A WOMAN OF HER WORD

A feminist analysis of contract interpretation principles

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Introduction

> Feminist legal theory is not the law with the hard questions taken out. It is the hard questions. It makes my head hurt. It makes my students' heads hurt. It makes it harder for them to fit but it makes it easier for them to understand why they do not.[1]

When one thinks of feminist jurisprudence, one may not think of contract law as an area ripe for critique. Although there are contracts that directly involve women's interests, such as surrogacy or relationship property contracts,[2] most contracts, even if they involve *women,* do not involve *women's interests.* The law assumes women and men contract in the same way and for the same purposes. This dissertation will ask: is a feminist law of contract possible? How does it compare to the current state of the law?

This dissertation will explore these questions by asking whether the trends in the law of contract interpretation principles for written terms are consistent with a feminist approach. This dissertation poses a critique within contract law, with the aim of reforming it, as compared to a critique aimed at abolishing contract law. It will argue the overall shifts in the law are consistent with a feminist approach. However, because the shifts were not motivated by feminism, there are incongruencies between the present state of the law and a feminist approach. These incongruencies are particularly seen in the operation of the reasonable man interpreting contracts.

This dissertation is structured as follows:

Chapter I outlines the value of posing a feminist critique of contract law to contract law and feminist jurisprudence.

Chapter II provides a framework for a feminist approach to contract law. It poses two feminist critiques. First, drawing from feminist critical legal studies, it poses a "default male" critique,[3]

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[1] Elisabeth McDonald "The Law of Contract and the Taking of Risks: Feminist Legal Theory and the Way It Is" (1993) 23 VUWLR 113 at 113-114.

[2] These types of contracts have been widely explored in the literature – see, for example, Gillian Hadfield "An Expressive Theory of Contract: From Feminist Dilemma to a Reconceptualization of Rational Choice in Contract Law" (1998) 146 U Pa L Rev 1235; Belinda Fehlberg and Bruce Smyth "Binding Prenuptial Agreements in Australia: The First Year" in Linda Mulcahy and Sally Wheeler (eds) *Feminist Perspectives on Contract Law* (Glasshouse Press, London, 2005) 125; Barbara Sullivan "It's All in the Contract: Rethinking Feminist Critiques of Contract" (2001) 18(2) LIC 112; Sharon Thompson "Feminist Relational Contract Theory: A New Model for Family Property Agreements" (2018) 45 J of Law and Society 617.

[3] This term comes from Caroline Criado Perez *Invisible Women: Exposing data bias in a world designed for men* (Chatto & Windus, London, 2019).

which argues contract law fails to be feminist where it allows judges to make gendered assumptions about the parties. Secondly, drawing from relational feminism, it poses an ethic of care critique.[4] This will argue contract law fails to be feminist where it unfairly prioritises the masculine ethic of justice over the feminine ethic of care.

Chapter III describes the trends in the law of contract interpretation. It argues the law shifted from textualism to contextualism in the 1990s[5] and has remained consistently contextualist since. It also argues the law has shifted towards admitting more types of evidence for the purpose of contract interpretation, including pre-contractual negotiations and post-contractual conduct.

Chapter IV assesses whether the shifts described in Chapter III are consistent with the critiques provided in Chapter II. It argues the shift to contextualism was necessary for the ethic of care critique, as it is impossible to reason with an ethic of care under textualism. The current law is inconsistent with the ethic of care because the reasonable man in contract law reasons with a masculine and untempered ethic of justice. The shift towards admitting more types of evidence is consistent with feminism because it displaces the default male by preventing the judge from making assumptions about the parties, but the law could still go further to be more consistent with the default male critique by admitting evidence of subjective intentions.

Chapter V assesses the implications of a feminist law of interpretation principles. It considers whether a feminist law of interpretation principles: (1) is beneficial for contract law; (2) fails to be "contract law" because it displaces the emphasis on parties' intentions; and (3) has implications for the legitimacy of the law. It also considers whether a critique that aims to reform rather than overhaul contract law can truly be said to be feminist.

[4] This concept comes from Carol Gilligan *In a Different Voice: Psychological Theory and Women's Development* (Harvard University Press, Cambridge (Mass), 1982).
[5] *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 (HL) [*ICS*].

I The Value of a Feminist Approach to Contract Interpretation Principles

A Introduction

> Feminist law reform advocacy offers the legal system two choices: live up to your promises, or be exposed as a naked system of power and domination. While we should not expect the imminent demise of an exposed system, neither should we lose an opportunity to point out that the emperor is inadequately clothed.[6]

Feminist jurisprudence aims to expose the masculine bias pervading the law.[7] It may be difficult for some to conceptualise the effect of masculine bias on contract interpretation principles,[8] and therefore some may question the value of a feminist critique. This chapter argues there is a risk the law is biased and a feminist critique *is* valuable to contract law and feminist jurisprudence.

