

# TEACHING TORTS AS IF THE WORLD REALLY EXISTED:<sup>\*</sup> REFLECTIONS ON HAROLD LUNTZ'S CONTRIBUTION TO AUSTRALIAN LAW SCHOOL CLASSROOMS

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[This article considers the contribution that Harold Luntz has made to the teaching of torts in Australian law schools. It focuses in particular on his co-authored text, *Torts: Cases and Commentary*, a fifth edition of which was published in 2002. The major contribution that the casebook makes to the teaching of torts is via its focus on the empirical context in which torts doctrine is developed and applied, and on the social context in which the rules operate. I focus in particular on the book's first chapter, in which the landscape of accidents and injuries is outlined in some detail, and where some aspects of particular theoretical approaches to tort law are discussed. I also look at some examples of particular issues dealt with in the book (such as domestic violence and the Stolen Generations) to illustrate its successful merging of detailed doctrinal issues with a critical and contemporary commentary on the limits of (tort) law.]

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## I INTRODUCTION

The opening section of the fifth edition of this outstanding teaching text, *Torts: Cases and Commentary*<sup>1</sup> is entitled 'Accident Compensation and the Law of

\* This title draws upon a number of previously published works, including Christine Boyle, 'Teaching Law as if Women Really Mattered, or, What about the Washrooms?' (1986) 2 *Canadian Journal of Women and the Law* 96; Leslie Bender, 'Teaching Torts as if Gender Matters: Intentional Torts' (1994) 2 *Virginia Journal of Social Policy and the Law* 115.

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<sup>1</sup> Harold Luntz and David Hambley, *Torts: Cases and Commentary* (5<sup>th</sup> ed, 2002). In its first and second editions, there was a third author, Robert Hayes. While Professors Luntz and Hambley have continued to work on the book together, I think it is fair to discuss this text in a forum on

Torts'. The two subheadings that follow are 'The Size of the Problem: Some Statistics' and 'The Cost of Injury'. Before a word of text appears, this book has already distinguished itself from all other Australian torts teaching texts by locating the doctrinal material within a framework that relates the legal rules, principles and practices of tort law to the type of problem that the law actually has to deal with. What is most remarkable is simply that such an approach might be considered especially notable. In other words, what is remarkable is that this is *not* the way other text writers have, in general, approached the teaching of torts. In this article, I shall highlight parts of the Luntz and Hambly casebook that distinguish this book — those that put the dry legal rules into context by engaging with important social issues. Given my own interests, my focus will be on the ways in which issues of social power — in particular, issues of gender or racial hierarchy, and disability — are dealt with.

In the first part of this discussion, I look broadly at the ways the authors use social context and empirical information about accidents and injuries to situate the material in the remainder of the book. I suggest that if those who engage in 'policy debates' about tort law reform had paid more attention to this type of material when studying law (or, indeed, in their working lives), we might have had a more informed 'debate' about the 'liability crisis' than that which occurred in 2002.<sup>2</sup> After reviewing the use made of the data included in the first chapter, I will briefly consider the stand-alone section on theoretical approaches to tort law, before examining some particular examples of engagement with topical social issues. These include the Stolen Generations, the refugee crisis, child abuse and domestic violence. I will conclude this discussion with two particular examples: a case study of *Deatons v Flew*<sup>3</sup> — a 'classic' Australian case that is used in almost every casebook — with an analysis of how the treatment in this book differs from other casebooks; and a suggestion for a teaching module based on a landmark Canadian case, *Jane Doe v Metropolitan Toronto (Municipality) Commissioners of Police*.<sup>4</sup>

The Luntz and Hambly torts casebook is an outstanding teaching vehicle. It is a testament to the value that I place on it that I have chosen to engage with it as an aspect of Harold Luntz's legacy as a leader amongst Australian law teachers and scholars. To the extent that my engagement involves some degree of

Professor Luntz for a number of reasons. There is no doubt that, despite the absence of a list of chapter attributions, the majority of the chapters are by Luntz. Moreover, those that are not written by Harold Luntz share the same contextualised, empirically-based attributes and are equally worthy of praise. To this extent, this article also celebrates David Hambly's contribution to torts teaching.

<sup>2</sup> For a broad overview of the issues that were discussed during that period, see the symposium entitled 'Forum: Reform of the Law of Negligence — Balancing Costs and Community Expectations' (2002) 25 *University of New South Wales Law Journal* 808.

<sup>3</sup> (1949) 79 CLR 370 ('*Deatons*').

<sup>4</sup> (1998) 160 DLR (4<sup>th</sup>) 697 ('*Jane Doe*'). In 1989, an application to strike out the statement of claim as disclosing no cause of action was dismissed in *Jane Doe v Metropolitan Toronto (Municipality) Commissioners of Police* (1989) 58 DLR (4<sup>th</sup>) 396. In 1998, the trial judge found in the plaintiff's favour in an action for negligence and breach of Jane Doe's constitutional right to equality: *Jane Doe* (1998) 160 DLR (4<sup>th</sup>) 697. This is discussed in Luntz and Hambly, above n 1, [2.6.16], [4.3.8].

critique, I should stress that this is intended in the spirit of a scholarly exchange and as a genuine attempt to make an excellent teaching text even better than it is.

## II INTRODUCING ACCIDENTS AND INJURIES

In the preface to the fifth edition, the authors reiterate the themes that inform this and the previous editions. Broadly, they are to provide primary sources to assist the reader to 'derive the contemporary law of torts'; to provide 'secondary sources from which the student may learn how that law operates in its social setting and its theoretical basis'; and to provide 'critical commentary on the law in both its theory and its operation'.<sup>5</sup> Harold Luntz and David Hambly begin their discussion by locating tort law within an empirical framework, drawing upon a diverse range of sources to illustrate the landscape of injury, disease, incapacity and compensation in Australia.<sup>6</sup>

### A *Where Do Injuries Occur?*

Drawing on hospital admissions information, Luntz and Hambly show that by far the largest proportion of injuries occur in the home (55 per cent), where there is rarely anyone that can be sued.<sup>7</sup> Workplace injuries account for 14 per cent, street and highway accidents 5 per cent, those in schools and other public areas 16 per cent, and sports and athletic injuries 10 per cent. Tellingly, the smallest proportion happens on the road, but there is no doubt that these have the most severe consequences for the person injured.<sup>8</sup> Data from the Australian Bureau of Statistics, reproduced in Luntz and Hambly, reveals that over 30 per cent of accidents causing disability lasting six months or more were caused by road accidents.<sup>9</sup> By contrast, only 13 per cent of accidents causing long term disability resulted from injuries that took place at home.<sup>10</sup>

### B *Who Makes Claims?*

'Road accident victims are far more likely to make claims and receive tort compensation than any other group.'<sup>11</sup> Seventy five per cent of claims finalised

<sup>5</sup> Luntz and Hambly, above n 1, xxix.

<sup>6</sup> Ibid [1.1.1]-[1.1.38].

<sup>7</sup> Ibid [1.1.5], drawing on data from Australian Institute of Health and Welfare ('AIHW'), *Australian Hospital Statistics 1999-00* (2001) 178, table 9.6 <<http://www.aihw.gov.au/publications/hse/ahs99-00/index.html>>.

<sup>8</sup> Luntz and Hambly, above n 1, [1.1.6], drawing on data from AIHW, *Australia's Health 2000: The Seventh Biennial Health Report of the Australian Institute of Health and Welfare* (2000) 54, table 2.8 <<http://www.aihw.gov.au/publications/health/ah00/index.html>>.

<sup>9</sup> Luntz and Hambly, above n 1, [1.1.7], drawing on data from Australian Bureau of Statistics ('ABS'), *Disability, Ageing and Carers: Accidents and Injuries — Common Causes of Disability* (2000) table 'People Aged 18 and Over with a Disability (a), Living in Households: Age Group — By Where Accident or Injury Occurred' <[http://www.abs.gov.au/CA25670D007E9EA1/0/C70D1B7D4F25DC5DCA25697C00278B80?Open&Highlight=0,injur\\*,accident,place,home](http://www.abs.gov.au/CA25670D007E9EA1/0/C70D1B7D4F25DC5DCA25697C00278B80?Open&Highlight=0,injur*,accident,place,home)>.

