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Law, harm and redress: a feminist perspective

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This paper explores understandings of harm in law through the application of a feminist perspective. Drawing on the idea of harm as a social construct, the paper considers the role of law in shaping perceptions of when a harm has occurred and whether it should be redressed. These themes are illustrated by means of a close legal and contextual analysis of the House of Lords decision in Waters v Metropolitan Police Commissioner,[1] *in which a woman was allegedly bullied at work for reporting she had been raped by a fellow officer. The paper raises questions about why this particular claimant had difficulty establishing that she had suffered harm, despite alleging 89 separate hostile acts by fellow officers, and even though the courts who heard her claim assumed for the purposes of legal argument that the facts alleged were true. It is argued that the narrowness of the approach adopted by most of the judges who heard Ms Waters' claim precluded recognition of the seriousness of the allegations and the social, political, and legal need to provide redress.*

INTRODUCTION: SEEING THROUGH LAW

> 'To be really good at "doing law", one has to have serious blind spots and a stunningly selective sense of curiosity.'[2]

* Inaugural lecture delivered at the University of Kent on 10 May 2002 to a mixed audience of lawyers, legal and non-legal academics, and members of the general public. The text has been minimally adapted to take account of the legal composition of the Legal Studies readership. I would like to thank my many colleagues at Kent Law School for their support and inspiration over the years.

1. [1995] ICR 510, EAT; [1997] ICR 1073, CA; [2000] 1 WLR 1607, HL.
2. P Schlag *The Enchantment of Reason* (Durham, NC: Duke University Press, 1998) p 140.

As a way of knowing, law is widely regarded as superior to many. Lawyers study for long periods, wield a vast amount of power (particularly when dressed in a wig and robe), and, not infrequently, earn enormous sums for doing so. In a world where reward is too often assumed to follow worth, lawyers, it would seem, are knowledgeable people, so much so that more and more are seeking to join their ranks, learn their language, see as they see, do as they do.

This appetite for law and for lawyers is reflected in the media, popular fiction and, especially, in contemporary cinema. A Dickensian portrayal of lawyers as crusty, ancient and grasping has given way to newer, hipper images. Tom Cruise in *The Firm* or Reese Witherspoone in *Legally Blonde* offer us an image of lawyers as young, hot, and very, very smart; while Julia Roberts, in *Erin Brockovitch*, realises our wildest dreams as a 'do-it-yourself' lawyer, finding her way to law's mysteries and rewards through dedication, persistence and a succession of short skirts. There are of, course, contrary, unattractive depictions of lawyers. Soames Forsyte, for example, chief villain in the TV drama, *The Forsyte Saga*, is as repellent now as when he first graced our small screens over thirty years ago. However, by and large, contemporary cultural images of lawyers are positive, or at any rate enticing, while law itself is accorded a high cultural and social significance. Not only is it a primary lens through which social relations are viewed, but the interpretations it yields are generally privileged.

In the circumstances, to suggest, as American legal scholar Pierre Schlag does, that 'doing law' – learning, practising, and teaching law – narrows our vision and warps our curiosity, is to raise a matter of considerable concern. What if, in this rush to see and do as lawyers see and do, we produce generations of stunted, myopic individuals? What if the increasing encroachment of law on virtually all aspects of social relations yields not insight but ignorance, not justice but prejudice? If Schlag is right – and he is far from the first to have made such a claim[3] – then legal *education* may be a contradiction in terms, and law students may be exposing themselves to serious psychological and cognitive damage as soon as they set foot in a law school. (In fact, it probably will not be too long before one of them sues!)

I want to argue here that Schlag is right; that 'doing law' can, and frequently does, effect an intellectual narrowness that is as impoverishing as it is debilitating. This, I believe, presents the law teacher with an enormous challenge. Truly to educate, he or she must simultaneously train students in the techniques that 'doing law' comprises, and counter the effects of that training by encouraging students to resist it. One way of doing this is to offer them multiple perspectives on law; to ensure they see it through a wide variety of different lenses, including race, class, gender, history, politics and culture. Such an approach serves the dual purpose of widening the scope of student studies beyond the narrow confines of legal doctrine while, at the same time, providing them with complex, often conflicting accounts of law's nature and operation. This, in turn, triggers the

3. The narrowing effects of traditional legal education upon intellectual growth and individual creative capacity are a recurring theme in critical legal scholarship. See in particular the work of Duncan Kennedy (eg 'Legal Education as Training for Hierarchy' in D Kairys (ed) *The Politics of Law: A Progressive Critique* (New York: Pantheon, 1982)). Feminist perspectives on legal education reflect similar concerns. See eg M Thornton *Dissonance and Distrust* (Oxford: Oxford University Press, 1996) ch 4.

process of critical thought. By flagging up the parameters within which legal education is typically bounded, students are alerted to the extent to which all of their thinking is, in some sense, already self-patrolled. In a broader context, this encourages students to develop good habits of critical self-reflexivity – to question and constantly scrutinise their own as well as others' viewpoints. In the context of legal education, it arms them with a means of resisting the intellectual constrictions that legal training can produce.

My friend and colleague, Alan Thomson, observed some years ago that 'it is difficult to see *through* law when you *see* through law'.[4] This is a neat way of capturing the idea that law so shapes our perceptions of the world that it tends to obliterate other points of view. This paper seeks to illustrate some of the difficulties of seeing through law, and to point to ways in which they may be overcome.

LAW AND THE CONCEPT OF HARM

The concept of harm is not one upon which people frequently dwell. Harm is widely assumed to be self-evident. From the cries of the small child who has cut her finger to the terrible injuries sustained by casualties of war, harm, it seems, is something that *happens*; it requires little interpretation or debate. Even among lawyers, harm is a relatively under-theorised concept with, as Robin West observes,[5] much more effort going into the business of deploying law as an *instrument* for the redress of harm than to more fundamental questions of what precisely harm entails and how we know and recognise its occurrence.[6]

4. A Thomson *Introduction to Law Lectures* (University of Kent, circa 1984).

5. R West *Caring for Justice* (New York: New York University Press, 1997) ch 2 'The Concept of Harm', esp pp 94–100. As West observes, the concept of harm has been extensively theorised in the context of economic analysis of law, where the definition and identification of harm generally turns upon cost-benefit calculations. It has also been closely scrutinised by feminists, most notably by West herself in the volume cited here, but also by C MacKinnon, see eg 'Sexual Harassment: its First Decade in Court' in *Feminism Unmodified: Discourses on Life and Law* (Cambridge, MA: Harvard University Press, 1987) pp 103–116; A Howe 'The Problem of Privatized Injuries; Feminist Strategies for Litigation' in M Fineman and N Thomadsen (eds) *At the Boundaries of Law: Feminism and Legal Theory* (New York: Routledge, 1991) pp 148–167; and R Graycar and J Morgan *The Hidden Gender of Law* (Annandale: Federation Press, 2nd edn, 2002) esp Pt 4; all of whom have deployed some notion of 'gendered harm' to probe the exclusion of injuries to women from the traditional armoury of legal wrongs. See also my own work, particularly 'Gendered Harm and the Law of Tort' (1996) 16 OJLS 407 and 'Tort Litigation in the Context of Intra-Family Abuse' (1998) 61 MLR 132. Outside these fields there has been little systematic consideration of the concept of harm, although there have been many studies of particular harms in particular contexts.