B The Risk of Gender Bias in Contract Law

Although the law of contract interpretation principles is putatively objective and uses gender-neutral language such as "the reasonable person",[9] there is a risk gender-bias lurks behind this sterilised language.[10] There are two main reasons for this risk.

The first reason is that the history of contract law is sexist. Like most law, the origins of contract law were written by men, when women were excluded from the bench and the bar. Contract law also rendered women invisible through the doctrine of coverture, whereby married women could only contract as an agent of their husband, and only for "necessaries."[11] Women's legal

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[6] Christine A Littleton "In Search of a Feminist Jurisprudence" (1987) 10 Harv Women's LJ 1 at 5.

[7] Hilaire Barnett *Introduction to Feminist Jurisprudence* (Cavendish Publishing Ltd, London, 1998) at vii; Patricia Smith "Four themes in feminist legal theory: Difference, dominance, domesticity, and denial" in Martin P Holding and William A Edmundson (eds) *The Blackwell Guide to the Philosophy of Law and Legal Theory* (Blackwell, Oxford, 2005) 90 at 90; Regina Graycar "The Gender of Judgments: Some Reflections on Bias" (1998) 32 U Brit Colum L Rev 1 at 10.

[8] Keren gives the example of a judge, when told that she was doing her PhD on contract law and feminism, responded "Really? What do they even have to do with each other?": Hila Keren "Feminist and contract law" in Robin West and Cynthia G Bowman (eds) *Research Handbook on Feminist Jurisprudence* (Edward Elgar Publishing Ltd, Cheltenham, United Kingdom, 2019) 406 at 406.

[9] See, for example, *ICS*, above n 5, at 912-913.

[10] Compare: A letter sent from David Slawson, the chair of the contracts section of the Association of American Law Schools, to Mary Joe Frug cited in Mary Joe Frug "Rescuing Impossibility Doctrine: A Postmodern Feminist Analysis of Contract Law" (1992) 140 U Pa L Rev 1029 at 1030: "the male bias of our society […] has not had important consequences for contract law."

[11] Peter Goodrich "Gender and Contracts" in Anne Bottomley (ed) *Feminist Perspectives on the Foundational Subjects of Law* (Cavendish Publishing Ltd, London, 1996) 17 at 23-25; Sally Wheeler "Going Shopping" in Linda Mulcahy and Sally Wheeler (eds) *Feminist Perspectives on Contract Law* (Glasshouse Press, London, 2005) 21 at 26-27.

status was below "infants," who could at least contract for necessaries in their own name.[12] This was the law until 1884.[13] Whilst the law has changed since then, there is a risk the "deep structure of the law is blemished by its masculine past."[14]

The second reason for risk is that the law is influenced by the experiences and opinions of those who create and interpret it,[15] who are likely to be male. In Aotearoa New Zealand,[16] male judges outnumber female judges in the District Court,[17] High Court[18] and the Court of Appeal, with the last of these being 80% male.[19] Only the Supreme Court has an equal gender split,[20] and the Employment Court and Family Court are the only courts where women judges outnumber men.[21] Despite there being more female than male lawyers,[22] only 23% of Queen's Counsel and 34% of directors or partners are women.[23] The judiciary and the profession also underrepresent Māori, Pasifika and other ethnic minorities.[24] Where the judiciary is mostly male, the law, including contract law, is likely to employ masculine reasoning methods and work to benefit men.

It is necessary to change the gender make-up of the judiciary and the profession to achieve equality between the sexes. However, this cannot be the only solution to the problem. There is mixed scholarship on whether female judges make more feminist decisions.[25] Further, judges

