

## Book Review

Martha Chamallas and Jennifer B. Wriggins, *The Measure of Injury: Race, Gender, and Tort Law*. New York: New York University Press, 2010, pp. 228, \$40.00.

Reviewed by Anne Bloom and Julie Davies

The subject of torts is a perennial favorite for first-year law students. The cases are fun to read and practically cry out for discussion of the broader social and political considerations at stake. But despite the easy connection between torts and public policy, the field is relatively under-analyzed from the perspective of gender and race. The pioneering work of Martha Chamallas (gender) and Jennifer Wriggins (race) is a welcome exception.

Some years ago, Chamallas argued (with the historian Linda Kerber) in a now iconic work that tort law undervalues the kinds of injuries that are more commonly experienced by women.<sup>1</sup> More recently, Jennifer Wriggins followed in Chamallas' tracks to make similar arguments in the context of race.<sup>2</sup> Both works were almost startling in the clarity of the analysis and led to important changes in the law.

*The Measure of Injury* brings the analytical power of Chamallas and Wriggins together in a comprehensive exploration of gender and racial biases in tort law. Like their earlier work, *The Measure of Injury* is beautifully written. It lays out the basic concepts of tort law in simple terms that even a layperson (or first-year torts student) could easily follow. It then draws upon literally hundreds of cases to powerfully illustrate how these principles have played out in tort law in ways that are, as the book jacket promises, "anything but gender and race neutral."

The book's major contribution is to expose how tort law under-compensates the injuries of women and minorities. Because discrimination in tort law is (for the most part) no longer overt, the authors rely upon detailed historical analyses and close examinations of contemporary rules to make their arguments. Much

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1. Martha Chamallas & Linda K. Kerber, *Women, Mothers, and the Law of Fright: A History*, 88 Mich. L. Rev. 814 (1990).
2. Jennifer B. Wriggins, *Damages in Tort Litigation: Thoughts on Race and Remedies, 1865-2007*, 27 Rev. Litig. 37, 53-57 (2007).

of this work involves untangling the ways in which old biases continue to be perpetrated in today's seemingly neutral practices. The result is an extremely sophisticated work of historical and legal analysis that is so well-written that first-year law students could use it as a supplement to their casebook.

The straightforward organization of the book facilitates its broad appeal. Two introductory chapters explain the authors' theoretical approach to the material and provide historical background on the key themes. The remainder of the book is then organized around the standard topics of a first-year torts class: intentional torts, negligence, causation, and damages.

As the authors explain in Chapter 1, their approach to tort law is heavily influenced by critical theory. For those who are not familiar with critical theory, Chapter 1 provides a particularly clear explanation of how critical theory differs from the "law and economics" and "corrective justice" approaches animating most torts scholarship today. Readers not particularly interested in theory, or already well-versed in critical theory, may want to skip this chapter. The authors provide a nice overview of the key theoretical points in the introductory paragraphs of subsequent chapters and the main points of the book can be gleaned without delving too deeply into the authors' theoretical lens.

Chapter 2 sets out what the authors refer to as the "historical frames" of the book. Although it might be tempting to gloss over this chapter as well, we recommend against it. The historical overview provides a very useful backdrop for the analysis that follows and, in any event, the details are just too fascinating to miss. The analysis of 19th century claims for "criminal conversation" (or adultery), for example, provides interesting insight on a mindset that continues to drive many tort cases today.

Although it seems like a claim for adultery might be available to either spouse alleging injury, 19th century judges restricted criminal conversation claims to men. The injury they recognized was not so much emotional distress as loss of the husband's right of exclusive sexual access to his wife. According to the authors, wives could not bring this claim because 19th century courts believed that women "lost nothing of permanent value" when their husbands committed adultery (39). Moreover, the "prevailing norm was that a wife should ordinarily forgive her husband when he committed adultery" (39).

It is tempting to dismiss these sorts of views as relics of the ancient past. But Chamallas and Wriggins link the cavalier attitude that 19th century judges displayed toward women's injuries in criminal conversation cases to a much longer history of tort law turning a blind eye to injuries involving women and minorities. Their recounting of emotional distress claims litigated over a century later, for example, involves similar themes.