6. Consideration of the concept of harm may give rise to any number of problematic questions. These include the key issues of how harm arises: what is the social process by which particular conduct and consequences (eg the arbitrary exercise of power by employers) is transformed from 'hard luck' to 'legal harm'? Can harm arise independent of its social and/or legal recognition: eg was sexual harassment 'harm' before it was socially recognised as such? Are 'harm' and injury' synonymous? If not, what is the distinction? If contingently synonymous, what are the contingencies? Finally, does harm necessarily imply agency of some kind? Eg is cancer harm, and is its characterisation as such dependent on how it is caused? Some of these questions are considered further below.

If we think about harm even for a moment, however, its axiomaticity is immediately questionable, with an intuitive understanding quickly giving way to a perception of harm as an unstable, slippery concept, highly dependent on context and very much the subject of interpretation. Moreover, although we tend to see harm as vested in the individual who sustains it, our concept of harm is thoroughly social. I mean this in at least two senses. First, harm is social in the sense that social location plays a role in determining the incidence and distribution of particular harms: women are more likely than men to be raped; workers are more likely than managers to be injured on the job. Secondly, harm is social in the sense that our understanding of harm is a product of social relations and the meanings they generate. In this context, pain or physical injury may be the most common social indicators of harm, but they are far from exhaustive or determinative. The notion of harm implies some element of *social recognition*; as such, it is fluid and contentious, shifting and changing over time.

Consider smacking. A generation ago, the physical disciplining of children was not only acceptable, it was widely seen as a necessary component of responsible parenting. Now, the smacking parent is an abuser and the smacked child is abused. To smack children today is to *harm* them; thirty years ago, the harm would have lain in 'sparing the rod'. This is more than just a change in social attitude. There is a very real sense in which children who are smacked today *are* abused. Because this is how smacking is socially portrayed, it is also increasingly how it is *experienced*. To the modern child, smacking is a violation of parental obligations. To children of past generations it was a parental duty, even an expression of love. It hurt, but in moderation it was neither viewed nor generally experienced as harmful.[7]

Law, of course, is heavily implicated in this particular change. We hear of teachers prosecuted for physically assaulting children;[8] of parents taken to court for violating their children's human rights.[9] We follow parliamentary debates on whether smacking should be outlawed.[10] Perceptions of harm then are closely linked to law, and legal recognition – in the form of a right to redress – is a key signifier that harm has been incurred.[11] Indeed, we can think of numerous examples of legal 'harms' that a generation ago would have been regarded as

7. Where smacking was so experienced, it had usually reached the point where it had violated the social and/or legal norm of 'moderation'. This border-crossing phenomenon also links to more complex issues surrounding circumstances in which a particular kind of harm is socially recognised but its occurrence routinely denied. Very often, this simultaneous recognition and denial of harm manifests social doubt about the scope or extent of the harm in question. Date rape is a case in point.

8. See eg the recent widely reported case of Marjorie Evans, the head teacher convicted but eventually cleared of physically assaulting a pupil ('Teacher Cleared of Assault: Appeal Judge Quashes Conviction for Slapping Pupil' *Guardian*, 2 September 2000, p 2).

9. See here *A v UK* (1998) ECHRR VI, 2692.

10. The legality of smacking has been the subject of recent parliamentary and public debate: see 'Parents told: you are free to smack' *Guardian*, 8 November 2001; and 'Comment: Leading Article: Ban smacking: Hitting children is always wrong' *Observer*, 11 November 2001.

11. The most dramatic example of the legal conferral of 'harm' status on particular conduct is sexual harassment in the workplace, which until the late 1970s was widely regarded as playful, harm*less* behaviour (witness the *Carry-on* films and other humorous depictions of sexually harassing behaviour). As Catharine MacKinnon famously observed, 'Sexual Harassment, the event, is not new to women. It is the law of injuries it is new to': n 5 above, p 85.

mere misfortune or bad luck. The practices of harsh employers, for example, may now attract legal liability on any number of grounds.[12] The consequences of incompetence in schools are increasingly the subject of legal dispute.[13] Even the birth of a healthy but unwanted child may generate legal liability for the doctor who fails to prevent it.[14] Virtually all of life's vicissitudes – birth, death, illness, work, family breakdown – are now located in a minefield of legal wrongs and remedies whilst, in our everyday lives – as doctors, teachers, builders, parents, volunteers – we must endlessly adjust our conduct to avoid inflicting legal harm on others. Indeed, sometimes, the spectre of law hangs so ominously that our strategies of risk avoidance extend well beyond the boundaries of any formally recognised harm, creating a social dynamic in which law's expansionist tendencies are given full expression.

In such legally imperialist times, one is momentarily halted by those seemingly rare instances where law openly questions or even denies the occurrence of harm, particularly when broader social justice considerations would appear to favour its recognition. When and why does law say no? How and where does it set its limits? Who are the winners and losers in the legal colonisation of harm?

LEGAL CONCEPTIONS OF HARM IN *WATERS v METROPOLITAN POLICE COMMISSIONER*[15]

I want to elaborate these points by telling the story of Eileen Waters, and what a story it is. The 'heroine' is a young woman, who, though tragically wronged, persists in her quest for justice against all the odds and long after even the most determined should have quitted. Set against the backdrop of gender relations in the London Metropolitan Police, it is the stuff of great TV crime drama: gutsy policewoman up against a macho police culture and colleagues who conspire to make her life miserable so she will leave the force.

It is a story too in another sense. *We do not know if it is true.* Although the incident that allegedly triggered events occurred in 1988, and although litigation commenced in 1992, a court has yet to make a full determination of

12. Until the introduction of redundancy payments in 1965 (Redundancy Payments Act 1965) and unfair dismissal in 1971 (Industrial Relations Act 1971), employer liability to employees was confined to claims arising from the contract of employment, in which context precedent had established very limited scope for recovery (*Addis v Gramophone Co Ltd* [1909] AC 488).

13. See eg *Dorset County Council v Christmas* [1995] 2 AC 634 (one of a number of 'education' cases heard alongside the abuse case, *X (Minors) v Bedfordshire County Council* [1995] 2 AC 644 and, more recently, *Phelps v Hillingdon London Borough Council* [2001] 2 AC 619. On the rising tide of litigation against schools, see 'Schools Face an Explosion of Litigation' *The Times*, 14 May 2002, supplement, pp 6–7.

14. The success of efforts to limit the scope of recovery in this context in *McFarlane v Tayside Health Board* [1999] 4 All ER 96, HL, remains to be seen. See in particular the decision of the Court of Appeal in *Rees v Darlington Memorial Trust* [2002] 2 WLR 1483. It is interesting in any case to note that their Lordships in *McFarlane* were in agreement in characterising an unwanted pregnancy as a personal or physical *injury*. See further I Kennedy and A Grubb *Medical Law* (London: Butterworths, 3rd edn, 2000) p 1578 for another example of the legal conferral of harm status.

15. [1995] ICR 510, EAT; [1997] ICR 1073, CA; [2000] 1 WLR 1607, HL.

the facts. This is because from the outset the legal issue has been whether, assuming the facts alleged *are* true, they disclose any cause of action, any form of harm the law can recognise.[16] It has taken five hearings, ten years, and 11 judges[17] to determine that Eileen Waters *may* have a claim to argue.