<sup>10</sup> Luntz and Hambly, above n 1, [1.1.7].

<sup>11</sup> Ibid [1.1.9], citing Marie Delaney, 'Some Characteristics of Personal Injury Claims in the New South Wales District Court' (Civil Issues No 8, Civil Justice Research Centre, 1995) 3. See also Donald Harris et al, *Compensation and Support for Illness and Injury* (1984) 50-1 and more

in the New South Wales District Court surveyed in 1994 were associated with motor vehicle accidents ('MVAs').<sup>12</sup> Yet only about 54 per cent of people injured in MVAs received any compensation.<sup>13</sup> Few common law claims are made for workplace injuries as such claims are mostly pursued via statutory workers' compensation schemes. In addition, accidents and injuries other than those at work or on the roads comprise only a very small proportion of tort claims in any year.

### C Are Damages Awards 'Too High'?

According to a Panel of Eminent Persons engaged by the federal government in 2002 to review the law of negligence, there is a widely held view in the Australian community that '[d]amages awards in personal injuries cases are frequently too high'.<sup>14</sup> Yet when one looks at the data collected in chapter one of the casebook, large claims leading to awards or settlements of over \$500 000 under the third party motor vehicle insurance system in New South Wales averaged only 115 per year between 1989–96.<sup>15</sup> In 1997, 128 of all claims (by type of insurance) were for more than \$1 000 000, of which the vast majority (89) were MVAs.<sup>16</sup>

### D How Many Australians with Disability Caused by Accident or Injury Have Access to the Tort System?

In 1998, there were about 3.6 million people in Australia with some form of disability, however only 590 600 (16 per cent) attributed their condition to some form of accident or injury.<sup>17</sup> Only 65 400 recovered damages and of those only 5660 received more than \$100 000.<sup>18</sup>

Yet any cursory reading of a media report in 2002 (or indeed 2003)<sup>19</sup> would suggest something vastly different to what this careful articulation of the empirical reality tells us. And it is not only the media that operate from an

generally ch 2, 'Who Claims Compensation: Factors Associated with Claiming and Obtaining Damages'.

<sup>12</sup> Luntz and Hambly, above n 1, [1.1.9] fn 23, citing Delaney, above n 11, 3.

<sup>13</sup> Luntz and Hambly, above n 1, [1.1.9], citing Delaney, above n 11, 3.

<sup>14</sup> Panel of Eminent Persons ('Ipp Committee'), *Review of the Law of Negligence: Final Report* (2002) 25. The Chairman of the Panel was Justice David Ipp and its members were Professor Peter Cane, Associate Professor Donald Sheldon and Mr Ian Macintosh.

<sup>15</sup> Luntz and Hambly, above n 1, [1.1.10], citing Motor Accidents Authority of New South Wales, *NSW Motor Accidents Scheme: Large Claims* (1997) 4.

<sup>16</sup> Luntz and Hambly, above n 1, [1.1.10].

<sup>17</sup> ABS, *Disability, Ageing and Carers 1998: Summary of Findings* (1999) 7, table 11, extracted in Luntz and Hambly, above n 1, [1.1.11].

<sup>18</sup> Ibid. See also Patrick Atiyah, *The Damages Lottery* (1997) 100.

<sup>19</sup> Note that New South Wales Premier Bob Carr has claimed that the 2002 changes have reduced litigation: see Nick O'Malley and Linda Morris, 'Changes to Negligence Laws Have Made Us Less Litigious, Boasts Carr', *The Sydney Morning Herald* (Sydney), 13 August 2003, 8:

The State Government's biggest rewrite of negligence laws in 70 years had stabilised the insurance market and pushed claims down, the Premier, Bob Carr, said yesterday. Citing statistics from independent and government agencies, Mr Carr said the public liability changes meant people were now less inclined to sue when something goes wrong. 'We're becoming a less litigious society and people are expecting more personal responsibility.'

empirically different context. In 2002, the Ipp Committee was appointed to review the law of negligence.<sup>20</sup> The terms of reference commenced with this statement:

The award of damages for personal injury has become unaffordable and unsustainable as the principal source of compensation for those injured through the fault of another. It is desirable to examine a method for the reform of the common law with the objective of limiting liability and quantum of damages arising from personal injury and death.<sup>21</sup>

The Panel referred to widespread perceptions in the community that:

- the application of the law of negligence by the courts is ‘unclear and unpredictable’;
- it is ‘too easy’ for plaintiffs to establish liability for negligence; and
- damages awards are ‘frequently too high’.<sup>22</sup>

Significantly, the Ipp Committee then said: ‘The Panel’s task is not to test the accuracy of these perceptions but to take as a starting point for conducting its inquiry the general belief in the Australian community that there is an urgent need to address these problems.’<sup>23</sup>

The painstaking work that Harold Luntz has done in putting together such a wide array of data to illustrate the landscape of injury and compensation seems to have been almost entirely overlooked in the stampede to be seen to be ‘doing something’ in the light of the rise in insurance premiums.<sup>24</sup>

### III CRITIQUE OF THE TORT SYSTEM

In a recent review of Professor Luntz’s fourth edition of his acclaimed damages treatise,<sup>25</sup> Justice Dyson Heydon, after describing the book as ‘one of the most outstanding treatises ever written on Australian law’, comments that the book ‘poses one central paradox. The author makes it plain ... that he regards the

<sup>20</sup> For the outcomes of the Ipp Committee’s work, see Ipp Committee, above n 14.

<sup>21</sup> For the full terms of reference, see *ibid* ix.

<sup>22</sup> *Ibid* 25.

<sup>23</sup> *Ibid* 26. Cf the discussion by Feldthusen pointing out that when the then Ontario Law Reform Commission was asked in 1991 to consider ‘whether a problem existed’ in the area of exemplary damages, the Commission concluded that there was no crisis and ‘that the law of punitive damages could be left to Canadian judges and juries without driving anyone into bankruptcy’: Bruce Feldthusen, ‘Posturing, Tinkering and Reforming the Law of Negligence — A Canadian Perspective’ (2002) 25 *University of New South Wales Law Journal* 854, 854 (emphasis in original); Ontario Law Reform Commission, *Report on Exemplary Damages* (1991).

<sup>24</sup> For some examples of the legislation which was enacted in New South Wales in the wake of the ‘crisis’, see the *Civil Liability Act 2002* (NSW) and the *Civil Liability Amendment (Personal Responsibility) Act 2002* (NSW). *Civil Liability Act 2002* (NSW) s 16(2) caps damages for non-economic loss at a maximum of \$350 000 (indexed) and the latter Act limits or completely precludes defendants’ liability in a bevy of instances. *Civil Liability Amendment (Personal Responsibility) Act 2002* (NSW) s 5F also provides that there is no duty to warn of an ‘obvious risk’, and yet defines such ‘obvious’ risks as including risks which have ‘a low probability of occurring’ and those which are not ‘prominent, conspicuous or physically observable’. Cf Reg Graycar, ‘Public Liability: A Plea for Facts’ (2002) 25 *University of New South Wales Law Journal* 810.

<sup>25</sup> Harold Luntz, *Assessment of Damages for Personal Injury and Death* (4<sup>th</sup> ed, 2002).

entire structure of the modern law as radically flawed.<sup>26</sup> Yet, Justice Heydon continues, ‘the passionate disapproval which the author has of the present law does not distort his exposition of it or otherwise damage the quality of that exposition’.<sup>27</sup> This marriage of the critical and the scholarly also exemplifies the Luntz and Hambly casebook, which is a living illustration of both the possibility and the value of this approach to teaching torts. It is clear to any reader by the end of chapter one that the common law tort system, and in particular its fault basis, is deeply flawed and irrational.