Chamallas and Wriggins explain that courts in early "nervous shock" cases refused to grant recovery to women who alleged that a defendant's conduct caused them to suffer a miscarriage or stillbirth. As "nervous shock" cases evolved into claims for emotional distress, some courts began to allow recovery but only for white women. For these courts, however, only white

women were regarded as sufficiently “fragile, delicate, [and] timid” to merit a court’s protection (48). African American women were viewed as “stoic and impervious to pain” (48).

The authors’ analysis of the outcomes in wrongful death cases reveals a similar bias, with both the race and the gender of victims significantly affecting both the possibility and the amount of recovery. In all of these examples, the authors expose courts’ relative indifference to the kinds of injuries suffered by women and minorities. As subsequent chapters make clear, we still live with the legacy of that bias, though in many instances the origins have been lost to us. Chapter 2 reminds us of this history and does an excellent job of framing the rest of the book.

Chapters 3 through 6 tackle the key doctrinal areas of torts. Each of these chapters begins with a remarkably clear summary of the relevant legal principles and a quick reminder of the book’s theoretical and historical premises. The authors then draw upon an extremely rich trove of cases to analyze how doctrine intersects with gender and race in each substantive area.

Chapter 3 focuses on intentional torts and emphasizes the undercompensation of two types of intentional torts that are of particular interest to women and minorities: domestic violence and workplace harassment claims. The authors note that relatively few tort claims are brought in these areas and that those claims that are brought rarely succeed. They then set out to explain why this is the case. Although their explanations differ in the particulars, the overall message is the same: Current legal practices discourage the bringing of tort claims that involve domestic violence and workplace harassment.

In the case of domestic violence, the authors link contemporary practices to the doctrine of inter-spousal immunity, which precluded the bringing of tort claims for domestic violence until well into the 1990s. One of the key rationales for the doctrine was the concern that family members would collude to bring fraudulent claims. Over time, however, support for the doctrine was eroded by the realization that it was not necessary to ban claims to prevent fraud. When the doctrine was abolished, the number of claims should have increased. The expected uptick, however, did not occur. Why not?

The authors make a convincing case that tort claims for domestic violence claims are not brought today for many of the same reasons that claims were barred under the doctrine of interspousal immunity. As they explain, even though the doctrine has been abolished, it lives on in the form of “family member exclusion” clauses to homeowners’ insurance policies. “Family member exclusion” clauses began to appear in insurance contracts around the same time that the interspousal immunity doctrine was abolished. The rationale for including those clauses was the same one offered for the doctrine of interspousal immunity, i.e., concerns about collusion and fraud.

As the authors also note, however, even if “family member exclusion” clauses are removed from insurance policies, it would still be difficult for victims

of domestic violence to sue in tort. This is because domestic violence is an intentional tort and liability insurance is rarely available for intentional torts. As a practical matter, the lack of liability insurance acts as a significant barrier to the bringing of all intentional tort claims. And, in the everyday practice of law, the availability of insurance is a key consideration in a lawyer's evaluation of a plaintiff's case. Without liability insurance, there is no deep pocket and would-be plaintiffs are likely to have difficulty finding a lawyer to represent them even when they have very strong claims.

The authors' explanation for why there are so few tort claims for workplace harassment makes a similar point but focuses on the actions of courts. The authors note that, although workplace harassment usually gives rise to an independent tort claim for intentional infliction of emotional distress, many courts bar plaintiffs from bringing tort claims for workplace harassment when another remedy exists. Since, in most instances, another claim does exist under local or federal civil rights law, the tort claim is effectively precluded.

Unfortunately, the fix is not as simple as overcoming the preclusion argument. This is because many courts allow workplace harassment claims in principle but deny them in practice. As was the case with "criminal conversation" claims on behalf of women in the 19th century, many contemporary courts simply do not consider workplace harassment to be that serious, even when it involves almost constant degradation. Indeed, the authors provide many chilling examples of courts dismissing workplace harassment claims as not sufficiently "outrageous" to qualify as a claim for the tort of intentional infliction of emotional distress.