The facts of the *Waters* case are long and complex and I will endeavour to summarise them, albeit in the knowledge that some aspects of the narrative may be lost. Like the courts hearing the claim to date, I will assume for purposes of legal argument that they are true as alleged.[18]

Ms Waters joined the police in 1987. A year later, when she was just 20 years old, she was raped by a fellow police officer in the police section house in which she resided. She subsequently complained to the reporting sergeant and a half-hearted, hostile and procedurally sloppy investigation was instigated and carried out, in which the principle of confidentiality appears to have been honoured only in its breach.[19] The investigation eventually resulted in a decision by the Crown Prosecution Service not to press charges. Meanwhile, Ms Waters' life as a police officer became more and more unbearable. As a result of making the complaint, she was ostracised and intimidated by her fellow officers; this continued literally for years and across three separate stations where she worked. In addition to routine incivility, outright aggression and the usual unimaginative tactics of bullies – poison pen letters, offensive cartoon drawings, pornographic magazines in her desk – colleagues sabotaged her work by failing to support her, hiding files and withholding court dates. She was unfairly allocated responsibilities and transferred twice, once without discussion or consent. Although senior officers were aware of what was happening, they did nothing to prevent it; indeed, some compounded matters by writing unfavourable reports on her performance and removing her from special duties.[20] On a number of occasions, she was 'advised' or told to leave the police.

In late 1991, questions began to be raised about Ms Waters' mental health. A psychiatrist later diagnosed post-traumatic stress consequent upon the rape and her subsequent experiences in the Metropolitan Police. In August 1992, she went off-duty for health reasons. At the same time, she began the long and arduous process of seeking redress through law.

16. The industrial tribunal (IT) and Employment Appeal Tribunal (EAT) did not so much proceed on the basis that the facts alleged were true as conclude, on the basis of certain *agreed* facts – specifically that an alleged rape had taken place while both parties where off duty – that no claim (under s 4(1) of the Sex Discrimination Act 1975) could arise. See further below.

17. This does not include 'lay' members of the IT and EAT. Although 'Industrial Tribunals' were renamed 'Employment Tribunals' in 1998 (Employment Rights (Disputes Resolution) Act 1998, s 1), I will use the former term throughout for purposes of authenticity.

18. The account that follows is drawn mainly from the judgment of Evans LJ in the CA ([1997] ICR 1073 at 1081–1084).

19. Ms Water also alleged that she, rather than the alleged perpetrator, was treated as the subject of investigation ([1997] ICR 1073 at 1082, CA). As an account of a rape investigation, her claims have more than a ring of familiarity to them. See generally S Lees *Carnal Knowledge: Rape on Trial* (London: Hamish Hamilton, 1996).

20. Specifically, her removal in July 1991 from the list of officers allowed to carry out POLSA duties (special searches). This was the event that triggered her application to the IT. (See the judgment of the EAT ([1995] ICR 510).

An account of the progress of litigation is rendered difficult by the fact that Ms Waters issued different claims in different courts. Essentially, there were two distinct strands to her claim. The first was employment discrimination-based. This commenced in an IT, and then went to the EAT. The second was tort-based, starting life in the High Court, coming together with the employment claim at the Court of Appeal. By the time the case reached the House of Lords, the employment discrimination claim had been abandoned, leaving only the tort claim to be heard by their Lordships. Let me outline the main legal arguments and the courts' determinations.

The discrimination-victimisation claim

1 The industrial tribunal

At the IT, Ms Waters claimed she had been victimised, contrary to s 4(1)(d) of the Sex Discrimination Act 1975 (SDA 1975).[21] According to this provision, it is unlawful sex discrimination to treat a person less favourably than another because they have made a complaint relating to an act which *would amount to contravention of the statute;* in other words, because they have complained about something that could constitute sex discrimination. Ms Waters alleged that the Metropolitan Police Commissioner – as her 'employer'[22] – had treated her less favourably than other officers because she had reported a sexual assault by a fellow officer. The implication was that the sexual assault was itself sex discrimination, capable of contravening SDA 1975.

On the morning of the tribunal hearing, however, counsel for the Commissioner produced a statement of 'agreed facts' which, after fairly swift and limited negotiation with Ms Waters' counsel (a trainee barrister from the Free Representation Unit), was submitted to the tribunal. Among the facts agreed was a statement that both Ms Waters and her alleged assailant were off-duty at the time the assault took place. This, it turns out, was fatal to her claim. SDA 1975 only provides a cause of action for discriminatory acts in particular *contexts* – specifically, employment, services, housing, and education.[23] As the assault, it was agreed, had taken place outside these contexts, it was not an act which contravened SDA 1975. Moreover, for the same reason, it was not an act for which the Commissioner, as her 'employer', could be *vicariously* liable. Thus, less favourable treatment consequent upon

21. S 4(1) states: 'A person ("the discriminator") discriminates against another person ("the person victimised") *in any circumstances relevant for the purposes of any provision of this Act*, if he treats the person victimised *less favourably* than in those circumstances he treats or would treat other persons, and does so *by reason* that the person victimised has – (d) *alleged* that the discriminator or any other person has *committed an act* which (whether or not the allegation so states) *would amount to contravention of this Act'* (emphasis added).

22. In fact, police officers are not 'employees' and the Commissioner, therefore, was not technically Ms Waters' employer. However, for purposes of SDA 1975, he is effectively deemed to be so (SDA 1975, s 17(1)). The question of the Commissioner's status as 'employer' is also pertinent to the tort claim (see n 37 below).

23. There are limited additional contexts in which SDA 1975 operates. For a comprehensive account of the Act's scope, see R Townshend-Smith *Discrimination Law: Text, Cases and Materials* (London: Cavendish, 1998) chs 10 and 11.

complaining about such an act was not victimisation under SDA 1975. The tribunal dismissed Ms Waters' claim without even hearing oral evidence.

2 The Employment Appeal Tribunal

This decision was affirmed by the EAT[24] who rejected an argument by Ms Waters' counsel that s 4(1)(d) should be interpreted purposively to ensure that those making good faith complaints about sex discrimination were not left unprotected if their complaint turned out to relate to an act not technically covered by the statute. Instead, the EAT took a *literal* approach to the words 'would amount to contravention of this Act' to deny the claim, despite the invocation by Ms Waters' counsel of art 7 of the Equal Treatment Directive[25] to support a purposive interpretation.

In addition, although Mummery J acknowledged in passing the dangers of parties agreeing facts in advance of the hearing, particularly where agreement was hastily reached without adequate notice of the stipulations, he did not think that the tribunal had abused its discretion to proceed by way of preliminary issue on agreed facts, however disadvantageous to Ms Waters, and even though Commissioner's counsel had given her counsel only one day's notice of their intention to raise a preliminary issue.

3 The Court of Appeal

At the Court of Appeal, the same view prevailed, even though Waite LJ purported to approve the principle of purposive interpretation and acknowledged that SDA 1975 should be interpreted 'to promote equality of opportunity between men and women'.[26] He felt, however, that in this instance the interpretation called for by Ms Waters' counsel – one which effectively extended victimisation to allegations that, objectively considered, were *aimed* at claiming protection under equality legislation, even if this was not expressly stated and even if the legislation did *not* cover the allegation in question – went too far. While conceding that employees making sex-related complaints, for example, rape by a co-worker, could, realistically, have little idea whether or not those complaints fell within the ambit of the Act, Lord Justice Waite insisted that protection should be forfeited if they did not:

> 'True it is that legislation must be construed in a sense favourable to its important public purpose. But there is another principle involved ... charges of sex and race discrimination are hurtful and damaging and not always easy to refute. In justice therefore to those against whom they are brought, it is vital that ... victimisation should be defined in language sufficiently precise to enable people to know where they stand before the law. Precision ... is also necessary to prevent the valuable purpose of combating discrimination from becoming frustrated or brought into disrepute through the use of language

24. [1995] ICR 510 at 517.