#### IV THEORY SECTION

Chapter one concludes with a brief discussion of the ‘[a]ims of the law of torts’, where the authors discuss law and economics and ‘[s]ome other legal theories’ — that is, ‘Critical Legal Studies’ and ‘feminist legal theory’.<sup>28</sup> There will always be disagreements about whether ‘theory’ should be separated out and taught or illustrated as a distinct ‘stand-alone’ phenomenon, or whether, for example, theoretical approaches to legal issues are more effectively demonstrated by being integrated, and discussed and explored where issues arise, in context.<sup>29</sup>

The law and economics section is perhaps the most effective. Unlike the other two sections — which rely heavily upon one large extract and present one person’s perspective and argument as if it were representative, rather than illustrative — the law and economics section provides a general overview of some of the issues. Moreover, it starts with a problem and locates the debate about law and economics within the framework of that problem: specifically, balancing safety with efficiency in the operation of trains and level crossings. This section also includes a critique that itself draws upon the literature in this field. So after pointing out that to be effective, economic analysis requires a free market and perfect knowledge, the authors conclude that ‘[s]ubsidies, taxes, monopolies and government regulation are far more likely to affect a particular decision than the relatively small accident costs that might or might not be incurred.’<sup>30</sup>

A 1990 article by Richard Abel represents ‘critical legal studies’<sup>31</sup> and, like the book in which his piece is located, Abel uses considerable empirical material to make his arguments. He relies in particular on Donald Harris’ Oxford study<sup>32</sup> to show the disproportionate rate of recovery for women and men (women are far less likely than men to recover compensation for injury) and concludes that the

<sup>26</sup> Justice Dyson Heydon, ‘Book Review: *Assessment of Damages for Personal Injury and Death* by Harold Luntz’ (2003) 25 *Sydney Law Review* 409, 411.

<sup>27</sup> Ibid 412.

<sup>28</sup> Luntz and Hambly, above n 1, [1.4.31]–[1.6.8].

<sup>29</sup> For a brief account of this tension in the context of feminist legal theory, see Regina Graycar and Jenny Morgan, *The Hidden Gender of Law* (1<sup>st</sup> ed, 1990) 7–10.

<sup>30</sup> Luntz and Hambly, above n 1, [1.5.14].

<sup>31</sup> Richard Abel, ‘A Critique of Torts’ (1990) 37 *UCLA Law Review* 785, extracted in Luntz and Hambly, above n 1, [1.6.4E].

<sup>32</sup> While the footnotes are omitted, it seems clear that Abel is referring to Harris et al, above n 11.

'decision to award compensation is inescapably political and unprincipled.'<sup>33</sup> He then makes some recommendations for reform that, while focusing on the irrationality of fault, include abolishing damages for non-pecuniary losses. While that may be a very popular approach (it certainly appeals to Australian legislatures which have moved to cap or limit such damages over recent years),<sup>34</sup> it fails to take into account the difficulties that women experience in having their losses quantified (that is, in those rare cases where they do seek advice, then sue, then succeed, which Abel points out is increasingly unlikely).<sup>35</sup> Many of the things that happen to women are characterised as 'non-economic' losses and therefore compensable (if at all) only by the type of damages that, in any legislative 'reform' of damages, are most likely to be abolished.<sup>36</sup> This example illustrates some of the difficulties of not only separating out 'critical' and feminist approaches, but also of using only one author as an example of each approach.

For feminist perspectives, we are given Leslie Bender's now classic critique of the reasonable man standard, coupled with her discussion of the 'no duty' problem and how that might be viewed were one to take an approach based on Carol Gilligan's 'web of connection' (or 'webs of interconnectedness', as Bender refers to the issue).<sup>37</sup> Unfortunately, while this is an important discussion, it is left to do too much and to serve too many functions. In this way, it becomes almost a parody of 'the' feminist position, even while Bender is at pains to point out that there is more than one feminism and more than one feminist approach to any particular legal problem. Finally, while there are references to some other feminist interventions into tort law, the concluding comment to the section is Gary Schwartz's somewhat breathtaking claim that feminist scholarship in tort law has been 'thin'.<sup>38</sup>

I wonder whether in a future edition the authors might consider employing a different approach to present these issues. Given the emphasis on the empirical context in the majority of the chapter, there are a number of empirical propositions that might illustrate the gendered operation of the law of torts and make the introduction of some feminist critique a little more focused. Gender differences can manifest themselves in tort law in a number of ways. There is some evidence

<sup>33</sup> Abel, above n 31, 801.

<sup>34</sup> See, eg, *Civil Liability Act 2002* (NSW) s 16(2).

<sup>35</sup> For a good illustration of these issues, see Lucinda Finley, 'Female Trouble: The Implications of Tort Reform for Women' (1997) 64 *Tennessee Law Review* 847. See also Regina Graycar, 'Hoovering as a Hobby and Other Stories: Gendered Assessments of Personal Injury Damages' (1997) 31 *University of British Columbia Law Review* 17, 26–31.

<sup>36</sup> Finley, 'Female Trouble', above n 35; Graycar, 'Hoovering as a Hobby', above n 35. See also Regina Graycar, 'Putting Gender on the Damages Agenda: Michael Chesterman's Contribution to Accident Compensation' in Kam Fan Sin (ed), *Legal Explorations: Essays in Honour of Professor Michael Chesterman* (2003) 140, 153–4.

<sup>37</sup> Leslie Bender, 'A Lawyer's Primer on Feminist Theory and Tort' (1988) 38 *Journal of Legal Education* 3, 28, 33–6, extracted in Luntz and Hambly, above n 1, [1.6.7E]. See also Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (1<sup>st</sup> ed, 1982).

<sup>38</sup> Gary Schwartz, 'Feminist Approaches to Tort Law' (2001) 2 *Theoretical Inquiries in Law* 175, 209, cited in Luntz and Hambly, above n 1, [1.6.8]. Joanne Conaghan has responded to this claim; see Joanne Conaghan, 'Tort Law and Feminist Critique' (2003) 56 *Current Legal Problems* (forthcoming).

that the nature of injuries suffered by women and men is qualitatively different.<sup>39</sup> Women are less likely to contemplate the possibility of a legal remedy for their injuries, less likely to seek legal advice when they have a potentially compensable claim and less likely to recover damages for their injuries.<sup>40</sup> Even when women do recover damages, the amount they receive is likely to be less than the amount a man would receive for a similar injury.<sup>41</sup> Women are also more likely to be the carers of people who suffer injuries.<sup>42</sup>

Another area in which the incidence of injuries is gendered is medical negligence, where a high proportion of the mass tort litigation concerns women and, in particular, women's reproductive capacities.<sup>43</sup> Joan Steinman has pointed out that 'women seem to be disproportionately affected by harmful drugs and medical devices'.<sup>44</sup> After examining a number of cases concerning well-known products, such as the Dalkon Shield,<sup>45</sup> she notes:

I do not know of a single mass tort in which men were injured by a product made for men to use or take, ostensibly to enhance their well-being. It appears that women, far more than men, take it on the chin from products made ostensibly for our good.<sup>46</sup>

These concerns about the 'theory' section are certainly not intended to detract from the importance of introducing torts students to theoretical perspectives on tort law. But I believe that this could be done more effectively by 'contextualising' the theory and problematising a variety of approaches to tort law, rather than presenting them as pre-given 'positions' that someone identified with a particular

<sup>39</sup> For example, men might be more likely to be injured through risk-taking behaviours, while women might disproportionately suffer personal injury by way of intentional torts perpetrated against them — such as assault and battery (trespass to the person), or by harms to their reproductive capacities through medical intervention and/or experimentation: see Regina Graycar and Jenny Morgan, *The Hidden Gender of Law* (2<sup>nd</sup> ed, 2002) ch 11. See also Lucinda Finley, 'A Break in the Silence: Including Women's Issues in a Torts Course' (1989) 1 *Yale Journal of Law and Feminism* 41; Anita Bernstein, 'Restatement (Third) of Torts: General Principles and the Prescription of Masculine Order' (2001) 54 *Vanderbilt Law Review* 1367; Martha Chamallas, 'Importing Feminist Theories to Change Tort Law' (1997) 11 *Wisconsin Women's Law Journal* 389.

