Book Review

Brian Sloan, *Informal Carers and Private Law,* Hart Publishing: Oxford, 2013, 260pp, HB £70.00 ISBN 978-1-84946-281-5

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With the impending crisis in care the tendency has been to consider what care services ought to be provided by the public sector and/or outsourced to the private sector, and how to appropriately regulate such providers. Consequently the literature has focused on a mixture of social policy and regulatory analysis. By contrast, in *Informal Carers and Private Law* Brian Sloan considers what private law remedies might be available to informal carers, that is, those who provide unpaid support to family or friends who require support due to old age, disability or some other reason. By definition, the informal carers Sloan is concerned with haven't formalised their relationship contractually – and given informal care often arises in the familial context one wouldn't expect people to formalise their relationship. On the other hand, promises of recompense and reward are sometimes made, care-recipients are receiving services that are otherwise costly, and care-givers give up much of their time and might come to expect some benefit – in particular what Sloan calls 'pure carers' who are not close relatives or the sexual partner of the care-recipient (who we might expect to give care for free), but rather friends giving up much of their life to give care outside of formal arrangements.

Sloan sets out three scenarios which he will examine through a variety of private law remedies: where 'the care-recipient indicates in some way that the carer will receive some property or other benefit in return for his efforts, often on the death of the care recipient, and for some reason the relevant benefit fails to materialise' (pp.20-21); where there is 'no indication of a benefit for the carer' (p.21); and 'where a benefit (promised or not) is in fact transferred by a grateful care recipient to her carer but the transfer is later challenged by the care recipient or (more likely) her estate' (p.21). The majority of the book concerns the first two scenarios, where the carer doesn't receive any benefit. In fact much of the discussion is oriented towards the situation where the care-recipient has died and hasn't given the carer any benefit either during her lifetime or in her will. The prominence of testamentary relief is hardly surprising given that care-recipients may not have the means during their lifetime to provide a benefit and in many cases the benefit is property or some portion thereof. The first scenario broadly maps on to what Sloan – drawing on the language of equity - calls 'unconscionability of dealing', where there has been a promise or other indication that the carer would receive a benefit but that benefit isn't forthcoming. This is in contrast to what Sloan calls 'unconscionability of outcome', which concerns undesirable outcomes in the absence of any promise of any benefit to the carer corrected by way of a redistribution of wealth. The core question

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for Sloan is 'whether private law remedies for carers do, can and should, address unconscionability of dealing or unconscionability of outcome' (p.21).

Chapters 2 to 4 deal with unconscionability of dealing, chapters 5 and 6 deal with unconscionability of outcome, and chapter 7 deals with the third scenario (which might be understood in terms of unconscionability of dealing, but unconscionability on the part of the carer rather than the care-recipient). In chapter 2 Sloan considers what property claims might be available to carers through proprietary estoppel and, to a lesser degree, constructive trusts. Proprietary estoppel can provide remedies to carers where there is a promise or other representation giving rise to a belief that they will obtain an interest in property, but it has certain limitations: it seems to be limited to property promises; moreover the carer must then continue to act to their detriment because of the representation, and not for some other reason (although it doesn't have to be the sole reason for acting); and it also gives rise to certain policy concerns regarding circumvention of formality requirements for disposition of interests in land and testamentary dispositions. The latter point is taken up in chapter 3 where Sloan considers New Zealand's Law Reform (Testamentary Promises) Act 1949, which he explains 'facilitates the granting of discretionary remedies in respect of testamentary promises relating to work or services' (p.91). Here Sloan sets out the requirements for making a claim under the Act, and concludes that the Act 'successfully circumvents many of the most serious difficulties presented by the modern law of estoppel in England as far as the informal carer is concerned' (p.119). Chapter 4 discusses unjust enrichment and the possibility of obtaining a monetary remedy for the provision of services. Sloan notes that although the provision of care could be analysed as an 'enrichment', a particular difficulty facing a carer in establishing such a claim is determining what the 'unjust factor' is, particularly as the carer could be conceived as a domestic risk-taker who had voluntarily assumed caring responsibilities (pp.124-125).