The authors conclude that the paucity of domestic violence and workplace harassment claims in tort law stems from a devaluing of the types of injuries that women and minorities are most likely to experience. While domestic violence and workplace harassment are now legally recognized as intentional torts, procedural and practical barriers make it extremely difficult for women and minorities to successfully bring claims. In the end, it is as if law barred the claims directly, as they did several years ago.

Chapter 4 covers negligence law. Among other things, the chapter emphasizes the role of physical harm in negligence law and shows how this emphasis has (once again) led to under-compensating the types of injuries for which women and minorities are most likely to seek recovery. Here again, tort law does not explicitly discriminate against women and minorities but, rather, refuses to recognize their injuries as presenting cognizable claims. Indeed, one of the things this chapter does particularly well is to point out the arbitrary and ridiculous distinctions courts have used to deny recovery in emotional harm and relational loss cases.

One example is the distinction that tort law draws between physical and mental harm. Courts are often suspicious of claims for emotional injury unless the claims are accompanied by evidence of physical harm. And some of the legal standards in negligence continue to treat physical and mental disabilities

as if they were wholly separate. But the more we learn about the science of the body, the more overwhelming the evidence becomes of the connection between the mind and body. And, as the evidence mounts, the more ridiculous the legal distinctions between physical and mental disability become.

Chapter 4 also pays special attention to the complex issues raised in cases involving sexual exploitation and reproduction. One of the authors' key points is that courts are not taking sufficient account of the gender and racial aspects of these cases. As an example, the authors describe a 1993 Texas case involving a nineteen-year old woman whose boyfriend secretly videotaped them having sex and circulated the video without her knowledge or permission (97). A jury awarded the plaintiff damages on a claim for emotional distress but the Texas Supreme Court reversed, on the ground that the relationship between the plaintiff and her boyfriend was not sufficient to create a duty.

As Chamallas and Wriggins explain, the court's reasoning denies the gendered aspects of the case. While it is theoretically possible that men and women would react similarly in a case like this, historically, the position of men and women has, in fact, been quite different, particularly in matters relating to sex. This historical context does matter in terms of the emotional harm that the victim is likely to experience and should matter for purposes of stating a claim for negligent infliction of emotional distress. Among other things, the authors emphasize that the courts should have recognized that a female victim of sexual exploitation is more likely to experience sexual harassment and a serious erosion of control over her own sexuality (98-99). Because of the foreseeability of this harm, "a duty of care should have been triggered" (99).

Cases involving reproduction receive a similarly complex analysis. As a general matter, the authors argue that negligence law implicitly values property rights more than relational rights. For example, the courts consistently undervalue childbearing and childrearing.

The authors make a particularly useful comparison between cases involving deprivations of reproductive rights and cases involving injury from coerced sterilizations, which usually involve African American women. As in the 19th century "criminal conversation" cases, the courts hearing coerced sterilization cases seem especially indifferent to the injuries involving the reproductive interests and suffering of minority women.

As an example of this indifference, the authors quote one court as saying that forced sterilization was not harmful to the African American plaintiff "because it did not cause any additional physical, pain, injury or illness" than the plaintiff was already experiencing from a different medical procedure (110). The court also emphasized that the plaintiff had "three prior children born out of wedlock" (109) and three more children after marriage. For those reasons, the court concluded, "the fact that she was not able to have a seventh child

after previously giving birth to six children is hardly something which would offend a reasonable sense of personal dignity” (110).

Chapter 5 addresses causation issues. And once again, the authors present a fascinating contrast—this time in the context of wrongful birth and lead paint cases. With respect to wrongful birth cases, the authors trace the evolution of courts from focusing on the actions of the mother to the actions of the physician. As changing social views made it easier to see reproduction as a choice, courts found it easier to focus less on the actions of the mother and began to find physicians liable when something went wrong.