<sup>40</sup> See Harris et al, above n 11, 51–2.

<sup>41</sup> See Graycar, 'Hoovering as a Hobby', above n 35; Jamie Cassels, 'Damages for Lost Earning Capacity: Women and Children Last!' (1992) 71 *Canadian Bar Review* 445; Martha Chamallas, 'Questioning the Use of Race-Specific and Gender-Specific Economic Data in Tort Litigation: A Constitutional Argument' (1993) 63 *Fordham Law Review* 73; Martha Chamallas, 'The Architecture of Bias: Deep Structures in Tort Law' (1998) 146 *University of Pennsylvania Law Review* 463.

<sup>42</sup> See *Griffiths v Kerkemeyer* (1977) 139 CLR 161; Regina Graycar, 'Women's Work: Who Cares?' (1992) 14 *Sydney Law Review* 86; *Van Gervan v Fenton* (1992) 175 CLR 327; Regina Graycar, 'Love's Labour's Cost: The High Court Decision in *Van Gervan v Fenton*' (1993) 1 *Torts Law Journal* 122. *Griffiths v Kerkemeyer*, *Van Gervan v Fenton* and the issues they raise are discussed in Luntz and Hambly, above n 1, [8.2.9], [8.2.25C]–[8.2.33].

<sup>43</sup> Lucinda Finley, 'The Pharmaceutical Industry and Women's Reproductive Health: The Perils of Ignoring Risk and Blaming Women' in Elizabeth Szockyj and James Fox (eds), *Corporate Victimization of Women* (1996) 59.

<sup>44</sup> Joan Steinman, 'Women, Medical Care and Mass Tort Litigation' (1992) 68 *Chicago-Kent Law Review* 409, 410.

<sup>45</sup> The Dalkon Shield was an intrauterine contraceptive device which caused injury to many women. For a discussion of the litigation and reference to some of the literature about it, see Graycar and Morgan, *The Hidden Gender of Law* (2<sup>nd</sup> ed), above n 39, 335–6.

<sup>46</sup> Steinman, above n 44, 412.

'ism' might take. Perhaps the section might be renamed, more broadly, 'critical approaches to tort law', given the changes in emphasis within various critical strands of legal scholarship over the past decades.

It is also important to observe that the reader (teacher or student) with no interest in issues of social context, critique or theory cannot so easily avoid them simply by not reading or teaching chapter one. This certainly provides a counter-point to the apparent acontextuality of some of the material in that chapter. Throughout the text, there are repeated reminders of, and cross-references to, some of the data, themes and theoretical positions raised in the first chapter. To give just a few examples, not only is there a reference to feminist critiques of the economic approach to standard of care (following the earlier critique of the 'reasonable man' standard),<sup>47</sup> but there is also considerable discussion of disability issues. After extracting the well-known decision in *Paris v Stepney Borough Council*,<sup>48</sup> there is a comment about the disincentive effects on the employment of people with disabilities and a cross-reference to the *Disability Discrimination Act 1992* (Cth) which proscribes disability discrimination.<sup>49</sup> Another related example is the extract from *Adamson v Motor Vehicle Insurance Trust*,<sup>50</sup> which is accompanied by a general discussion of injuries that result from illness (in that case, mental illness) and a comment that this issue provides one of the best arguments for the introduction of a no-fault system of compensation, at least in relation to MVAs.<sup>51</sup> In chapter 11, on trespass, a note points out the relevance of some of the classic cases on false imprisonment (*Bird v Jones*<sup>52</sup> and *Balmain New Ferry Co Ltd v Robertson*)<sup>53</sup> to the highly contentious litigation that ensued when the *MV Tampa* sailed into our waters and our collective consciousness, loaded with claimants for refugee status who had escaped a sinking ship.<sup>54</sup> The section on medical liability in chapter seven also contains a

<sup>47</sup> The authors revisit Bender's article extracted in chapter one in the section of the casebook on breach of duty. In the latter, they draw attention to Bender's critique of the economic nature of the calculus of negligence: see Luntz and Hambley, above n 1, [1.6.7E], [3.1.7] respectively. Of course, feminist critiques of the reasonable man standard have continued to appear in the years since Bender's piece was published. Further examples include Margo Schlanger, 'Gender Matters: Teaching a Reasonable Woman Standard in Personal Injury Law' (2001) 45 *Saint Louis University Law Journal* 769; Finley, 'A Break in the Silence', above n 39. The notion of a 'reasonable woman' standard has been received cautiously by many feminist theorists, a number of whom have expressed concern that the standard seems to essentialise the category 'woman', thereby collapsing a diverse range of experiences and backgrounds into one falsely homogenous category. On this point, see Finley, 'A Break in the Silence', above n 39; Kathryn Abrams, 'The Reasonable Woman: Sense and Sensibility in Sexual Harassment Law' (1995) 42 *Dissent* 48. Conversely, some theorists have argued that the standard could have value for feminist-influenced litigation: see, eg, Leslie Kerns, 'A Feminist Perspective: Why Feminists Should Give the Reasonable Woman Standard Another Chance' (2001) 10 *Columbia Journal of Gender and Law* 195. For an overview of the issues raised by this complex debate, see Caroline Forell and Donna Matthews, *A Law of Her Own: The Reasonable Woman as a Measure of Man* (2000).

<sup>48</sup> [1951] AC 367, extracted in Luntz and Hambley, above n 1, [3.1.26C].

<sup>49</sup> Luntz and Hambley, above n 1, [3.1.28].

<sup>50</sup> (1957) 58 WALR 56, extracted in Luntz and Hambley, above n 1, [3.2.14C].

<sup>51</sup> Luntz and Hambley, above n 1, [3.2.18].

<sup>52</sup> (1845) 7 QB 742.

<sup>53</sup> (1906) 4 CLR 379.

<sup>54</sup> Both the original Federal Court decision, *Victorian Council for Civil Liberties Inc v Minister for Immigration and Multicultural Affairs* (2001) 110 FCR 452 and its subsequent overruling in *Ruddock v Vadarlis* (2001) 110 FCR 491 are noted in Luntz and Hambley, above n 1, [11.5.8].

renewed critique of the tort system as a method of responding to medical injury and misadventure,<sup>55</sup> with a more sustained and critical treatment of medical issues in the context of intentional torts in chapter 13 raising some interesting questions about the status of the foetus, and issues of bodily integrity and autonomy.<sup>56</sup> These are complex issues and their resolution goes well beyond tort law, but there are many interesting examples that can be used in teaching both negligence and intentional torts, and some are used to good advantage in this edition. Perhaps in the next edition, a more sustained treatment will be given to the issue of ‘wrongful birth’ following the High Court’s decision in *Catanach v Melchior*<sup>57</sup> in 2003.

## V SOME PARTICULAR SITUATIONS AND SOCIAL PROBLEMS<sup>58</sup>

A review of the fourth edition pointed out that a feature of this book was that, unusually, it dealt with issues such as domestic violence and sexual harassment.<sup>59</sup> This is also the case in the fifth edition but in addition there are some other, newer subjects that are dealt with as social problems rather than merely legal categories.<sup>60</sup> For example, there is a new category in the section on duty of care, ‘Child Protection Agencies’.<sup>61</sup> While the fourth edition had a section, ‘The Police and Child Protection Agencies’, these have been separated out in the fifth edition, and far more attention is paid to the latter issue. This reflects, as the authors point out, a growing trend in common law countries for litigation to be brought against such agencies for their negligence in carrying out their responsibilities for caring for children.<sup>62</sup> Significantly, the text draws the attention of students to the intersection of tort law and human rights law via the decision of the European Court of Human Rights in *Osman v United Kingdom*.<sup>63</sup> Also included here are references to the unsuccessful litigation that has been brought by members of the Stolen Generations.<sup>64</sup> For the first time, the authors have

<sup>55</sup> Luntz and Hambly, above n 1, [7.9.1].

