

Theorizing Damage Through Reproductive Torts

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Nicky Priaulx, *Injuries That Matter: Manufacturing Damage in Negligence*, available at [BePress](#).



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Of the five basic elements of the negligence cause of action (duty, breach, cause-in-fact, proximate cause, damage), the concept of “damage” (sometimes referred to as “injury” or “harm”) has probably received the least attention from torts scholars and certainly commands less time in the classroom. Indeed, the comparative lack of discussion likely exacerbates the common tendency to confuse the concept of actionable damage with the related topic of recoverable *damages*, i.e., those specific items of loss (such as medical expenses or sums paid for pain and suffering) that are a consequence of an actionable injury. In the U.S., controversial claims for negligent infliction of emotional distress and for reproductive injuries, especially wrongful conception and wrongful birth claims, have triggered debates under the headings of duty, proximate cause, or recoverable damages. Recently, however, Gregory Keating has argued that the concept of harm “can do more work than it is presently being made to do,”¹ inviting more theorizing about what lies beneath the largely intuitive concept of harm or damage.

This ambitious article by British tort theorist Nicky Priaulx aims to fill the void by theorizing about the normative dimensions of the concept of damage. Although she doesn’t use the f-word (feminism) until the end of the piece when she discusses just whose injuries tend to be addressed by tort law, her approach is clearly informed by feminist scholarship, as is evident by her starting point that the concept of damage is “imbued with ideals of social justice and equality [and] directed towards treating like cases alike.” (P. 2.) But Priaulx’s legal feminism is of a newer stripe: it is as much about harm to men as it is about harm to women and is interwoven into a universal theory about how to shape tort law to fit the social experience of injury.

Priaulx’s critique of British negligence law has a familiar ring. She upbraids the courts for continuing to treat the presence of a bodily harm as the “gold standard of ‘damage’ in negligence” (P. 7) and for assuming that physical harms are different in nature from other kinds of harms. According to Priaulx, the British courts have been so intent on finding “a physical hook” to justify recovery that they often distort or misrepresent the experience of tort victims. She would instead center the concept of ‘harm’ on those events which leave individuals appreciably worse off, experiences that are so disruptive or corrosive of life “as to completely destabilise it.” (P. 8.) This definition of harm of course is broad enough to capture many non-physical injuries classified as emotional or relational (or what Priaulx calls “psycho-social harms”), from the loss of a loved one, to the “labour of caring for a child that one does not want.” (P. 9.)

Priaulx’s focal points are two prominent reproductive harm cases: a case involving a negligently-performed sterilization of a woman that resulted in the birth of a healthy child and a case involving the negligent destruction of sperm samples provided by male cancer patients about to undergo chemotherapy. Although the

British courts found a way to allow the plaintiffs to recover a limited amount of damages in each case, Priaulx argues that the decisions utterly failed to capture either a woman's experience of raising an unwanted child or the significance of infertility in the lives of the male plaintiffs. In the negligent sterilization case, the courts placed too much emphasis on the physical aspects of pregnancy and childbirth, minimizing the continuing, deleterious effects of forced motherhood in such situations. In the lost sperm case, the courts treated the harm merely as a loss of physical property, completely missing the social and psychological effects on men who confront the prospect that they may not be able to father children.

Priaulx digs deep to express the multiple dimensions of reproductive harm in each case, explaining how gendered stereotypes eclipse our understanding of male and female experiences. Echoing feminist scholars such as Robin West and Reva Siegel, Priaulx contends that the "significance of *being* pregnant is inextricably intertwined with the considerable responsibility and enduring consequences which pregnancy heralds." (P. 11.) In her analysis, any attempt to draw a "clean line at birth" and deny damages associated with childrearing in wrongful conception cases not only recapitulates the law's preoccupation with physical injury but insists on treating the birth of a child as "natural" and a "blessing," despite its real disruptive effects on mothers who take on the care and labor of raising a child. (Notably, Priaulx does not consider the possible stigma wrongful conception suits may inflict on children labeled as unwanted, a concern that has surfaced in the U.S. caselaw.) In a similar vein, Priaulx contends that the law utterly misapprehends the impact of infertility upon men, envisioning the harm as extending only to their "wallets or property." (P. 18.) Courts often end up by treating men as only "distant," "vicarious," or "peripheral" actors in the reproductive process. Lost are the stories of men who mistake infertility for impotence, who feel worthless when they discover that they are infertile, or whose masculinity so depends on the prospect of becoming a father that they no longer believe their lives makes any sense.

The most notable aspect of Priaulx's analysis of harm is that she regards the reproductive injuries suffered by both male and female plaintiffs in these cases as "essentially the same kind of harm" and contends that "[i]f we care about horizontal equity between victims, in the sense of treating like cases alike, there is no reason for distinguishing between [the] cases." (P. 22.) Priaulx is only able to assimilate the harm of forced motherhood to the lost opportunity to father children because she believes that in the end it all comes down to loss of autonomy. What is important for autonomy theorists like Priaulx is the frustration of reproductive plans, whether it is being compelled to become a mother against one's wishes or being denied the opportunity to become a biological father. What matters is the "freedom to make plans concerning reproduction [and] its instrumental relationship with a far broader series of interests which form the architecture of our lives." (P. 22.) In this analysis, there is no significant difference between decisions to reproduce and decisions not to reproduce. One's physical body (and bodily integrity) also becomes an aspect of autonomy, conceptualized as a "stable platform for pursuing one's plans." (P. 7.) Similar sentiments were recently articulated by Gregory Keating in his analysis of the famous *Dillon v. Legg* case in which a mother suffered nervous shock upon witnessing the negligent killing of her child. For Keating, the harm to Margery Dillon was at bottom a shattering injury to her "agency," because it "forced upon her an unwelcome end to one of her life's important projects," namely the raising of her child.

Autonomy theories, such as Priaulx's and Keating's, certainly work to explain why we should not limit tort recoveries strictly to bodily harms. They also are important contributions to the body of tort theory that has neglected the concept of harm and its normative dimensions. But if the goal is to connect tort law to the psychological and social experience of injury, I wonder whether reducing everything to "autonomy" is really the right move. Unlike Priaulx, I am not ready to equate the lost opportunity for biological fatherhood to either the imposition of an unwanted child or the loss of one's existing child because I sense that there something qualitatively different about the relational injuries suffered by mothers in the bystander and wrongful conception cases that is simply not captured by naming the injury a loss of autonomy and/or a frustration of an important life project. The destruction of an important, intimate and irreplaceable relationship is an especially devastating

harm. Although tort law has long recognized relational harms, such as loss of consortium, we have so far failed to articulate what makes some relationships special and especially deserving of legal recognition. Perhaps we need a theory of relational harm all of its own.

1. Gregory C. Keating, *When is Emotional Distress Harm?*, in **Tort Law: Challenging Orthodoxy**, 304 (Stephen G.A. Patel, Jason W. Neyers & Erika Chamberlain, Eds.) (2013). [?]

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