The gender of damages and compensation

Is the Australian law of tort and compensation gender neutral in the way it allocates damages and compensation for injuries? Do all those who suffer compensable injuries receive appropriate compensation for their injury via common law damages or via statutory compensation (or a combination of the two)? Are the only relevant variables the type of injury; whether the system of compensation is a fault or no-fault system; the location where the injury occurred; and how it occurred?
Scholars such as Reg Graycar have long questioned the gender neutrality of the law of damages. Gender matters. It matters for a range of reasons. Women who suffer injury have historically encountered and continue to suffer barriers to gaining appropriate damages or compensation for their injuries. Women and men do not always suffer personal injuries in ways which are similar or identical. Men suffer more injuries in ways that the current law of torts and current statutory compensation systems are likely to recognise as resulting in compensable damage or as worthy of statutory compensation. Women suffer more injuries in categories where damages cannot be recovered, are limited or where statutory compensation schemes do not respond adequately with compensation. When women do successfully litigate or claim, they may receive less damages, their damages may be categorised as non-economic (and thus worth less damages or compensation), and their damages may be subject to excessive deduction for vicissitudes of life.

‘Private’ work in the home and in the family, still disproportionately carried out by women including those also in the paid workforce, continues to be undervalued and under-compensated in both tort and in statutory compensation systems. There is an expectation that female caring labour (or at least a significant amount of it) provided to those with a disability or injury should be provided for free as a normal expectation of family or community life. Statutory tort reforms and new forms of statutory disability and injury support that have evolved over the last 20 years have not substantially addressed the disadvantage suffered by female claimants nor the devaluing of female work (paid and unpaid).

**WHICH INJURIES AND HARMS ATTRACT DAMAGES AND COMPENSATION?**

Men suffer more serious personal injuries and deaths in accidents than women, particularly as a result of risky activity, motor vehicle accidents and hazardous occupations. Historically, injuries and deaths which occur in these ways are more likely to attract tort damages or some level of statutory compensation. They occur in the shadow of statutory no-fault schemes, compulsory insurance and liability insurance (for example, via workers’ compensation schemes, compulsory third party insurance, no-fault motor vehicle compensation schemes, and lifetime care and support schemes for catastrophic work and motor vehicle injuries). The nature of these ‘male’ injuries is that there may be multiple paths to obtain damages, compensation or lifetime care and support. For example, a seriously injured plaintiff in some states may be able to claim statutory no-fault benefits under a work or motor vehicle scheme, maintain rights to some common law damages in tort, and obtain further lifetime support care and support under a National Injury Insurance Scheme (NIIS) or the National Disability Insurance Scheme (NDIS).

Women, however, suffer a range of particular injuries more commonly than men. Women suffer injuries from sexual assault and domestic violence at rates much higher than men. Women suffer birth injuries and carry a higher care and financial burden in wrongful birth or wrongful life cases. Women are injured in the home at rates far higher than men. While men suffer more severe physical injuries in the workplace, women suffer psychological workplace injuries at higher rates than men. While men suffer far more serious injuries in motor vehicle accidents, women may suffer disproportionately worse long-term outcomes from ‘minor’ whiplash injuries. This may explain the slightly larger number of claims by women overall in motor vehicle injury schemes yet predominantly male claimants in lifetime care and support schemes, which respond to catastrophic motor vehicle injury.

These gender differences in injury types are important. For many categories of claim where women suffer disproportionately from injuries or the impacts of injuries, no compensation or damages are available or the damages available are restricted or difficult to claim. For example, for women who suffer severe injuries as a result of domestic violence, their only practical means of compensation may be a statutory criminal compensation scheme with the modest benefits and limitations that characterise these schemes.

Where a woman suffers a serious disability as a result of domestic violence, there may be some lifetime care and support (although no economic loss, medical costs or compensation for pain and suffering) available under the NDIS.