25. Council Directive 76/207/EEC, art 7 of which provides that: 'Member States shall take the necessary measures to protect employees against dismissal by the employer as a reaction to a complaint within the undertaking or to any legal proceedings aimed at enforcing compliance with the principle of equal treatment.'

26. [1997] ICR 1073 at 1091.

which encourages unscrupulous or vexatious recourse to the ... Act ... It is better, and safer, to give the words ... their clear and literal meaning.'[27]

Ms Waters' discrimination claim was denied – without any hearing on the facts – to protect notional defendants in notional cases from 'hurtful' and 'damaging' allegations and to discourage claims from 'unscrupulous' and 'vexatious' litigants.[28]

The Court of Appeal refused leave to appeal to the House of Lords and the discrimination claim was abandoned.

The tort-negligence claim

1 The High Court

In 1994, Ms Waters issued a writ against the Metropolitan Police Commissioner. The writ listed 89 separate acts of harassment and intimidation and sought damages and an injunction in relation to them. The legal bases of her claim were manifold. It was alleged first that the Commissioner was *personally* liable either for negligence or breach of an implied contractual term.[29] Secondly, it was alleged that the Commissioner, as 'employer', was *vicariously* liable for torts committed by police officers in the course of their employment. Possibilities here included conspiracy to injure, intimidation, malfeasance and negligence.[30]

The Commissioner's response was to apply to have the writ and statement of claim struck out; that is, he asked the court to rule that even if the facts alleged were true, they disclosed no viable cause of action. Although the striking out procedure is supposed to be applied only where a plea is 'doomed to fail or unarguable',[31] the Commissioner's application was granted.[32]

2 The Court of Appeal

The Court of Appeal subsequently affirmed the striking out. Evans LJ, giving the primary judgment, cursorily dismissed most of the alleged legal claims, homing

27. [1997] ICR 1073 at 1097. Waite LJ also rejected the argument that in the wake of the decision in *Jones v Tower Boot Co Ltd* [1997] ICR 254, CA (holding that the phrase 'course of employment' in SDA 1975, s 41(1) was wider than its common law construction), the question of whether or not the alleged rape took place in the course of employment should be reopened. As both parties, Waite LJ argued, were clearly off-duty at the time, it was 'inconceivable', even on the expanded conception in *Jones*, that the rape occurred in the course of employment (at 1095–1096). In fact, the point is at least arguable, particularly as Ms Waters was required to live in the section house as part of the terms of her probationary engagement (at 1094).

28. One cannot help but catch the echo here of that older legal platitude: 'Rape is a claim that is easy to assert but hard to disprove ...' which, under the guise of the corroboration rule, operated in rape trials with equally pernicious effects. My thanks to Peter Goodrich for making this connection.

29. Breach of statutory duty may also have been argued at some point.

30. It is not clear how specific the original statement of claim was as to the range of torts/civil wrongs alleged. It looks like eg intimidation emerged after the original statement of claim was struck out and that, at the Court of Appeal, Ms Waters' counsel declined to plead conspiracy to injure. However, all of them featured at some point in legal argument.

31. *Williams & Humbert Ltd v W & H Trade Marks (Jersey) Ltd* [1986] AC 368, HL.

32. Initially by Master Prebble, later affirmed by Wright J in the High Court.

in quickly on negligence as the main contender. Thus, he stated, there could be no conspiracy because there was insufficient evidence that the police officers were acting in concert.[33] He also ruled out malfeasance in public office because 'no express statement of malice is made in the statement of claim'.[34] Intimidation, he determined, could not apply because it required threats of unlawful conduct, and it was not clear what, if any unlawful conduct was alleged to have been threatened as opposed to have been committed.[35] He was particularly sceptical about the Commissioner's vicarious liability, pointing out that Ms Waters could not prove a direct causal connection between any individual act by a police officer and the psychological injuries she had allegedly sustained. Put bluntly, because Ms Waters had been harassed by so many officers, on so many different occasions, in so many different ways, and without any apparent planning or orchestration, she faced an evidentiary nightmare – specifically, how to prove that any or all of the acts alleged had caused her injury.[36]

This left the claim that the Commissioner was personally negligent, that is, in breach of a duty of care owed to Ms Waters as her 'employer'[37] not to cause her foreseeable injury. Interestingly, at this time, the case law evidenced a growing willingness to recognise that foreseeable psychological injury – including damage caused by stress, overwork or bullying – might fall within the ambit of an employer's duty.[38] However, no such claim had yet been successfully made out against the police and Evans LJ was not of a mind to allow one. He drew here on two prior cases. The first was *Hill v the Chief Constable of West Yorkshire*,[39] a failed suit against the police by the mother of the last victim of the Yorkshire Ripper, alleging that the police's negligent investigation had caused her daughter's death. The second was

33. In fact, this point was conceded by Ms Waters' counsel, presumably because it would have been too difficult to adduce sufficiently convincing evidence to the contrary ([1997] ICR 1073 at 1086, CA).

34. [1997] ICR 1073 at 1086.

35. [1997] ICR 1073 at 1086. On the contractual claim, see below.

36. See also the short judgment of Swinton-Thomas LJ, who drew on these circumstances to argue that in the absence of combination, ie concerted planning to drive Ms Waters from the force, none of the officers involved could reasonably have foreseen that their action or actions would cause her psychiatric injury. This is fairly extraordinary reasoning, suggesting that unless the officers had *expressly agreed* to harass Ms Waters, they could not individually have anticipated harm to her, even though they may have been fully aware of the extent to which she was being victimised. This is a judgment which drips with disdain for the claims alleged. A potential additional difficulty in the context of vicarious liability is the deliberate/intentional nature of the original act (ie the rape). Interestingly, the path to vicarious liability here has recently been eased by the House of Lords in *Lister v Hesley Hall Ltd* [2000] 2 WLR 1311. See commentary by P Giliker 'Rough Justice in an Unjust World' (2002) 65 MLR 269.

37. Technically, the police are officers of the Crown, not employees, so Ms Waters' argument was dependent on establishing that the two parties were in a relationship analogous to employer and employee. Fortunately, the weight of evidence, drawn from statute and from prior case law, fell heavily in favour of applying the analogy in this context. See Evans LJ [1997] ICR 1073 at 1088.

38. See in particular *Walker v Northumberland County Council* [1995] ICR 702, cited in legal argument but not in the judgments, and *Johnstone v Bloomesbury Area Health Authority* [1992] QB 332 (not cited at all).

39. [1989] AC 53, HL.