<sup>56</sup> Ibid [13.2.17]–[13.2.22]. See also Jenny Morgan, ‘Foetal Imaginings: Searching for a Vocabulary in the Law and Politics of Reproduction’ (2000) 12 *Canadian Journal of Women and the Law* 371.

<sup>57</sup> (2003) 199 ALR 131; cf Luntz and Hambly, above n 1, [7.2.18].

<sup>58</sup> This subheading draws upon the characteristic ‘not elsewhere classified’ chapter that has appeared regularly in editions of this casebook. It includes, in the fifth edition, sections on the unfortunately named ‘abnormal plaintiffs’; product liability; mass torts; occupiers’ liability; statutory authorities; omissions; employer and employee; medical liability; rescue; nervous shock; and illegality: Luntz and Hambly, above n 2, ch 7.

<sup>59</sup> Susan Fitzpatrick, ‘Book Review —Torts: Cases and Commentary (4<sup>th</sup> edition) by Harold Luntz and David Hambly’ (1996) 4 *Torts Law Journal* 87, 87.

<sup>60</sup> See Graycar and Morgan, *The Hidden Gender of Law* (2<sup>nd</sup> ed), above n 39, 1–3 for a discussion of the need to approach law by reference to social categories and life experience, rather than merely legal categories.

<sup>61</sup> Luntz and Hambly, above n 1, [2.7.19].

<sup>62</sup> Cf *Sullivan v Moody* (2001) 207 CLR 562, which is used to illustrate the contemporary approach to negligence: Luntz and Hambly, above n 1, [2.2.24C].

<sup>63</sup> (1998) 8 Eur Court HR 3124. The earlier UK decision, *Osman v Ferguson* [1993] 4 All ER 344, is also discussed: Luntz and Hambly, above n 1, [2.7.19], [2.7.21], [2.7.23].

<sup>64</sup> *Cubillo v Commonwealth* [No 2] (2000) 103 FCR 1 (‘Cubillo’); aff’d (2001) 112 FCR 455; *Williams v Minister, Aboriginal Land Rights Act 1983* (2000) Aust Torts Reports ¶81-578. See

included a whole subsection<sup>65</sup> devoted to claims brought by Aboriginal people against the Australian government for harm suffered when they were children. These cases are referred to in other parts of the book as well, particularly in the context of intentional torts (though note also the discussion of *Cubillo* in chapter 10 on breach of statutory duty).<sup>66</sup> There is, of course, also the section on the police, including the case of *Hill v Chief Constable of West Yorkshire*,<sup>67</sup> which is discussed in more detail below in the context of the *Jane Doe* case study.

## VI CHILD SEXUAL ASSAULT AND LIMITATION OF ACTIONS

While I cannot do justice to all the interesting and innovative material in this book, the treatment of child sexual abuse and limitation of actions legislation warrants singling out. In a section of chapter 11 on intentional torts, the authors return to the important and difficult issue of statutes of limitation in the context of child sexual abuse claims. Statutes of limitation, first raised in chapter five, have troubled courts (and legislatures) around the world.<sup>68</sup> One of the most common reasons survivors of childhood sexual abuse, or other analogous harms, fail to recover compensation is the use of statutes of limitation to bar actions that are seen as having been brought too late. The various rationales for limitation rules are well articulated in the case law and have most recently been reiterated by various law reform agencies including the Law Commission for England and Wales in its reference on limitation of actions.<sup>69</sup> A series of amendments to the harsh common law rule that the cause of action arises ‘when the damage occurs’ was made when it became clear that certain diseases, in particular mesothelioma and other asbestos-related dust diseases, did not manifest until the limitation period had passed.<sup>70</sup> So legislation was passed in England and all of the Australian states and territories that provided for a limited form of extension of time.<sup>71</sup>

also Jennifer Clarke, ‘Case Note — *Cubillo v Commonwealth*’ (2001) 25 *Melbourne University Law Review* 218.

<sup>65</sup> Luntz and Hambley, above n 1, [2.7.22].

<sup>66</sup> Ibid [10.2.11].

<sup>67</sup> [1989] AC 53 (*Hill*).

<sup>68</sup> For some examples of the case law (all of which are referred to in this chapter), see *Stubbings v Webb* [1993] AC 498 (House of Lords); *M v M* [1992] 3 SCR 6 (Supreme Court of Canada); *S v G* [1995] 3 NZLR 681 (New Zealand Court of Appeal) — following *M v M* and *W v A-G* [1999] 2 NZLR 709 (New Zealand Court of Appeal) — which added what Luntz terms a ‘questionable refinement’; that is, it instituted a hybrid subjective/objective test. Note that in some Canadian jurisdictions, limitation periods have been abolished altogether for child sexual abuse: see, eg, *Limitation Act*, RSBC 1996, c 266, s 4(k); *Limitation of Actions Act*, RSS 1978, c L-15, s 3(3.1), while in California the limitations period for certain child sexual abuse claims has been suspended for one year commencing on 1 January 2003 by an amendment to CAL CIV PROC CODE (Deering) § 340.1 (2003).

<sup>69</sup> Law Commission for England and Wales, *Limitation of Actions*, Consultation Paper No 151 (1997) 11–16; Law Commission for England and Wales, *Limitation of Actions*, Report No 270 (2001). See also Queensland Law Reform Commission, *Review of the Limitation of Actions Act 1974 (Qld)*, Report No 53 (1998) 6–8.

<sup>70</sup> Luntz and Hambley, above n 1, [5.2.2]. See *Cartledge v E Jopling & Sons Ltd* [1963] AC 758. The House of Lords noted that legislation was imminent, but of course could not apply it retrospectively in that case: at 784 (Lord Pearce).

<sup>71</sup> See Luntz and Hambley, above n 1, [5.2.3] for details of the current legislation. As the authors note, one recent amendment in Victoria provides that, in cases of disease or disorder, time does

This legislation was designed with this particular social problem in mind — that is, the industrial diseases that befall workers (almost invariably male) who work in dusty work environments.<sup>72</sup> It was not surprising then that courts encountered such difficulty in applying the extension provisions to a different form of harm, namely, child sexual abuse.<sup>73</sup> The matter went to the House of Lords in a case referred to briefly in chapter 11, *Stubblings v Webb*,<sup>74</sup> which concerned a claim by a woman against her step-father and step-brother for damages flowing from sexual abuse in childhood. The issue before the Court was whether she had brought her action too late. She had not sued within six years of the original injury (or, in her case as a minor, from her majority), but she tried to rely on the amendments that provided an extension of time. The House of Lords held that these did not apply to child sexual assault, since her action was a ‘trespass to the person’, not personal injury caused by ‘negligence, nuisance or breach of duty’. As Lord Griffiths explained the distinction: ‘If I invite a lady to my house one would naturally think of a duty to take care that the house is safe but would one really be thinking of a duty not to rape her?’<sup>75</sup> He also said:

The plaintiff’s case was that although she knew she had been raped by one defendant and had been persistently sexually abused by the other she did not realise that she had suffered sufficiently serious injury to justify starting proceedings for damages until she realised that there might be a causal link between psychiatric problems she had suffered in adult life and her sexual abuse as a child. ... I have the greatest difficulty in accepting that a woman who knows that she has been raped does not know that she has suffered a significant injury.<sup>76</sup>

As the Law Commission of England and Wales commented:

This has led to the anomalous result that a claimant who has been sexually abused by her father may have longer to bring a claim for damages against her mother for negligently failing to prevent the abuse than to bring a claim against her father for actually committing the abuse.<sup>77</sup>

not run until the plaintiff has knowledge of both the disease and the fact that it was caused by the act or omission of another person: *Limitation of Actions Act 1958* (Vic) s 5(1A).