While we have compulsory insurance schemes and widespread no-fault schemes in place to cater for predominantly male injuries in the workplace (even where the injury is the fault of the worker), we have yet to implement a scheme which compensates domestic violence victims in a meaningful or substantial way. In the absence of compulsory insurance or liability insurance (which typically does not respond to liability for intentional harm), intentional tort claims against a perpetrator may be financially ruinous.

Claims for psychological workplace injuries are typically more difficult than physical workplace injury claims. Such claims are often seen as novel and difficult in the common law, face additional hurdles, caps and thresholds in statutory workers’ compensation schemes and within schemes have much higher claim refusal rates than physical injuries. ‘Minor’ whiplash and soft tissue motor vehicle injury claims increasingly face hurdles, caps and restrictions in motor vehicle insurance schemes to reduce scheme costs. Such claims are often stereotyped as fraudulent. These damages restrictions may disproportionately harm female claimants.

At the same time, catastrophic injury no-fault NIIS schemes have been expanded in response to predominantly male injuries regardless of fault. In some states of Australia, there are restrictions on the ability to claim for wrongful birth actions, with the burden of these torts resting primarily on the shoulders of mothers. For many categories of female injury – for example, those suffered in the home – the law has never provided a remedy, considering those harms to be ‘private’. However, at the same time, there has been comparatively extensive compensation for injuries in the ‘public’ ‘work’ domain even where those injuries are the fault of the worker.

**VALUING ‘FEMALE’ HARM WITH DAMAGES AND COMPENSATION**

Tort law has also been criticised for failing to value the loss or damage that women suffer when injured, and for awarding...
lower damages in female claims. In her early work, Graycar identified ‘gendered’ judicial narratives around ‘female’ work, including lack of female attachment to the workforce, and paid work being of secondary importance to the caring and domestic roles that women play.14

In addition, Graycar noted the disadvantage women suffered due to their unpaid domestic work being categorised as non-economic, and of less value than paid work. This stereotyping had the potential to lower the amount of damages women received for economic loss.

Grant’s recent study of judicial decisions concerning thresholds in the Victorian Transport Accident scheme suggested that times had changed and there was now no discernible difference in the way judges described male and female paid work trajectories.15 Grant suggests that the ‘modern judiciary may be better equipped with more accurate understanding of the nature of women’s paid work’.16

However, Grant found evidence to support Graycar’s suggestion that wage earning and economic loss were still seen as far more valuable and privileged than work in the home.17 Women remain significantly disadvantaged in the calculation of their damages to the extent that their unpaid work is deemed non-economic and as part of general damages for the loss of the ability to ‘enjoy’ life. Tort reform legislation including thresholds, damages caps and damages schedules for general damages including pain, suffering and loss of enjoyment of life have exacerbated the disadvantage of female plaintiffs, given that their ‘work’ is characterised as ‘non-economic’ and therefore subject to restriction of damages. Loss of the ability to claim, or restrictions on claiming punitive damages have also disadvantaged women who are the victims of large scale toxic torts which have clustered around reproductive and cosmetic products.18

For example, substantial groups of women have recently suffered harm from breast implants, contraceptive products, cosmetic surgery (which has been largely unregulated) and from surgical devices such as mesh implants.

The compensation principle and gender pay gap
The way damages for past and future economic loss are calculated may also substantially disadvantage women. Damages are calculated on the basis that the plaintiff is returned to the position that they would have been in but for the injury. It has long been recognised that this approach to damages, focusing on ‘corrective justice’, reiterates and reinforces existing economic and social disadvantage. There is a substantial gender pay gap in Australia. In 2017/2018 the gender pay gap was 21.3 per cent (or over $25,000 a year on average). However, in some professions it was substantially higher.19 Factors that influence the gender pay gap include discrimination, women’s ‘disproportionate share of unpaid caring and domestic work’, lack of women in senior roles, ‘lack of workplace flexibility’ and ‘greater time out of the workforce’.20 Calculation of damages utilising a female plaintiff’s current or pre-injury salary will reinforce and perpetuate the gender pay gap into damages and result in lower damages for female plaintiffs, compared to comparative male plaintiffs performing the same occupation. The other potential negative impact on damages calculation occurs when current salary (or that at the time of injury) is utilised to calculate future economic loss without adequate allowance for future wage improvement or career progression.