Calveley v Chief Constable of Merseyside Police,[40] in which police officers who were the subject of internal disciplinary proceedings failed to establish that the Chief Constable owed then a duty to conduct those proceedings with reasonable care. In both cases the proffered reason for denying a duty was *public policy*. In *Hill*, the judicial concern was that the effectiveness of police operations might be undermined by the imposition of a duty of care in the context of criminal investigations. In *Calveley*, a duty of care was also thought inappropriate because internal police affairs were so closely regulated by statute, including disciplinary regulations. These same considerations, Evans LJ stated, applied in *Waters*, and a duty of care should not therefore be recognised.

It is worth noting in passing how the contractual argument simply falls from sight here. Evans LJ denied a duty of care by invoking the now well-worn *Caparo*[41] formula, the third 'limb' of which asks whether it is just and reasonable to impose a duty. This has provided an open door for policy arguments against the imposition of a duty, effecting in particular the development of 'pockets of immunity' in the context of negligent acts by public authorities. This trend towards public authority immunity reached its height in the House of Lords judgment in *X v Bedfordshire*.[42] Shortly thereafter, a judgment of the European Court of Human Rights in *Osman v UK*,[43] suggesting that 'blanket' tort immunities might violate art 6(1) of the European Convention on Human Rights, led to greater circumspection on the part of British judges, and an increasingly willingness to probe public policy arguments or carefully to delineate their scope.[44] Ironically, the European Court of Human Rights has since backtracked on its position in *Osman* in the recent decision of *Z v UK*.[45]

While not wishing to comment on whether and when such 'immunities' are desirable, or even if they are appropriately characterised as immunities,[46] it is notable that Evans LJ locates Ms Waters' claim in this particular context rather than in the context of the developing authorities on employers' *contractual* obligations. This was clearly the strategy of Ms Waters' counsel, who sought to argue that the Commissioner was in breach of both an implied term to maintain a safe system of work and a duty to maintain the mutual trust and confidence of his employees.[47] In so far as Evans LJ addressed this argument at all, he assumed that the scope of any contractual duties would not exceed that of a duty of care

40. [1989] AC 1228, HL.
41. *Caparo Industries plc v Dickman* [1990] 2 AC 605, HL.
42. [1995] 2 AC 63.
43. (1998) ECHR VIII, 1.
44. See esp *Barrett v Enfield Borough Council* [1999] 3 WLR 79.
45. Application 29392/95, 10 May 2001. The whole sorry saga, with particular emphasis on the human rights dimension, is reported and analysed by Conor Gearty in 'Unravelling *Osman*' (2001) 64 MLR 159 and *Osman* Unravels' (2002) 65 MLR 87.
46. It has been pointed out, both judicially and by academic commentators, that, in fact, the invocation of policy to deny a duty of care under the third limb of *Caparo* effects not an *immunity* from liability but a denial that liability arises in the first place, and that on this point the European Court of Human Rights in *Osman* were misled – see Gearty (2001), n 45 above, at 184.
47. [1997] ICR 1073 at 1088.

in tort, thereby invoking the *Caparo* criteria to determine the extent of an employer's contractual duties.[48] In fact, this assumption is not without contention, although no hint of this contention is offered by Evans LJ. Neither *Walker*[49] nor *Johnstone*[50] applied *Caparo*[51] even though both were suits against public authorities. By contrast, in *White v Chief Constable of South Yorkshire*[52] in which the House of Lords dismissed the claims of police officers who sued their chief constable for psychiatric injury suffered consequent to their involvement in the Hillsborough football disaster, their Lordships were adamant that the scope of an employer's contractual duty was co-terminous with tort, at least in so far as it pertained to mental injury suffered from witnessing physical injury to another.[53] *Walker* was expressly distinguished by Lord Hoffman on the grounds that the complainant in that case was not a secondary victim. It is not clear therefore to what extent the ruling in *White* affects the development of employer liability for workplace stress. More importantly, the whole issue reveals how Evans LJ manoeuvred Ms Waters' claim into a legal context where it was easier to deny.

The end result of all this doctrinal negotiation was the dismissal of Ms Waters' appeal, Evans LJ effectively concluding that where a policewoman is raped by one colleague and then seriously and persistently harassed by others, where the response of senior police officers is, at best, to do nothing, and, at worst, to join in, public policy *requires* that such conduct be judicially ignored and the glaring injustice at the heart of it left unredressed.

Ms Waters appealed to the House of Lords.

3 The House of Lords

In the House of Lords, Ms Waters appeal was finally *allowed*, and the striking-out set aside, Lord Slynn observing: 'this is not a case which plainly and obviously must fail.'[54] Their Lordships only heard the tort claim, and began by making it clear that Ms Waters' case would stand or fall on negligence.[55] So their main focus of attention was on whether or not it could be argued that the Commissioner owed Ms Waters a personal duty to guard against the risk of foreseeable mental injury to her.

Given the expansion of employer liability for stress-related claims since the Court of Appeal decision in 1997, their Lordships were not difficult to convince

48. [1997] ICR 1073 at 1088.
49. *Walker v Northumberland County Council* [1995] ICR 702.
50. *Johnstone v Bloomesbury Area Health Authority* [1992] QB 332.
51. *Caparo Industries plc v Dickman* [1990] 2 AC 605, HL.
52. [1999] 2 AC 455.
53. [1999] 2 AC 455. See per Lord Goff at 483; per Lord Steyn at 497; and per Lord Hoffman at 505.
54. [2000] 1 WLR 1607 at 1614, HL per Lord Slynn.
55. [2000] 1 WLR 1607, HL. Like the courts before them, their Lordships acknowledged that the Commissioner was not technically an employer, but had little difficulty in holding that his position was sufficiently analogous to warrant him being treated as such (Lord Slynn at 1610; Lord Hutton at 1616). Moreover, Lord Hutton was explicit that the scope of any implied contractual duty on an employer to prevent foreseeable mental injury to employees was also subject to the rules in tort (at 1616, citing *White v Chief Constable of South Yorkshire* [1999] 2 AC 455).

that the scope of an employer's duty to provide a safe system of work might well extend to foreseeable psychiatric as well as physical harm.[56] This left the question of whether a duty of care was precluded by virtue of the public policy arguments cited in the Court of Appeal.[57] Their Lordships thought *not*, distinguishing both *Hill* and *Calveley* on the grounds that the considerations applying there did not necessarily govern here.[58]

Hill, if you recall, concerned the risk of harm to members of the public occasioned by badly conducted criminal investigations; *Calveley* addressed the potential harm to suspects arising from shoddy criminal or internal investigations. While Ms Waters' claim included elements of both these cases, her allegations of bullying by co-employees and senior officers' failure to intervene extended well beyond them. As Lord Hutton remarked:

> 'In my opinion, the decisions in *Calveley* and *Hill* are distinguishable ... This is not a case in which the plaintiff's allegations relate only to negligence by the police in the investigation of an offence. As an important part of her case, she complains of harassment and victimisation after she had made an allegation of rape against a fellow officer, and I consider that the fact the alleged harassment and victimisation were triggered by the allegation of the offence does not bring that complaint within the ambit of the type of claim where the House held that considerations of public policy exclude the existence of a duty of care.'[59]

In other words, the public policy arguments relied upon by the Court of Appeal were *not* necessarily fatal to Ms Waters' claim, which should *not*, therefore, have been struck out.