<sup>72</sup> Cf *Bale v Seltsam Pty Ltd* (Unreported, Queensland Court of Appeal, Fitzgerald P, McPherson JA and Helman J, 23 August 1996), extracted in Luntz and Hambly, above n 1, [2.5.9C], which involved the widow of an asbestos worker who became ill after washing her husband’s clothes. See also Elizabeth Handsley, ‘The Asbestos Worker’s Wife: Excluded by Science’ (1997) 5 *Torts Law Journal* 154.

<sup>73</sup> See Regina Graycar and Jenny Morgan, ‘Disabling Citizenship: Civil Death for Women in the 1990s’ (1995) 17 *Adelaide Law Review* 49, 63–76; Annette Marfording, ‘Access to Justice for Survivors of Child Sexual Abuse’ (1997) 5 *Torts Law Journal* 221, 230–54. Cf Joanne Conaghan, ‘Tort Litigation in the Context of Intra-Familial Abuse’ (1998) 61 *Modern Law Review* 132, 140–4.

<sup>74</sup> [1993] AC 498.

<sup>75</sup> Ibid 508. However, see the Court of Appeal decision in the same case, where all three judges readily accepted that there had been a breach of duty: *Stubblings v Webb* [1992] QB 197.

<sup>76</sup> *Stubblings v Webb* [1993] AC 498, 506. See also Graycar and Morgan, ‘Disabling Citizenship’, above n 73; Conaghan, ‘Tort Litigation in the Context of Intra-Familial Abuse’, above n 73.

<sup>77</sup> Law Commission for England and Wales, *Limitation of Actions*, Report No 270, above n 69, 2, referring to *S v W* [1995] 1 Fam LR 862. Note that the European Court of Human Rights did not reverse the decision, though it commented that limitation periods did raise issues of access to justice: *Stubblings v United Kingdom* (1996) 4 Eur Court HR 1487.

The use of the limitation of actions problem, illustrated by the difficulties of seeking redress for childhood sexual abuse, is a very effective way to teach trespass. The chapter starts, as do so many law text treatments, with an account of the different histories of trespass and (the action on the) case, but here students are finally given an opportunity to understand where those few ‘trespass’ cases fit into the scheme of things. For many years, law students have probably wondered why Ms Letang<sup>78</sup> chose to sunbathe in a carpark (well, Australian students certainly would have), but they may well have found it too hard even to begin to comprehend why her legal advisers chose to bring an action in trespass. A discussion of the limitation of actions legislation tells that story much more clearly than any attempt at drawing some conceptual difference between direct and indirect injuries, the strategy commonly used to differentiate trespass from negligence.

The authors use overseas cases to excellent effect by way of contrast with the Australian authorities that are, rightly, their main focus. One case the authors might consider adding to the next edition is *Muir v Alberta*,<sup>79</sup> an action from Alberta, Canada, brought by a woman sterilised as a result of a policy adopted by the province in the earlier part of the 20<sup>th</sup> century. Leilani Muir was admitted to that province’s training school for ‘mental defectives’ in 1955 and remained there for 10 years.<sup>80</sup> After only the most cursory medical tests, she had been labelled a ‘mentally defective moron’<sup>81</sup> and was surgically sterilised, under the *Sexual Sterilization Act*, RSA 1955, c 311.

The Court held that the sterilisation and the detention of Ms Muir were unlawful and she was awarded damages of over CA\$700 000, which included an amount for aggravated damages.<sup>82</sup> Ms Muir had also sought punitive damages, but the Court said:

The defendant’s actions were unlawful, offensive and outrageous. Punitive damages in the amount of \$250,000 suggested by Ms Muir would certainly have been ordered had it not been for the fact that the government allowed Ms Muir to bring this action. It could have put an end to her claim; her claim was made too late, and the government could have used this delay as a complete answer to all of Ms Muir’s claims. This deliberate abandonment of a complete defence is in the nature of an apology. Indeed, it is more than an apology: it is an amendment — a real effort to make things right. As a matter of public policy, this and other governments should be encouraged to recognize historical wrongs and to make fair amends for them. They should not be punished for doing so.<sup>83</sup>

<sup>78</sup> *Letang v Cooper* [1965] 1 QB 232, extracted in Luntz and Hambly, above n 1, [11.3.7C] and discussed at [11.3.9], [11.3.10], [11.3.17], [11.3.20].

<sup>79</sup> (1996) 132 DLR (4<sup>th</sup>) 695.

<sup>80</sup> Ibid 695.

<sup>81</sup> Ibid (Veit J).

<sup>82</sup> Ibid.

<sup>83</sup> Ibid 735. Note that after her case was decided, a reparations program was established to deal with others in her situation: see Goldie Shea, *Redress Programs Relating to Institutional Child Abuse in Canada* (1999) Law Commission of Canada <[http://www.lcc.gc.ca/en/themes/mr/ica/shear/redress/redress\\_main.asp](http://www.lcc.gc.ca/en/themes/mr/ica/shear/redress/redress_main.asp)>.

This case would not only complement the discussion of the sterilisation cases (*Secretary, Department of Health and Community Services v JWB*,<sup>84</sup> *P v P*)<sup>85</sup> in chapter 13, but it would also provide a useful illustration of the differences between exemplary and aggravated damages (chapter eight). Perhaps most importantly, it would give Australian students an opportunity to see alternative ways of dealing with the same sorts of difficult issues of systemic injury and harm that we face in this country, such as those involving the Stolen Generations.<sup>86</sup>

## VII VICARIOUS LIABILITY AND THE WICKED BARMAID IN *DEATONS*

The chapter on vicarious liability provides another interesting example of the use of overseas material to good effect, this time the judgment of the Supreme Court of Canada in *Bazley v Curry*.<sup>87</sup> The text foreshadows the High Court decision in *New South Wales v Lepore*,<sup>88</sup> and it is hoped that the next edition will retain the *Bazley* extract and use it to contrast critically with the High Court's treatment of that issue.

One of the comforts of teaching a course — even if intermittently over a period of 20 years, as I have done — is that while it is essential to keep up with new developments, there are some certainties in life, at least thus far. We will, I imagine, always teach *Donoghue v Stevenson*<sup>89</sup> and I do not recall a time at which *Deatons* was not included in the section on vicarious liability.

The ‘facts’ of this case involving the unfortunate (wicked?) Opal Ruby Pearl Barlow will be reasonably well-known to most. As Dixon J recounted:

The plaintiff’s case was that he went into the public bar and asked by name for the publican. Thereupon the barmaid threw first the beer into his face and then the glass. According to his case it was an unprovoked and unjustified assault and his case was so left to the jury.

The case made for the defendants was that the plaintiff, who was drunk, did ask for the publican, that the barmaid said he was in the saloon bar, that the plaintiff then pushed his way through the customers in the wrong direction upsetting a number of glasses of beer, that the barmaid then asked him to go away, whereupon he used filthy expressions and struck the side of her face. She then threw in his face the beer from the glass she was holding, but the glass slipped out of her hand and also hit his face. The jury found a verdict against both defendants — the barmaid and the company employing her. On either version of the assault the barmaid would be liable. She made no case of self-defence and on the

<sup>84</sup> (1992) 175 CLR 218 (‘Marion’s Case’).

<sup>85</sup> (1994) 181 CLR 583.

<sup>86</sup> See Human Rights and Equal Opportunity Commission, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (1997); see also *Cubillo* (2000) 103 FCR 1; aff’d (2001) 112 FCR 455; Regina Graycar, ‘Compensation and the Stolen Children: Political Judgments and Community Values’ (1998) 21 *University of New South Wales Law Journal* 253.