A similar evolution has not occurred, however, in lead paint cases. Lead is well known to produce severe cognitive difficulties, but establishing causality for cognitive impairment in a particular child is problematic. As the authors explain, in attempting to resolve the causation issues, courts sometimes order parents and family members to undergo IQ testing and allow defendants to discover the mother’s educational records. One memorable quote from a lawyer for the lead paint industry explained the rationale for these practices as “relevant” to the question of whether the children alleging injury in lead paint cases are “home listening to Shakespeare” or “in front of a video game eight hours of the day” (143).

As these quotes make clear, and in contrast to wrongful birth cases, causation questions in lead paint cases continue to focus on the mother. This is so even though it is well known that lead paint causes the very cognitive conditions about which the plaintiffs complain. Indeed, the evidence against the lead paint industry is much stronger than the evidence against doctors in most wrongful birth cases. Nevertheless, there is an underlying suspicion in lead paint cases that the mother may be responsible for the child’s injuries.

Chamallas and Wriggins also show how causal analyses in lead paint cases are influenced by racial biases about the role of inheritance in intelligence. As they point out, parental IQ tests and similar measures are not especially useful for predicting the intelligence of any particular child. But courts and defense counsel overestimate the relevance of such tests because of pre-existing biases they hold about minorities. This not only makes lead paint cases more difficult to prove but also discourages families from bringing such claims for fear of humiliation.

Much more broadly, the authors suggest that biases affect causal judgments across the board in tort litigation. Drawing on insights from cognitive psychology, Chamallas and Wriggins make a powerful case that even experts are influenced by a “normality bias” that makes them more likely to see something that they expect to see (127). The existence of this bias compromises the objectivity of witnesses, including experts, and pervades the thinking of judges and juries. They are prone to believe that injury or hardship naturally accompany the plaintiff’s socioeconomic status, gender, or race. As illustrated so well by the wrongful birth and lead paint cases, gender and racial biases enter into cases in ways that may be difficult to detect.

Chamallas and Wriggins do not say that causal analysis in tort litigation is completely broken. But their arguments raise a number of important questions about current practices. Tackling the implications of this extremely important chapter could (and should) occupy a small legion of law professors willing to take on the task of reconstruction.

For different reasons, the chapter on damages also deserves a great deal of attention. As in the other chapters, the authors begin with an overview of how damages law is employed in tort litigation. The authors then offer an avalanche of data to show how women and minorities are grossly under-compensated. The evidence is so overwhelming that there is really no room for argument. Tort law has some work to do before women and minorities are compensated fairly for their injuries.

Fortunately, Chamallas and Wriggins also propose a fix. Using examples drawn from cases and the distribution of the federal September 11 Victim Compensation Fund, they urge courts to refuse to allow race and gender to play a role in the setting of awards. The simple way to do this is to refuse to use tables that reflect past discrimination. Instead, the authors recommend the use of “blended tables representing the composite experiences of men and women of diverse races” (170). It is very difficult to argue with this recommendation and seems likely that future courts will rely upon this chapter to make the very changes that the authors propose.

Another interesting argument made in this chapter has to do with the impact of recent tort reforms on the recoveries of women and minority plaintiffs. The authors point out that the popular caps on non-economic damages promoted by tort reformers reinforce the notion that property (or economic) harm is more important than relational harm. As the authors explain, because women and minorities are most likely to have claims that cannot be expressed in economic terms, the caps affect them disproportionately, with the effect of further reducing already limited recoveries.

The point is an interesting one but it should be noted that these caps are hard on everyone. Anyone who must rely on the tort system to get money for medical care or other needs following an injury is hurt by the caps. The application of caps in certain types of cases, such as medical malpractice, distorts tort litigation and makes it infeasible to litigate cases where there has been real injury. Perhaps the arguments made here, however, will attract attention from civil rights advocates who, for the most part, have steered clear of the tort reform wars.

The six substantive chapters of the book are followed by a very brief conclusion. In this final chapter, the authors set out several broad proposals for reform. The first is a general argument in favor of more aggressive incorporation of civil rights norms into tort law. This seems harmless enough as a general proposition but we suspect that the application may be more challenging than the authors anticipate.