While the improvement in the gender pay gap has been relatively slow, there has been gradual positive progress over time.21 There have also been significant policy reforms which are intended to address the gap in the future.22 Future economic loss calculations using contemporary income levels may not adequately allow for the closing of the gender pay gap in the future (even where allowance is made for improvement as a possible ‘positive’ vicissitude).

There has also been focus, particularly in other countries, on the very negative impact of using male and female average income tables to calculate economic loss.23 This has particular salience where the plaintiff is catastrophically injured as a child and will not be able to work at all, or will only be able to work in a substantially reduced capacity. In these cases there is, of course, no existing career or income patterns that can be drawn upon to calculate damages. There are, however, instances where male and female average earning statistics (either general or relevant to a particular occupation) may also be used in the calculation of economic loss for adult claimants in the absence of more reliable personal income evidence.24 Again, the difficulty of using male and female average earning statistics is that their effect will be almost always to diminish the amount of damages for a female plaintiff, compared with a
comparative male plaintiff who performed the same occupation. As discussed above, when present figures are extrapolated to calculate future economic loss, this may further disadvantage female plaintiffs in a situation where future improvements in the gender pay gap and workforce participation over time may improve the economic outcomes for women over the long term.

Vicissitudes of life
The reduction of damages for future vicissitudes of life may also disproportionately affect women. While the size of deduction may vary from case to case based on the individual circumstances of a particular plaintiff with positive and negative circumstances balanced against each other, standard deductions of around 15 per cent appear to be commonplace. However, there are cases where women have faced larger deductions for vicissitudes based on factors such as their assumed future absences from work for maternity leave, or part-time work patterns. It appears rare that a father, despite being equally responsible socially and legally for the care of his children, faces such a deduction from his damages. Ironically, fatherhood may actually increase the damages of a male plaintiff given the evidence of a ‘daddy bonus.’ The fact of fatherhood appears to increase a man’s wage and his superannuation. The converse is true for women. This is an area where inappropriate unconscious stereotyping of expectations of typical female work patterns and primary responsibility for parenting may actively work against female plaintiffs, particularly given the very ‘intuitive’ way in which the amount for vicissitudes is calculated. This is particularly so where the vast number of damages claims will be settled through pre-court negotiation with no agreed reasons, rather than in a judicial determination where explicit reasons for damages calculations are required. In addition, an inclusion of matters such as career interruption in ‘negative’ vicissitudes may, in effect, create a double damages deduction for a female plaintiff where the figure used for her economic loss damages calculations has already been impacted by the gender pay gap, which itself is at least partly attributable to career interruption.

VALUING ‘FEMALE’ CARING WORK WITH DAMAGES AND COMPENSATION
One of the longstanding criticisms of the manner in which damages are calculated is the systematic way that the law devalues female caring work. Women, despite growing participation in the paid workforce, provide the majority of unpaid caring work. They make up 68.1 per cent of primary carers of those with a disability. Carers suffer economic disadvantage as a result of their care work. As Jane Campbell argued in the ‘Women and the Law’ edition of Precedent in 2018, gratuitous care is a clear feminist issue. While recovery of gratuitous care damages has been recognised since Griffiths v Kerkemeyer, recovery of this form of damages has been an ‘easy target’ for tort reforms which limit the ability to recover for unpaid care. There is an assumption that the vast amount of caring work for those with an injury or disability is carried out for free as a normal expectation of caring family members and more broadly by volunteer members of the community. The majority of those unpaid carers will be women.