<sup>87</sup> [1999] 2 SCR 534 (‘Bazley’), extracted in Luntz and Hambly, above n 1, [17.3.18C]. Cf *Jacobi v Griffiths* [1999] 2 SCR 570. See also *Lister v Hesley Hall Ltd* [2002] 1 AC 215. These cases are discussed in Luntz and Hambly, above n 1, [17.3.20], [17.3.22] respectively.

<sup>88</sup> (2003) 195 ALR 412 (‘Lepore’).

<sup>89</sup> [1932] AC 562.

facts she could not make one. The provocation may have been great but that is no answer to the plaintiff's cause of action, whatever effect it might have upon damages.<sup>90</sup>

His Honour concluded:

The truth is that it was an act of passion and resentment done neither in furtherance of the master's interests nor under his express or implied authority nor as an incident to or in consequence of anything the barmaid was employed to do. It was a spontaneous act of retributive justice ...<sup>91</sup>

The authors follow this extract immediately with the comment:

Now that the nature of sexual harassment is better understood and it is an employer's duty to protect employees from such behaviour, might there be greater scope for argument that the contract of employment of a barmaid impliedly authorises her to defend herself against conduct of that type?<sup>92</sup>

This problematising of the facts, and the refusal merely to repeat the epithets used to describe Ms Barlow by various members of the High Court, is another of the features that singles out this text (and it also distinguishes itself from the acceptance of the principle enunciated in *Deatons* without criticism of the facts by a majority of the High Court in its more recent decision in *Lepore*).<sup>93</sup> By contrast, so many of the other relevant torts texts surveyed on their treatments of this case either do not provide the background facts to the case — that is, that the customer who was hit with the beer and the glass was drunk and abusive — or are so selective that it appears that Ms Barlow acted without any provocation. Several simply omit the facts altogether and assert the 'principle' for which the case is authority based on a one line holding. Of course, it is central to the way we teach the case law method that cases are extracted and summarised, and the 'facts' are often presented, sometimes parenthetically, before what the authors of any casebook consider to be the key paragraphs that expound upon relevant legal principles. But the 'facts' are not always so straightforward; as the whole process of litigation demonstrates, those facts upon which a decision is based are the version of events that a court has found, on the balance of probabilities, to be preferable to the version presented by the opposing side.<sup>94</sup> In a devastating critique of the way courts themselves (let alone casebook writers and editors) present facts, Jenny Morgan has demonstrated how easy it is for courts to create

<sup>90</sup> *Deatons* (1949) 79 CLR 370, 379–80.

<sup>91</sup> *Ibid* 381–2.

<sup>92</sup> Luntz and Hambly, above n 1, [17.3.11].

<sup>93</sup> (2003) 195 ALR 412. See Gummow and Hayne JJ (at 473) who endorse Dixon J's approach to vicarious liability in *Deatons* and Kirby J (at 495) who states that it is unnecessary to overrule *Deatons* while still recognising that the High Court is moving towards a 'broader formulation' of vicarious liability. Gleeson CJ is the only judge who recounts the facts in *Deatons* in some detail but also distinguishes it on the basis that 'the barmaid's responsibilities were not protective': at 428. Gaudron, Hayne and Callinan JJ do not mention *Deatons* in their respective judgments, however it should be noted that they reach their respective decisions on very different bases.

<sup>94</sup> See Kim Lane Scheppelle, 'Facing Facts in Legal Interpretation' (1990) 30 *Representations* 42; Kim Lane Scheppelle, 'Just the Facts Ma'am: Sexualised Violence, Evidentiary Habits, and the Revision of Truth' (1992) 37 *New York Law School Law Review* 123; Lisa Sarmas, 'Storytelling and the Law: A Case Study of *Louth v Diprose*' (1994) 19 *Melbourne University Law Review* 701.

a variety of accounts of the same event, using not much more than a few different adjectives (these include ‘scornful’, ‘vituperative’, ‘contemptuous’ and ‘promiscuously’).<sup>95</sup> In that respect, the Luntz and Hambly casebook stands out as the only book examined that provides as full an account of the facts in *Deatons* as is available from the judgment (accepting the limits of that exercise) and for raising the issue of sexual harassment directly in the ensuing notes.

### VIII NEGLIGENCE, THE POLICE, JANE DOE AND HILL

A landmark Canadian civil action for sexual assault that combines an equality-based understanding of sexual assault with the traditional tort of negligence is referred to in the casebook, though perhaps not given the prominence it might deserve, for which reason I have chosen to elaborate on it with a view to demonstrating its utility as a teaching aid.<sup>96</sup> Jane Doe, the victim of a serial rapist, sued the police for negligence and a breach of her constitutional right to equality.<sup>97</sup> It took over 10 years for her case to be decided, but in 1998 it was finally resolved.<sup>98</sup>

The trial judge outlined the facts as follows:

[1] [Jane Doe] was raped and otherwise sexually assaulted at knife point in her own bed in the early morning hours of August 24, 1986 by a stranger subsequently identified as Paul Douglas Callow. Ms Doe then lived in a second floor apartment ... in the City of Toronto; her apartment had a balcony which was used by the rapist to gain access to her premises. At the time, Ms Doe was the fifth known victim of Callow who would become known as ‘the balcony rapist’.

[2] Ms Doe brings a suit against the Metropolitan Toronto Police Force (hereafter referred to as MTPF) on two bases; firstly, she suggests that the MTPF conducted a negligent investigation in relation to the balcony rapist and failed to warn women who they knew to be potential targets of Callow of the fact that they were at risk. She says, as the result of such conduct, Callow was not apprehended as early as he might have been and she was denied the opportunity, had she known the risk she faced, to take any specific measures to protect herself from attack. Secondly, she said the MTPF being a public body having the statutory duty to protect the public from criminal activity, must exercise that duty in accordance with the *Canadian Charter of Rights and Freedoms* and may not act in a way that is discriminatory because of gender. She says the police must act constitutionally, they did not do so in this case and as the result,

<sup>95</sup> See Jenny Morgan, ‘Provocation Law and Facts: Dead Women Tell No Tales, Tales Are Told about Them’ (1997) 21 *Melbourne University Law Review* 237, discussing *Moffa v The Queen* (1977) 138 CLR 601 (esp Barwick CJ).

<sup>96</sup> See Luntz and Hambly, above n 1, [2.6.16] for mention of the case, [4.3.8] in respect of causation.

<sup>97</sup> Section 15(1) of the *Canadian Charter of Rights and Freedoms*, pt 1 of the *Constitution Act 1982*, being sch B to the *Canada Act 1982* (UK) c 11 (‘Canadian Charter’) provides:

Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination, and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

<sup>98</sup> *Jane Doe* (1998) 160 DLR (4<sup>th</sup>) 697.

her rights under sections 15 and 7 of the *Charter*, have been breached. She seeks damages against the MTPF under both heads of her claim.<sup>99</sup>

MacFarland J found that Doe's constitutional right to equality had been breached by the police action, as had her right to security of the person.<sup>100</sup> Her Honour also found that the police had been negligent in their investigation. The finding that a duty of care is owed by the police in these circumstances contrasts with the decision of the House of Lords in *Hill*,<sup>101</sup> which is extracted in chapter two (it is the case to which the reference to *Jane Doe* is appended, by way of a brief note). That case concerned the 'Yorkshire Ripper', perhaps the most notorious killer of women in Britain since Jack the Ripper. Between July 1975 and November 1980, Peter Sutcliffe murdered 13 women and attempted to murder eight others, all in the area of West Yorkshire. He was arrested in 1981 and confessed to the crimes. In *Hill*, the mother of Sutcliffe's last victim sued the Chief Constable of West Yorkshire for negligence on behalf of her daughter's estate. As in *Jane Doe*, the police applied to strike out the statement of claim, arguing that it disclosed no cause of action. The police had been successful in the lower courts<sup>102</sup> and Ms Hill appealed to the House of Lords. The House of Lords held that the statement of claim was rightly struck out:

Sutcliffe was never in the custody of the police force. Miss Hill was one of a vast number of the female general public who might be at risk from his activities but was at no special distinctive risk in relation to them ... [T]he identity of the wanted criminal was at the material time unknown and it is not averred that any full or clear description of him was ever available. ... Hill cannot ... be regarded as a person at special risk simply because she was young and female. Where the class of potential victims of a particular habitual criminal is a large one the precise size of it cannot in principle affect the issue. All householders are potential victims of a habitual burglar, and all females those of an habitual rapist.<sup>103</sup>

Lord Keith would also have dismissed the appeal on the additional ground that, for public policy reasons, an action should not lie against the police in such circumstances. The police in *Jane Doe* had also tried to have the case dismissed before trial,<sup>104</sup> but the Court rejected the challenge and stated that the principle of public policy relied on in *Hill* to exempt the police from liability was not part of Canadian law.<sup>105</sup>

<sup>99</sup> Ibid 701 (MacFarland J).