Turning to unconscionability of outcome, in chapters 5 and 6 Sloan considers the availability of provision on death, under the Inheritance (Provision for Family and Dependents) Act 1975, and a brief consideration of the possibility of *inter vivos* provision following the breakdown of caring relationships by analogy with the law relating to relationship breakdown for both spouses and cohabitants. Regarding provision on death, Sloan explains that informal carers who are family members will generally be eligible for provision under the 1975 Act whereas 'pure carers' face difficulties in establishing eligibility. Sloan provides a thorough engagement with the literature on the purposes of the law of succession, and the justifications for interfering with testamentary freedom, and concludes that 'since society is content to interfere with testamentary freedom to provide for certain individuals with a connection to the deceased, "pure" carers should in principle be eligible for discretionary provision from a care recipient's estate' (p.203). Chapter 7 reverses the discussion and looks at the protection of care-recipients from the undue influence of carers when making gifts. What's interesting in this chapter is that Sloan considers how undue influence may actually be a 'blockage' to providing carers with benefits in being overly officious in

setting aside transactions. As he explains, '[t]he fetter of undue influence is often a beneficial one given the inherent vulnerability of the care recipient. On the other hand, it should not be forgotten that the doctrine can override the autonomy of a legally competent care recipient, effectively through the actions of her estate' (p.238). It's difficult to see how undue influence is overriding autonomy though, as the point of undue influence is to undo transactions that haven't met equity's standards for assessing autonomy.

In the final chapter Sloan turns his focus to the normative aspect of his distinction between unconscionability of dealing and unconscionability of outcome. The problem, as Sloan conceives it, is that while remedying unconscionability of dealing is generally seen as unproblematic as promises have been made and expectations created such that the carer-giver is less of a risk-taker, unconscionability of outcome entails remedialism and distributive justice such that it affects the autonomy of the care-recipient – particularly their testamentary freedom to choose not to give any benefits - in circumstances where the carer can be conceived as a risk-taker. Sloan concludes that although unconscionability of dealing is effectively dealt with by proprietary estoppel, the uncertainty of such principles coupled with the policy concerns regarding circumventing formality requirements suggest that the UK should adopt a statutory remedy similar to New Zealand (p.240). An approach solely concerned with unconscionability of dealing though would exclude a large number of carers, ie those to whom no promises or assurances have been made, so Sloan adds that despite political concerns with distributive justice 'English law should do more to recognise the carer as a category of applicant in his own right' under the Inheritance (Provision for Family and Dependants) Act 1975 so as to deal with unconscionability of outcome (p.242).

Informal Carers and Private Law occupies a difficult territory between doctrinal legal analysis and social policy. While it provides an interesting and extensive analysis of the possible availability of a variety of private law claims, the normative aspects of the discussion beg a number of questions, not least why extend private law redress for informal carers, as Sloan concludes? Although Sloan at one point sets aside issues of social policy concerning the balance between formal state provision and informal private provision of care, distinguishing them from the legal issues with which he is concerned (p.19), he also explicitly includes the normative question of whether private law remedies should address unconscionability of dealing and unconscionability of outcome. In doing so part of the consideration must be the excluded social policy arguments: in part the justification for intervention will shape the nature, form and measure of any relief that ought to be given, so consideration of the normative foundations of relief would seem necessary; in part the justification for private law redress depends on the availability (or lack thereof) of State provision. In the first chapter Sloan sets out the social policy context of his study and the arguments for private law support for carers. Following a brief discussion of the arguments in favour of State support for carers and the existing framework of State support, Sloan considers a variety of justifications for private law remedies to recognise informal care, including the need