How did the House of Lords come to a conclusion that had so eluded the lower courts? Well, one reason, of course, is that they are the House of Lords. As the highest court of the land they are not as hidebound by precedent, being free in appropriate circumstances to extend the law – albeit incrementally and with due respect to the existing doctrinal framework. This 'creative/legislative' dimension, although not particularly evident in the judgments, was, according to Ms Waters' solicitor, apparent in the proceedings, where their Lordships adopted a much more open and investigative stance than the lower courts. A second distinguishing feature is the changing legal landscape during the long period in which Ms Waters' litigation was conducted. In 1991, when she first instituted a claim, sexual harassment was in its legal infancy and workplace bullying as a legal harm had barely been conceived. By the time Ms Waters' case reached the House of Lords, subsequent claims not dissimilar to hers – including stress claims against the police – were beginning to bear legal fruit.

56. [2000] 1 WLR 1607, HL. Interestingly, both Lord Slynn (at 1611) and Lord Hutton (at 1616) characterise Ms Waters' claim as one of 'bullying', a term which, by 2000, had entered and taken solid roots in legal vocabulary.

57. Like the Court of Appeal, their Lordships were not enthusiastic about the vicarious liability claim. They did, however, show more flexibility in recognising that the plaintiff could make a claim based on the *cumulative* effect of individual acts rather than having to rely on establishing a connection between each individual act and the harm she allegedly sustained.

58. Lord Slynn emphasised that Ms Waters' claims went far further than *Hill* and *Calveley* and, therefore, could not be contained by them.

59. [2000] 1 WLR 1607 at 1618.

Finally, and perhaps most significantly, when the House of Lords heard Ms Waters' case, the law and discourse of human rights had just made a resoundingly successful entry into the English legal arena with the enactment of the Human Rights Act 1998. While human rights arguments are not formally made in *Waters*, it is clear that they play a role. In particular, between the Court of Appeal and House of Lords decisions in *Waters*, a 1998 decision of the European Court of Human Rights, *Osman v UK*,[60] had held that the conferral of 'blanket immunities' on the police in relation to the investigation and suppression of crime could violate art 6(1) of the European Convention on Human Rights, which entitles individuals to 'a fair and public hearing' in a court of law.[61] Viewed in retrospect, the sweeping application of public policy arguments by the Court of Appeal in *Waters* risked violating human rights and called for a much more cautious and considered application of policy arguments in the House of Lords.[62]

Hence, in the judgment of Lord Hutton, for the first time concern is expressed about the public policy implications of ignoring Ms Waters' claim:

> 'If the facts alleged by the plaintiff in her statement of claim are true they disclose a situation of gravity which should give rise to serious concern that a young policewoman should be treated in the way she alleges and that no adequate steps were taken by senior officers to protect her ...'[63]

Later on, he continues:

> 'If the present case goes to trial the preparation of the defence will take up much time and effort on the part of police officers, but this is a consequence faced by defendants in many actions and I do not consider that it is a consideration of sufficient potency to counterbalance the plaintiff's claim that she is entitled to have a remedy for a serious wrong. Moreover, if the plaintiff succeeds at the trial in proving in whole or substantial part the truth of her allegation ... such proof would reveal a serious state of affairs in the Metropolitan police. If such a state of affairs exists I consider that it is in the public interest to seek to ensure that it does not continue ...'[64]

I, for one, would agree. However, I cannot help but wonder *why* it took so long and so much effort on Ms Waters' part for a judge to recognise and articulate this important and glaringly self-evident consideration. The police, after all,

60. Above, n 43.

61. The relevant part of art 6(1) of the European Convention on Human Rights reads: 'In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.' For a critical account of the European Court jurisprudence in relation to art 6(1), see Gearty, n 45 above.

62. See eg the comments of Lord Slynn [2000] 1 WLR 1607 at 1613–1614: 'It is very important to bear in mind what was said in *X (Minors) v Bedfordshire County Council* [1995] 2 AC 644; in *Barrett v Enfield London Borough Council* [1999] 3 WLR 79 and in *W v Essex County Council* [2000] 2 WLR 601 as to the need for caution in striking out on the basis of assumed fact in an area where the law is developing as it is in negligence in relation to public authorities if not specifically in relation to the police.'

63. [2000] 1 WLR 1607 at 1615.

64. [2000] 1 WLR 1607 at 1619.

are supposed to fight crime, investigate rape, interview rape victims and compile evidence for the prosecution. How could we not be concerned by an allegation that they not only ignore rape victims, but punish them for the temerity of complaining?

REVISITING *WATERS* FROM A FEMINIST PERSPECTIVE

It is time to inject a little feminism into proceedings. Not that the account to date has been wholly feminism-free. As soon as you cease to view W*aters v Metropolitan Police Commissioner* as a set of legal problems and start to confront the personal tragedy that lies behind it, you are in the realms of feminism or, at least, you are in a place where you can begin to see *through* law instead of *seeing* through law.

What do I mean by feminism for these purposes? Well, I would not even begin to offer a definition. Feminism in the academy has many faces; it draws on diverse intellectual traditions; it crosses disciplines (it has even penetrated the nether reaches of the natural sciences). Moreover, it is consonant with a range of different, sometimes conflicting, positions. So the feminism I am offering you here is a personal version; it is a perspective that draws mainly on my background, my ideals, my politics, my sense of justice. More importantly, it is a perspective that I find works well with students. It encourages them to interrogate their own preconceived ideas; it induces a healthy scepticism in relation to positions they have intuitively reached; and it teaches them that reliance on 'common sense' is too often simply an excuse for not thinking carefully.

The notion of feminism I adopt is characterised by three broad features.[65] First, it is a perspective that hunts out the *gender* dimension so often lying undetected at the heart of a legal issue. Obviously then, it takes issue with any gender-neutral presentation of a case like *Waters*. Secondly, it is an approach that is *woman-centred*;[66] it takes women from the legal wings and places them, their needs and aspirations on the legal centre-stage. How does the *Waters* case look from the perspective of women's needs and aspirations and what can we learn from seeing law from such a point of view? Thirdly, the approach I am adopting is inescapably normative: it invokes particular values and principles, such as sexual equality, social justice, individual autonomy and self-realisation, and considers law in the light of them. What weight, if any, do the courts in *Waters* give to these concerns? Do other judicial concerns compete with or even eclipse those I identify?

The gender dimension

First, is there a gender dimension to the *Waters* case? Of course there is. It positively wreaks of the havoc wrought by masculinity under threat. It is also a case that exemplifies, *par excellence*, the reasons why many people – but

65. For a full development of my position here, see J Conaghan 'Reassessing the Feminist Theoretical Project in Law' (2000) 27 JLS at 351–385.

66. The difficulties that anti-essentialism poses for women-centred approaches are fully discussed by Conaghan, n 65 above, at 363–374.

particularly women who are raped – continue to distrust the police. *Waters* is an emblematic example of law's common correspondence with a male point of view and its consequent inadequacy in the face of harms typically suffered by women.[67]

Yet this gender dimension is barely glimpsed in the judgments. Indeed, one might be forgiven for thinking that the sex of the parties had no bearing on what allegedly occurred. The sex discrimination claim failed after all, while the argument that was successful – or at least deemed not yet *un*successful – presented events in the gender-neutral and highly traditional terms of an accident at work.

Does that mean that what happened to Ms Waters was *not* sex discrimination? Well, yes and no. Clearly, the original IT application was drafted too narrowly, confining the claim to victimisation, rather than making a more open-ended discrimination claim based on sexual harassment. But Ms Waters drafted the application herself because legal aid was (and still is) unavailable for IT proceedings, so she had little advice on how best to frame her claim.