<sup>100</sup> Section 7 of the *Canadian Charter* provides: 'Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice'.

<sup>101</sup> [1989] AC 53.

<sup>102</sup> For the Court of Appeal's decision, see *Hill v Chief Constable of West Yorkshire* [1988] QB 60.

<sup>103</sup> [1989] AC 53, 62 (Lord Keith).

<sup>104</sup> *Jane Doe* (1998) 160 DLR (4<sup>th</sup>) 697. See Mayo Moran, 'Case Comment: *Jane Doe v Board of Commissioners of Police for the Municipality of Metropolitan Toronto*' (1993) 6 *Canadian Journal of Women and the Law* 491.

<sup>105</sup> *Jane Doe v Metropolitan Toronto (Municipality) Commissioners of Police* (1989) 58 DLR (4<sup>th</sup>) 396, 430 (Henry J). The main authority relied on was *Nielsen v City of Kamloops* [1984] 2 SCR 2.

As with all engagements with other people's books, it is tempting to engage in a commentary that is more reflexive, that sounds more like a statement of the 'if I were writing this book' variety. So I will admit that my use of this case is precisely that, and is an account of how I present these cases in my own torts classes. The treatment draws on the extract in *The Hidden Gender of Law*<sup>106</sup> and includes not only extracts from the Canadian and House of Lords judgments, but also contains some more contextual material about *Hill*. One of the points I make in teaching this case is that virtually no information appears in the House of Lords judgment about the circumstances of the investigation that would help a reader to understand why Ms Hill might have thought it appropriate to sue them. Of course, this is not unusual in the context of appellate litigation, especially litigation surrounding the issue of whether to strike out a statement of claim. Nonetheless, it is valuable to provide the students with some contextual material from outside the judgments.

Joan Smith, an English essayist, has written a detailed critique of the police investigation in *Hill*.<sup>107</sup> She points out that Sutcliffe was finally arrested by police from a different police force (that is, not the West Yorkshire police who were conducting the investigation).

Sutcliffe, a married man living in a semi-detached house in a good suburb of Bradford, was simply not what anyone had expected. ... Sutcliffe had been interviewed not once but *nine* times. He wore the same size boots as the murderer (indeed, the boot which had left an impression on a sheet in the flat of one of the victims, and on the thigh of another, was standing in Sutcliffe's garage as he was interviewed). His only alibi for the murder was given, contrary to police procedure, by close relatives, including his wife. He had a previous conviction ... as a result of being found in a woman's garden with a knife and hammer — the very weapons used by the Ripper. ... His appearance matched fairly closely photofit pictures created by two of his surviving victims. His various cars, which had left tyre prints at the scenes of some of the murders, were frequently logged by police in red-light districts in Bradford, Leeds and Manchester.<sup>108</sup>

Smith explains that the police decided on a profile for the killer, based largely on their views of the women who were being attacked and killed. They ignored important evidence from several non-fatal attacks involving women who ranged from a schoolgirl of 14 to two considerably older women, but when there were two homicides, the police saw a link in the two murders and identified the killer as a prostitute killer.

Three major errors flowed from the acceptance of this hypothesis. First, genuine Sutcliffe victims were excluded from the list of his crimes because they were the wrong 'type' of woman, while a murder ... he did not commit was included on grounds of the ... woman's character and habits. Second, the police fell into the trap of expecting the killer to behave like the nineteenth-century Ripper. Third, they convinced themselves that they 'knew' the killer in some mysterious and undefined way; that, if they were suddenly confronted by him, they would recognize him at once. ...

<sup>106</sup> Graycar and Morgan, *The Hidden Gender of Law* (2<sup>nd</sup> ed), above n 39, 373–80.

<sup>107</sup> Joan Smith, *Misogynies: Reflections on Myth and Malice* (1989) 117–51.

<sup>108</sup> Ibid 118 (emphasis in original).

What did they expect? Someone slavering at the mouth who would throw back his cloak and flourish a blood-stained knife? Obviously not; what [the police] were expressing was actually no more than a vague expectation of *difference*, that there would be something — a nervous gesture, a manner of speaking, staring eyes, a careless remark about prostitutes — that would single him out. Whoever he was, whatever his background, this man would be different from the rest, and from them ... They were wrong, of course ... One of the chief ironies of the whole Yorkshire Ripper case is that the police spent millions of pounds fruitlessly searching for an outsider when the culprit was just an ordinary bloke, a local man who shared their background and attitudes to a remarkable degree.<sup>109</sup>

Of course, it is this same question of police attitudes and assumptions that lies at the heart of *Jane Doe* and was able to be explored via the joining of her negligence action with her constitutional claim that her right to equality had been denied.<sup>110</sup> This case can also be used to remind students of how tort issues connect with other areas of legal doctrine, not least constitutional and human rights issues.<sup>111</sup>

## IX SOME CONCLUDING REMARKS

Leslie Bender has pointed out:

We rarely, if ever, hear about political movements to fundamentally reform contract law or to abolish property law — the other cornerstones of our civil common law — but almost weekly we're deluged with stories and assaults about the end of tort law, new reforms for tort law, or arguments about how tort law has to be fundamentally reformed. These assaults on tort law occur in large part, I would argue, because most tort theorists, jurists, practitioners, and members of the public have gotten stuck conceptualizing tort law in one of its historical manifestations, as a compensatory mechanism for physical injuries, and erroneously interpret that manifestation as what tort law is fundamentally about.<sup>112</sup>

Bender argues instead that tort law should be seen as part of a struggle for social justice. Whether we agree or not, it is only possible to engage in such a debate if we have paid attention to the contextual and theoretical issues that surround the way we think about tort law. The Luntz and Hambly casebook provides a very good start for doing so.

Despite the best attempts by legislatures to eliminate negligence law from legal practice and daily life in Australia, I imagine it will be some years yet before we cease teaching *Donoghue v Stevenson*<sup>113</sup> and the vast array of issues that this outstanding text deals with. It is a pleasure to teach from a book that starts from the premise of introducing students to the world that surrounds the rarefied atmosphere of appellate court decision-making, where even the facts are

<sup>109</sup> Ibid 123–4 (emphasis in original).

<sup>110</sup> See also her book: *Jane Doe, The Story of Jane Doe: A Book about Rape* (2003).

<sup>111</sup> See also *Carmichele v Minister for Safety and Security* [2001] 4 SALR 938 (CC).

<sup>112</sup> Leslie Bender, 'Tort Law's Role as a Tool for Social Justice Struggle' (1998) 37 *Washburn Law Journal* 249, 252–3.

<sup>113</sup> [1932] AC 562.

left behind, supposedly no longer necessary to the determination of principle. By using the social context data, by introducing students to theoretical perspectives and by naming some of the issues by reference to what happens in the world rather than just by reference to legal categories, this book stands out as a model teaching vehicle. We can only hope that Harold Luntz's retirement will not impede the production of a sixth edition.