How the expectation of ‘free’ care by female family members is reflected in statutory schemes
The devaluing of care work, and the stereotyping of the nature and impact of caring work, is also reflected in relevant statutory schemes. For example, as Campbell notes, statutory schemes such as lifetime care and support schemes and the NDIS will not typically pay for care by family members. There is an assumption that ‘funding a family member to provide supports to a participant may be detrimental’ and funding will be provided only in very exceptional circumstances, such as where there is a risk of harm, cultural reasons or strong views of the participant and all other options have been exhausted. However, at the same time, schemes may reduce entitlements to paid care where the need for care is reduced by voluntary care by family members. For example, in order to fund care costs as a ‘reasonable and necessary support’, NDIS participants must fulfil the requirements of s34 of the National Disability Insurance Act 2013 (Cth). This provides that ‘the funding or provision of the support takes account of what it is reasonable to expect families, carers, informal networks and the community to provide’. Both the legislation (and the relevant rules and operational guidelines) are framed in general terms and refer to ‘general community expectations’ about what parents and family members will provide for both adults and children with a disability. However, it is clear that the expectations and impacts of care fall far more heavily on to the shoulders of female parents and family members. Any assumption that ‘free’ care will be provided has the potential risk of stereotyping and devaluing what should be expected of female family members, particularly mothers and partners. The effect of this provision may be to reduce the hours of care that the NDIS will provide funding for as a reasonable and necessary support. ‘There is a particular risk that high expectations of ‘free’ care by female family members as a normal and ‘reasonable’ societal expectation will be used as a mechanism to ensure that the NDIS remains financially sustainable as a whole and to ameliorate current workforce shortages of paid carers.

CONCLUSION: IS IT GETTING BETTER?
Is it getting better? Have we reached the point where we can say that damages and compensation are awarded in a gender-neutral way and injured women do as well as injured men? In some senses, the answer is ‘yes’. There is evidence that judges determining damages may be less likely to accept damaging stereotypes about female career paths. There are recent appeal cases where judicial use of stereotyping (for example, that a woman may choose not to work if she has a successful male partner) has not been accepted. There has been judicial warning that general submissions by counsel (with no evidence) about what women will or will not do in the course of their working lives should not be accepted. The introduction of NDIS Lifetime Care and Support schemes and the NDIS have recognised the need to pay for some of the care costs of those who suffer severe disability as a result of injury. However, to the extent that damages calculations still embody and reflect the gender pay gap, damages calculations are based on average female earnings (which are lower than male average earnings), and women (but not men) have the vicissitude
of the assumed ‘obligation’ of child care and its consequences counted negatively against them, female damages remain compromised. In addition, it is clear that there are still female injuries we do not count as worthy of damages or adequate compensation (even where the woman is faultless) while we are willing to compensate predominantly ‘male’ injuries (even where the male bears fault). Tort reforms which have affected damages have not benefitted women – in fact, they have likely disproportionately negatively affected damages for women and decreased the value of caring work undertaken by women. We also continue to make assumptions that the still primarily ‘female’ activity of domestic work and caring for children and adults with an injury or disability is to be a ‘free’ and voluntary activity, despite this resulting in economic disadvantage for women. Women it seems, as Graycar first suggested in 1997, are still ‘hoovering’ and caring for a hobby.37


Associate Professor Kylie Burns, Griffith Law School, is a co-author of Luntz, Hambly, Burns, Dietrich, Foster, Grant, Harder. Tort: Cases and Commentary, now in its 8th edition. Some of the material in this article draws from Chapter 1 of that text. The author thanks her co-authors Emeritus Professor Harold Luntz and Dr Sirko Harder for sharing extracts from their forthcoming new edition of Assessment of Damages for Personal Injury and Death, which also informed this article. Thanks also to Michael Lee of Vincents who provided valuable email k.burns@griffith.edu.au.