However, even if she had had the full benefits of a sharp lawyer, she might still not have succeeded in establishing sex discrimination. There are two reasons for this. First, her claim would essentially have been one of sexual harassment, and at the time she went to law – in 1991 – the case law on sexual harassment as sex discrimination was in its early stages.[68] Secondly, and relatedly, to succeed, Ms Waters would have had to show that she was treated less favourably because she was a woman. The Commissioner could conceivably respond that if she was harassed, it was not because she was a woman but because she had broken a workplace taboo by informing on a fellow officer. A man who behaved that way, the Commissioner might argue, would be similarly treated. The point is that SDA 1975 does not make it unlawful to harass a woman if a man, similarly situated, would be harassed as well.

Now, we might well protest: *but she was reporting a rape*! Surely this must be sex discrimination? Well, if we were to put the question as follows: did Ms Waters' sex play a large part in determining what happened to her? The answer is a resounding *yes*. Does that mean she was discriminated against contrary to SDA 1975? Well, *I* think so, but I can see that the argument is not unproblematic.

What all this points to is the limits of our concept of sex discrimination and our over-reliance upon it to solve the problems of gender inequality in the workplace. SDA 1975 was of little use to Ms Waters. More importantly, its failings allowed the judges to ignore the gender dimension to the claims she was making as well as the gender implications of finding against her. Only in the House of Lords – in what is by far the most sympathetic of all the judgments – does Lord Hutton signal gender as part of the legal narrative. Thus, while Lord Slynn, in the company of most of the other judges, refers to Ms Waters as 'the plaintiff' throughout, Lord Hutton begins by describing her as 'a young policewoman'

67. This draws on the notion of gendered harm. See further R West *Caring for Justice* (New York: New York University Press, 1997) ch 2.

68. See, in particular, *Porcelli v Strathclyde Regional Council* [1986] ICR 564, the first appellate decision to recognise sexual harassment as a violation of SDA 1975. The European Commission Recommendation on the protection of the dignity of men and women at work was not adopted until 1992 (OJ 1992 L 49/1).

making a complaint against a 'male colleague'.[69] It is as if, for the briefest of moments, we catch a glimpse of events as they must have appeared to Ms Waters. Lord Hutton, it seems, is the nearest we have in *Waters* to a woman-centred point of view.

A woman-centred approach

It is unsurprising then that only Lord Hutton seems to recognise that something very serious may have happened here. Phrases such as 'situation of gravity',[70] 'serious concern'[71] and 'serious state of affairs'[72] pepper Lord Hutton's judgment and are striking only because they are nowhere apparent in any of the other judgments, contemporaneous or prior. For the most part, the judges in the *Waters* case do not reflect at all on what may have occurred in the Metropolitan Police, preferring to dispose of the case by reference to legal arguments, for example, of statutory interpretation or public policy, that bypass such uncomfortable reflections.

Of particular note is the ease with which virtually all of the judges consign the alleged rape to the background of their considerations, a casual footnote to the main text. Consider Evans LJ in the Court of Appeal:

> 'They went out for a walk together and when they returned to her room, she alleges that he raped and buggered her. He plays no further part in the present story.'[73]

Or Lord Jauncey in the House of Lords, who observes of the police officers' negligent failure to deal with the rape complaint:

> 'I consider that the facts relating thereto may be relevant only as narrative.'[74]

Now there *is* a legal reason for burying the rape in the background of the main legal arguments. Once it had been determined – on an agreed set of facts – that the rape took place off-duty, there seemed to be no legal way to link it to a claim against the Metropolitan Police Commissioner. This is evident in the strategy of Ms Waters' counsel, who were as keen as the judges to focus on what happened *after* the rape, not the rape itself. The difficulty though with this strategy is that it inclines us to forget that this all started with a rape; and that whatever harm Ms Waters' subsequently sustained came on top of the terrible trauma of the rape itself. To put it another way, it is impossible fully to appreciate the extent of the harm Ms Waters' allegedly sustained unless we keep the rape very much in the frame. In this context, the legal characterisation of the harm as 'mental' or 'psychological' in character – again a characterisation that flows directly from Ms Waters' legal arguments[75] – is as ironic as it is misleading.

69. [2000] 1 WLR 1607 at 1615.
70. [2000] 1 WLR 1607 at 1615.
71. [2000] 1 WLR 1607 at 1615.
72. [2000] 1 WLR 1607 at 1619.
73. [1997] ICR 1073 at 1079.
74. [2000] 1 WLR 1607 at 1614.
75. Ie that an employer's duty of care in relation to employees encompasses harm of a non-physical origin.

Every time we come to consider what has emerged as the key legal issue – what is the appropriate extent of legal liability for negligently inflicted psychological harm – we are encouraged to forget that the nub of this case is an alleged act that was unequivocally physical.

There is another troubling dimension to the judges' approach to the rape allegation in *Waters*. Although they were never required to confront the seriousness of the rape or the police response to it; although they never stopped to consider how it might feel to be treated in the way that Ms Waters claims she was treated, there are signs that the judges *presumed* to know. Consider, for example, the comments of Lord Jauncey in the House of Lords, invoking the *Calveley* case to deny that a duty of care should extend to the failure to deal with the rape complaint. He observes:

> 'If no such duty is owed to suspect police officers [as *in Calveley*], then I cannot see how it should be owed to a police officer complainant who is likely to be *far less affected by the manner of the investigation*'[76] (emphasis added).

How does he *know* that? How does he know that suspects are more 'affected' by negligent police investigations than complainants? Surely, it will depend on the allegation, the context, the parties involved. I would hazard a guess that a suspect in – say – a fraud case might be less 'affected' by a poor investigation than a complainant in a rape case, but I accept that particular circumstances might require modification of that intuitive weighting. Come to think of it, the whole idea of equating the two situations abstractly, without regard to the particular context in which they are played out, is a nonsense;[77] but it is a nonsense that not only offers itself as legitimate legal argument, but presumes to know and to rate (on a scale of one to ten perhaps?) how it feels to be raped and have your rape ignored.

A not dissimilar perspective is evident in Waite LJ's concerns about the 'hurt' and 'danger' which 'vexatious claims of sex discrimination might occasion for potential defendants'. In the context of the grave allegations made in *Waters*, it is truly baffling that he should place such great emphasis on deterring merely irritating or frivolous claims. There seems to be a glaring lack of balance here: on the one hand, a strongly articulated concern to ensure that defendants are protected from those who might make unwarranted and legally unsustainable claims; on the other hand, a blindness to the competing concerns to which these predilections give rise, in particular, the concern to ensure that access to justice and substantive fairness are not compromised by over reliance on legal technicalities.

Aileen McColgan, commenting on the Court of Appeal judgment, has remarked: 'In his concern for the interests of those engaged in victimisation, Lord Justice Waite perhaps exhibited too little regard for the interests of the victimised.'[78] That is putting it mildly. The interests of the victimised are not

76. [2000] 1 WLR 1607 at 1614.

77. Actually, it is what Pierre Schlag calls 'an equivalency complex'. For a shrewd critique of this and other kinds of judicial legitimation techniques, see P Schlag *Laying Down the Law: Mysticism, Fetishism and the American Legal Mind* (New York: New York University Press, 1996) pp 152–159.

