28. While this does have something in common with the approach in *Sullivan v Moody*, and may well lead to some similar conclusions in novel cases, it focuses more expressly on features of the relationship between the parties rather than, for example, desirable or undesirable policy outcomes. This is not to say that the *Caparo* approachexcludes policy considerations, but it tends to mediate its approach to policy through the relationship of the parties. [↑](#endnote-ref-28)
29. I don’t believe this to be true, and would find it very surprising if it were. I think it is rather that the boundaries of behaviour are set differently where economic losses are concerned, because they can be caused in so many ways. Actually the remedies of tort law are focused on the economic impact of harms (Bender 1989-90; Steele 2011; Stanton 2012). [↑](#endnote-ref-29)
30. There is a risk, pointed out by Frug, that the darker side of relationships (their propensity to form a web which is not only connecting, but also has the ‘sticky, trapping character of a spider’s web’, and their own potential for hierarchy), will be glossed over in Gilligan’s work given the nature of her undertaking (to disrupt the identification of maturity with the ethic of right): Frug (1992) at 45 [↑](#endnote-ref-30)
31. For debate around this strategy and exploration of the deeper roots of the received approach contested by Gilligan, see Richardson (2007). [↑](#endnote-ref-31)
32. Lord Atkin did of course add the idea of ‘proximity of relationship’ to his neighbour principle, and the abstract refrain of some parts of his judgment have arguably been disproportionately sampled in ensuing debate. [↑](#endnote-ref-32)
33. A point effectively made by Biggs and MacKenzie (2000), though introducing a collection without an essay about tort. [↑](#endnote-ref-33)
34. The tort of negligence typically concerns itself with actual rather than threatened harms, so the question of injunctive relief for negligence has tended to arise as a matter of theory rather than practice. [↑](#endnote-ref-34)
35. To the extent that this is premised on differentiation between types of harm, the difficulties of drawing the lines between recoverable and irrecoverable harm in any meaningful way is discussed by Priaulx, this volume. [↑](#endnote-ref-35)
36. Bender (1989-90) and, at more length (1990), discusses the economic form of damages in order to propose that something less easily internalised by business should be chosen – such as a literal duty to care. I have argued that there is an interesting relationship between theories which try to secure more money (compensation is not good enough) and emerging ideas that money is inappropriate (compensation would sully the idea of rights) (Steele 2011). [↑](#endnote-ref-36)
37. The risk-taking activities of young adults is emphasised, but this is particularly aimed at the case of young men: see Lord Scott’s rather hesitant syntax when he asked ‘why should the council be discouraged by the law of tort from providing facilities for young men and young women to enjoy themselves in this way?’ (*Tomlinson* [2003]: [94]). More directly, Lord Hoffmann referred to the incidence of serious diving injuries almost exclusively among young adult men, and particularly to the expert evidence of Dr Penny which used the expression ‘macho male diving syndrome’ (*Tomlinson* [2003]; para [49]). Were macho rules thought appropriate for macho games? See the earlier discussion of games and the ‘legal sense’ in work referred to by Carol Gilligan. [↑](#endnote-ref-37)
38. Contrast the remarks of Sedley LJ in the court below, concurring with Ward LJ: ‘negligence is fact-specific, and we are able neither to determine what the occupiers’ duties are in other places nor to predicate our decision on what its effect on those occupiers might be.’ (*Tomlinson* [2002]: [42]) The language used by the Court of Appeal was generally muted and lawyerly, in contrast to the vivid expression in the House of Lords. Its judgment was reversed. [↑](#endnote-ref-38)
39. Lord Hoffmann does not here mention the voluntary actions of others, and scholars have rightly explained that voluntary carers are not often made visible in the law. See for example Herring (2007). [↑](#endnote-ref-39)
40. I emphasise ‘solidarity’ rather than care because the case can be seen as part of a continuing relationship between private law and regulatory responses: see further Lee (2012), Campbell (2010). [↑](#endnote-ref-40)
41. Moses LJ pertinently stressed that ‘sometimes these cases are bedevilled with the quest to attach blame either to the parent or the occupier’. This would be ‘absurd and offensive’ (*Bourne Leisure*: [2009]: [16], [17]). But notice the felt need to emphasise this. [↑](#endnote-ref-41)
42. All of these cases are of the type that tend to be discussed in tabloid newspapers in connection with ‘blame culture’ or ‘compensation culture’, and the courts may be seen to be struggling to express a decision about legal duties and liabilities in a context where the public may think of them in different terms, about responsibility and blame. [↑](#endnote-ref-42)
43. See the discussion in the previous section. [↑](#endnote-ref-43)
44. ‘On the face of it, the accident was her own fault. … But she claims in these proceedings that it was the fault of the local authority …’ (Lord Hoffmann *Gorringe* [2004]: [8]). [↑](#endnote-ref-44)
45. Even in a rare recent case where the Court of Appeal found a route to a negligence duty in the context of statutory powers and duties of a public nature (*Connor* [2010]), Sedley LJ pointed out that all employers, not just local authorities, owe duties not only to their employees but also to shareholders, regulators and the like, which may pull in different directions ([119]). Complexity and competition in legal narrative is not confined to the public sphere, and indeed public law (regulation) has a far broader influence than this. [↑](#endnote-ref-45)
46. The significance of risk assessment was likewise identified as a key trend in employers’ liability over the last 20 years by Smith LJ in *Threlfall v Kingston-upon-Hull City Council* [2010], and summarised in terms of a need to ‘take positive thought for the risks arising from … operations’ ([35]). [↑](#endnote-ref-46)
47. *Baker v Quantum Clothing* [2011]was a case of occupational deafness in the knitting industry among employees exposed to a level of noise below that prioritised in the applicable Code of Practice, which was based on the available research. None had been conducted on this level of exposure. *Sienkiewicz v Grief* [2011] was an application of *Fairchild v Glenhaven Funeral Services* [2002]to an office worker, whose employment did not follow the same pattern as the employees in *Fairchild* and *Barker v Corus UK Ltd* [2006] in that there was only one employer. Levels of exposure were lower and the first instance judge was persuaded that occupational exposure did not double the background risk of living in Ellesmere Port. The Supreme Court seemed to distance itself from the fairness of *Fairchild*, despite applying it. Problems have also been encountered by family members suffering secondary exposure to dust, suggesting a presumed lack of imagination in reasonable foreseeability. *Smith v Northants* [2009] concerned a care worker whose work involved collecting people with disabilities from their homes. The employer was exonerated from absolute liability under the Provision and Use of Work Equipment Regulations 1992 because it did not ‘control’ the equipment (a ramp) which gave way: it was not ‘work equipment’. Baroness Hale, dissenting, stressed the possibility of other narratives which would produce a different sense of the fairness of attaching responsibility to the employer: ‘My Lords, perhaps it all depends upon how you tell the story’ (*Smith v Northants*:[32]). [↑](#endnote-ref-47)
48. A general point about the ahistorical nature of much ‘difference’ feminism is made by Conaghan (1996: 167), who also raises the dangers of applying the ‘ethic of care’ to tort. See also Kerber (1986). [↑](#endnote-ref-48)