to reduce the burden on the State (pp.12-13); the fact that care gives rise not only to a social debt but also to individual debts that should be repaid[1] (p.15); that giving too much credence to altruism doesn't account for the modern economy-driven world we live in (p.16); that simply treating care as inherent to familial relationships might lead to an under-appreciation of informal care by society (p.16); questioning just how voluntary informal care really is (p.17); and in the conclusion Sloan puts more emphasis on the need to encourage informal care (p.239). However, he doesn't reach any concrete conclusion. Instead he states that private law remedies may sometimes be necessary (presumably due to a lack of State provision or compensation) (p.18); an expectation of remuneration is sometimes reasonable, as is the idea that the care-recipient meet that expectation (p.18); and, from a pragmatic perspective, remedies are in fact being awarded and denied (p.20). The final sentence however goes much further: '[T]he strain under which societal resources will be placed and the need for justice for informal carers render it vital at least seriously to consider the specific recognition of such carers within private law, *even in the absence of unconscionable dealing and even for entirely altruistic carers*' (pp.245-246, my emphasis). Here we have two clear but questionable justifications. First 'the need for justice', even for altruistic informal carers, but it isn't clear what the demand for 'justice' is. After all, to many informal carers the very suggestion of payment can be regarded as offensive. Secondly, private law should be used to take some of the burden away from State provision. But this returns us to the very question of social policy which Sloan wants to bracket, and highlights the link in political rationality between extending private redress and the dismantling of the welfare state underpinned by the discourse of Big Society, with which carers have been associated (p.3). The politics underpinning *Informal Carers and Private Law* is very much the Coalition's politics of austerity: an extension of private redress is necessary because State provision must be cut back. Without the detailed consideration of the relationship between justifications for, and extension of, private law redress and State support, what we are left with is a thinly articulated assumption that sometimes informal carers (but who, when and why?) *should* obtain some sort of redress (but in what form and measure?), and that in fact some informal carers *can* and *do* get some redress. But if they are to get a remedy, at least in terms of proprietary estoppel, constructive trusts and unjust enrichment, it is not *because* they are carers as such but because something happened that would in any case give rise to a private law remedy.

One of the most striking aspects of *Informal Carers and Private Law* is the pervasiveness of the language and doctrines of equity: from Sloan's adoption of the language of unconscionability to the analysis of proprietary estoppel, constructive trusts, undue influence and unconscionable bargain, equity permeates this text. It perhaps shouldn't be surprising, given equity developed so many private law remedies, but more pertinently because in many respects equity is the jurisdiction of care *par excellence*, ranging from care for the King's conscience to an historical and pastoral concern with the vulnerable and exploited, with

[1] Drawing on the work of Martha Fineman, *The Autonomy Myth: A Theory of Dependency* (New York, New Press, 2004).

'infants, lunatics and married women'.[2] This view of equity has been much criticised, from both liberal-economic and feminist perspectives. The liberal-economic criticism is that far from demonstrating an altruistic attitude, 'equity's doctrines are more easily explained in efficiency terms' and underpinned by the self-interested individual.[3] More important for present purposes though are the criticisms in the feminist literature, for example that although equity may have provided some modest protection to married women, equity also subverted those rights, and that equitable remedies reinforce a number of stereotypes in its construction of female subjectivity.[4] In this way equity constructs Woman as vulnerable, and consequently in need of care (and sometimes as 'homemaker' and therefore in need of protection against the Man of Property) – along with those others operating under a 'special disability', such as infants and lunatics. What's all this got to do with Sloan's book? After all, with the exception of the chapter on undue influence, here equity isn't intervening due to the care-*recipient's* vulnerability but rather to provide remedies for the *informal carer*, that is equity is caring for the carer. However it is the way in which Sloan assesses the availability of private law remedies for carers by analogy with the parties in the equitable cases discussed that is important. Due to the poverty of 'care' cases in proprietary estoppel and constructive trust Sloan draws on the cases he considers provide the closest fit, as he does when he analogises informal carers to the position of cohabitants in considering *inter vivos* relief for breakdown of caring relationships. In so doing, it is necessary to conceive the carer as in some way vulnerable and the care-recipient as in some way exploitative.[5] It is also problematic because a number of the cases Sloan draws on are women's claims to redress, often in the context of cohabitation, so Sloan is reasoning by analogy from a particular form of subjectivity, that has been critiqued in feminist literature, to the informal carer – in this sense, and in spite of Sloan's choice to refer to the carer in the male gender and the care-recipient in the female, the informal carer's work resembles women's work and in this way channels a particular strand of discourse emanating from feminist claims concerning the recognition of informal and household labour without the necessary political and theoretical consideration of the relationship between the claims and concerns of women and informal carers.[6] It's not that analogies shouldn't be drawn – it's unavoidable and the very nature of legal argument – but it is important to recognise the politics of subjectivity involved in discussing informal carers' claims for redress through the idiom and doctrines of equity.[7]