78. A McColgan *Discrimination Law: Text, Cases and Materials* (Oxford: Hart, 2000) p 134.

considered at all. What we have, then, is a legal determination that is wholly one-sided, what one might call a *defendant-centred* approach. It is only when matters are viewed from the perspective of the claimant – specifically from the perspective of a female claimant seeking to convince a male judiciary that she has suffered serious harm – that the judge's partiality is fully exposed. A woman-centred approach thus operates here as an effective critical technique for scrutinising and challenging law's claims to neutrality and impartiality. At the same time, it initiates an agenda in which law is called upon to take seriously the needs and concerns of women.

In pursuit of (feminist) norms

So let us take them seriously and consider what is at stake here. I would say a lot. First, there is the whole issue of police workplace culture. This does not sound like a good working environment. Indeed, if the facts are true, it is an environment where bullying is rampant, management is ineffectual and sexism is entrenched. Is this the picture of the equal opportunities workplace we want to promote post-MacPherson?[79] Surely tolerance of this kind of intimidatory regime will adversely affect the recruitment and retention of women and minority police officers?[80]

A related concern is health and safety. Occupational stress in the police is a serious and well-documented problem,[81] and studies suggest that its greater prevalence among women and ethnic minority police officers is related to their exposure to prejudice, discrimination and harassment.[82] Levels of sexual harassment within the police remain high, suggesting that Ms Waters' experiences are all too common.[83] Why tolerate practices which, offensiveness aside, are dangerous to the health and safety of women police officers?

A final consideration relates to the police role as crime-fighters. If *Waters* is illustrative of police attitudes, women who are raped have serious grounds for concern. It may be tempting to dismiss the case as 'one-off' – just an *individual* case – as Jeremy Paxman observed – but there is reason to believe that it may be the mere tip of a rape-tolerant iceberg. Recent figures reveal that just over 7% of currently reported rapes result in conviction.[84] This is a woefully small proportion, requiring us to conclude either that the vast majority of women who report rape are liars or that a significant number of men get away with it. One of the factors implicated in the low conviction rate is *insensitivity* in the handling

79. See *The Stephen Lawrence Inquiry. Report of an Inquiry by Sir William MacPherson of Cluny* (Cm 4262-I, February 1999) holding that the Metropolitan Police Service was 'institutionally racist' (para 6.39). See also Recommendations 64–66 on the recruitment and retention of minority police officers.

80. The only judge to see this as an issue was, of course, Lord Hutton. See his comments at [2000] 1 WLR 1607 at 1619–1620.

81. See, in particular, J Brown and E Campbell *Stress and Policing: Sources and Strategies* (Chichester: John Wiley, 1994).

82. Both within the police force and from the public at large; see Brown and Campbell, n 81 above, p 168.

83. J Brown and F Heidensohn *Gender and Policing* (Basingstoke: Macmillan, 2000).

84. HMCPSI, *A Report on the Joint Inspection into the Investigation and Prosecution of Cases involving Allegations of Rape* (April 2002).

of rape complaints by, among others, police officers.[85] There is compelling evidence then to suggest that police attitudes to rape hinder the criminal justice process. None of this registers with the judges in *Waters*. Not one of them recognises – let alone considers – the implications, for women and the general public, of turning a blind eye to serious crime among our crime fighters.

But should they? Surely, judges should just apply law, not engage in ethical or normative or political decision-making? My argument is that to apply law is precisely to engage in ethical, normative or political decision-making while simultaneously denying that you are doing it. The reasoning of the judges in *Waters* is far from norm-free. They are very concerned to protect innocent defendants from unscrupulous claims by complainants; they are also openly protective of the police – for reasons which should not lightly be dismissed. Good policing is clearly not aided if the police are compelled to take endless steps to guard against the risk of liability as they go about the business of apprehending criminals. On the other hand, good policing is also undermined if the police themselves are criminals or cover up for criminals. It is not that the latter consideration should outweigh the former. It is that both deserve the courts' attention.

Interestingly, the judges in *Waters* do pay some heed to the principle of sex equality, or, more specifically, 'equality of opportunity', particularly in the discrimination claim where Ms Waters' counsel invokes it in support of a purposive interpretation of SDA 1975. While Judge Mummery in the EAT is fairly dismissive, Waite LJ in the Court of Appeal purports to give the principle due deference, stating at the outset that it is 'common ground'[86] that the legislation should be interpreted in line with its declared purposes of outlawing sex discrimination and promoting equality of opportunity. Amazingly, however, he then proceeds to pray those principles in aid of a narrow, restrictive interpretation of the Act, arguing that the wider interpretation put forward by Ms Waters will frustrate 'the valuable purpose of combating sex discrimination' by bringing the Act into 'disrepute'.[87] Can Lord Justice Waite really believe that this decision enhances the utility of law as a mechanism for combating sex discrimination; that women are better served by a legal regime where their bona fide complaints about discrimination open them up to the possibility of unprotected victimisation? In particular, if we look at the issue concretely, rather than in terms of an abstract consideration of the evils which accompany frivolous tribunal applications, does this line of argument really *convince*?

CONCLUSION

The purpose of this paper has been to offer a partial account of why Eileen Waters' claim met with such difficulties in the context of an apparent legal and social tendency to expand rather than contract categories of harm. It is an account

85. HMCPSI, n 84 above. There is evidence too of particular problems in this regard in the Metropolitan Police. See 'Is the Met Failing Women over Rape and Domestic Violence?' *The Times*, 13 November 2001, followed by a byline two weeks later that 'The Met is Making Rape Cases a Priority' *The Times*, 27 November 2001.
86. [1997] ICR 1073 at 1091.
87. [1997] ICR 1073 at 1097.

which dwells closely on the values and outlook of those who took the decisions, their easy identification with the defendants highlighted in stark contrast to their patent lack of sympathy with the claimant. It is an account, too, which cannot be gleaned from conventional approaches to law; indeed, is likely to be obscured by them. And yet it resonates; it strikes a chord; it opens a door and, by doing so, I hope that it shows us how to see *through* law while, at the same time, *seeing* through law.

I would like to end this paper on a personal, maybe even sentimental, note. I want to explain what attracted me to Eileen Waters' case. It was not just that it comprised a series of deliciously complex doctrinal puzzles – although I confess that did attract me; it was not even that it was a high profile, major-league tort case. In fact, it is not. Despite its House of Lords status, *Waters* has received astonishingly little academic attention, so little in fact as to whet my perverse appetite for that which is popularly disregarded. Nor is it simply that Eileen Waters is a woman alleging a harm typically suffered by women.

No, the main reason for my attraction to the *Waters* case was the sheer inequality of the battle she chose to fight. One young, ostracised woman up against the whole of the Metropolitan Police Force, not once, not twice, but through five separate hearings over ten long years, and *still* she continues. I could not help but admire her persistence, her stamina, her stubborn disregard of appalling odds.

People like Eileen Waters rarely gain themselves. Indeed, I wonder whether, even if every word she recounts is true, she can now win, faced as she is with the daunting prospect of proving events that took place between 11 and 14 years ago. And yet, win or lose, Eileen Waters has played a small, unsung part in paving the way for others to benefit from a system of justice that to date has denied her. The very least we can do is take her concerns seriously, examine the evidence, hear her story. I hope that one day soon, a court will.