Many practitioners go to great pains to keep civil rights and tort claims separate for jurisdictional and other strategic reasons (such as avoiding preemption and other types of arguments which defendants routinely employ to avoid or delay liability). Moreover, there is reason to be wary of merging torts and civil rights law, particularly in the intentional torts realm. In Section 1983 law, the U.S. Supreme Court has become persuaded that civil rights law and tort law are indistinguishable, with troubling effects. Among other things, this development has led to limitations on duty and on insistence of compensatory tort damages, with the effect of eroding protection for constitutional rights.<sup>3</sup>

The authors also want to make it easier to bring tort claims for domestic violence and harassment. Since the absence of liability insurance seems to be a key reason why lawyers are reluctant to bring tort claims for domestic violence, the authors suggest the expansion of homeowners' liability coverage as one potential solution. If the insurance industry was encouraged to develop a product that covers this type of injury, the authors believe they would respond by doing so.

We agree that the expansion of liability coverage would be beneficial to domestic violence survivors trying to start a new life. But it may not be a good idea generally to allow people to self-insure for acts of their own aggression or intentional torts. Should a risk pool in which all purchasers of homeowners insurance are members be required to bear the costs of other people's violence? And if insurance products are offered to cover domestic violence, will it ultimately expand to include all intentional torts?

Another proposal recommends that freedom from sexual harassment and reproductive rights be treated as "special interests that trigger a duty of care in negligence law" (189). The idea here is to make it easier for sexual harassment victims and women with reproduction-related injuries to sue. One of the key points that the authors make in this section is that the U.S. legal system is culturally and legally unreceptive to these types of claims. In contrast, we note that other legal systems are much more receptive to dignitary harms that affect social relationships. The law of slander in Ghana and the civil law in countries like France and Austria, to give a few examples, are very receptive to claims that protect the tranquility of social groups. Broader acceptance of similar concepts in the U.S. would provide greater protection to women and minorities.

3. *See e.g.*, *Deshaney v. Winnebago County Dep't of Social Services*, 489 U.S. 189 (1989) (invoking tort limitations on affirmative duty to affirm dismissal of a due process claim brought against the department of social services after it failed to remove a child from an abusive household); *Carey v. Piphus*, 435 U.S. 247 (1978) (stressing that Section 1983 damages are ordinarily to be governed by tort rules of damages, and holding that "the basic purpose of a Section 1983 damages award should be to compensate persons for injuries caused by the deprivation of constitutional rights.").

Finally, we note that there are some aspects of gender and sex-based bias that the book simply does not address, like the treatment of transsexuals and intersex populations in tort law. But no book can cover everything and *The Measure of Injury* already covers an astonishing array of topics that are often ignored in tort law. As the first comprehensive examination of gender and race bias in tort law, the book makes a huge contribution to the field. There is more ground to cover, of course, and hopefully other scholars will continue to develop analyses of tort law along these lines.

As we noted at the outset, one of the great pleasures of the book is that it combines complex analysis with a high degree of readability. But could you really use *The Measure of Injury* as a supplement in a first-year torts class? As tort professors with a couple of decades of teaching experience between us, we think the answer is yes. Indeed, we would like to especially recommend particular chapters that provide extremely helpful explanations of complex subjects that commonly pose problems for students.

One of the most challenging areas of tort law for most first-year students, for example, is causation. Although the basic concepts are relatively simple, students stumble as they apply principles to actual cases. In our view, the causation chapter and especially the discussion of the lead paint litigation could be very useful for first-year students who struggle to understand the concepts of causation. We also believe that first-year students would benefit from reading Chapter 2, which places tort law principles in a broader historical context.

The book is also appropriate for more advanced courses, like Advanced Torts, and courses that focus on legal issues affecting women and minorities. The book would also be a good choice for seminars in law and society and in law and politics, for institutions that offer these courses. In short, this is great stuff for readers at every level. But tort junkies starved for more discussion of gender and race will find it particularly irresistible.