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[2] Elizabeth Stone, 'Infants, Lunatics and Married Women: Equitable Protection in *Garcia v National Australia Bank*' (1999) 62 *Modern Law Review* 604.

[3] Anthony Duggan, 'Is Equity Efficient?' (1997) 113 *Law Quarterly Review* 601.

[4] See Rosemary Auchmuty, 'The Fiction of Equity' and Maggie Conway, 'Equity's Darling?', both in Susan Scott-Hunt and Hilary Lim (eds), *Feminist Perspectives on Equity and Trusts* (London: Cavendish, 2001). On stereotypes and the construction of subjectivity in equitable remedies see Lisa Sarmas, 'Story Telling and the Law: A Case Study of *Louth v Diprose*' (1993-1994) 19 *Melbourne University Law Review* 701.

[5] On the vulnerability/exploitation dichotomy, see Lisa Sarmas, 'Story Telling and the Law: A Case Study of *Louth v Diprose*' (1993-1994) 19 *Melbourne University Law Review* 701.

[6] For a critique of a similar move in the context of Italian thought on immaterial labour see Donatella Alessandrini, 'Immaterial Labour and Alternative Valorisation Processes in Italian Feminist Debates: (Re)Exploring the "Commons" of Re-production' (2011) 1(2) *feminists@law*.

[7] For a feminist engagement with questions of care and subjectivity, particularly in the context of disability, see Kate Bedford, *Harmonizing Global Care Policy? Care and the Commission on the Status on Women* (UN Research Institute for Social Development: Gender and Development Programme Paper No 7, February 2010), pp. 18-21.

Despite its problems, though, *Informal Carers and Private Law* carries important potential: it provides a way of thinking about informal care issues, and consequently social policy, through the categories and concepts of private law. For example, in the chapter on proprietary estoppel the concepts of 'expectation' and 'detrimental reliance' provided useful frames through which to think how informal care is conceived, experienced and enacted. Likewise in the chapter on unjust enrichment the discussion of 'enrichment' requires thought about the form and measure of the enrichment, which touches on the difficult but underexplored question of the measure of value,[8] while the discussion of 'unjust factors' gets right to the heart of the discussion as to when a remedy reversing any enrichment will be awarded – the different 'unjust factors' themselves provide a possible language for thinking these justifications, reversing the usual priority of moralistic justifications being translated into legal forms. So perhaps *Informal Carers and Private Law* should be read not as a dry, doctrinal analysis of the availability of certain private law remedies in the context of informal care or an argument for the extension of private redress, but rather an example of how private law can provide language and concepts for political thought. In this sense, *Informal Carers and Private Law* can be read as a contribution to jurisprudence.

[8] On the problem of measure, see Lisa Adkins, 'Feminism After Measure' (2009) 10 *Feminist Theory* 323 and Lisa Adkins and Celia Lury (eds), *Measure and Value* (Wiley-Blackwell, 2012).