[12] Goodrich, above n 11, at 23-25; Wheeler, above n 11, at 26-27.
[13] Married Women's Property Act 1884 (48 VICT 1884 No 10).
[14] Keren, above n 8, at 407.
[15] Helen Winkelmann "What Right Do We Have? Securing Judicial Legitimacy in Changing Times" (Dame Silvia Cartwright Address, 17 October 2019); Mayo Moran *Rethinking the Reasonable Person: An Egalitarian Reconstruction of the Objective Standard* (Oxford University Press, Oxford, 2003); Graycar, above n 7, at 14. See also Bertha Wilson "Will women judges really make a difference?" (1990) 28 Osgoode LJ 507.
[16] The numbers given within this section relating to the judiciary are estimates only – there is a lack of official information about how many judges identify with which genders. A survey has been commissioned, but as at writing, the results have not been released: Edward Gay "Chief Justice asks judges for information including ethnicity, gender and sexuality" *Stuff* (online ed, New Zealand, 15 October 2021).
[17] An estimated 61% of judges are male in the District Court: Mike White "Diversity badly lacking among New Zealand's judges" *Stuff* (online ed, New Zealand, 4 October 2020).
[18] The High Court is approximately 57% male: see White, above n 17.
[19] Ibid.
[20] Ibid.
[21] Ibid.
[22] With 52.5% of lawyers identifying as female in 2020: Geoff Adlam "Snapshot of the Profession 2020" (2020) 940 LawTalk 26 at 30. 2018 was the first year where there were more female lawyers than male lawyers: Geoff Adlam "Snapshot of the Profession" (2018) 915 LawTalk 43 at 43.
[23] Adlam "Snapshot of the Profession 2020", above n 22, at 30.
[24] Adlam "Snapshot of the Profession 2020", above n 22, at 31; White, above n 17.
[25] See Susan L Miller and Shana L Maier "Moving Beyond Numbers: What Female Judges Say about Different Judicial Voices" (2008) 29 Journal of Women, Politics & Policy 527; Shuai Wei "Gendered Justice in China: Victim-Offender Mediation as the "Different Voice" of Female Judges (2021) 65 Int'l J Offend Therapy & Comp Criminology 346. Compare with Rosemary Hunter "Can *feminist* judges make a difference?" (2008) 15 IJLP 7; Rosemary Hunter, Clare McGlynn and Erika Rackley "Feminist Judgments: An Introduction" in Rosemary

are bound by the rules of precedent, and must apply sexist laws even if they wish to change them. The law must be assessed for its gender implications and reformed.

C The Value of a Feminist Approach

Given there is a risk contract law is biased and only promotes the interests only of men, there is value to contract law and feminist jurisprudence of querying whether the law truly is biased.

1 Value to contract law

There are three main benefits of having this critique for contract law.[26]

First, the threat of gender bias jeopardises the legitimacy of contract law. The law purportedly applies to everyone equally, but if the law is proved to be biased, then this is untrue.[27] Contract law would fail on its own terms.

Secondly, assuming a feminist approach would be different from the status quo, a feminist critique of contract law is the first step towards providing an agenda for reform. This reform could improve contract law because it would reflect *all* of society, rather than just its fore*fathers.* There is a question as to whether reform would be beneficial, or whether "the principles and underlying premises [of contract law] are so firmly entrenched and so fundamentally sound that no good would be achieved by attempting to re-invent the wheel, even if the revised version did have a few more spokes on it."[28]

Some scholars, feminists included, have argued there is no "uniquely feminist" approach to contract law,[29] and a gendered critique does not provide value because the arguments could be made in other terms.[30] This argument cannot lead to the conclusion that the critique is not valuable, because it presupposes its conclusion. Even if the conclusions of a feminist critique are the same as the current law, there is still value in having the critique itself because the reasoning to get to those conclusions may be different. This is important because the law develops in accordance with its underlying principles, and if the underlying principles are

Hunter, Clare McGlynn and Erika Rackley (eds) *Feminist Judgments: From Theory to Practice* (Hart Publishing Ltd, Oxford, 2010) 3 at 6.

[26] This will be assessed in more detail in Chapter V.

[27] Barnett, above n 7, at vii; Smith, above n 7, at 90; Graycar, above n 7, at 10.

[28] Wilson, above n 15, at 515.

[29] Wilson, above n 15, at 515.

[30] See, for example, David R Dow "Law School Feminist Chic and Respect for Persons: Comments on Contract Theory and Feminism in the Flesh-Coloured Band Aid" (1991) 28 Hous L Rev 819 at 821.

inconsistent with feminism, the conclusions could change to be inconsistent with feminism. If the feminist critique reaches the same conclusions as another critique of contract law it is still valuable because the subordination of women in our society may be a key reason as to *why* this critique has not been adopted.[31]

Thirdly, a critique is still valuable even if does not result in any reform. As noted in the quote introducing this chapter, it is important to acknowledge the flaws and biases in our legal regime.

2 Value to feminist jurisprudence

Feminist jurisprudence also benefits from a critique of contract law because it demonstrates the full extent of the feminist challenge to the law.[32] Feminist critiques cannot be belittled as only applying to "women's issues" like reproduction, or within the private sphere.[33] Women, and others that do not fit the law's standards, are affected by all areas of the law. This is especially so with contract law, which is a foundational legal subject, as it not only affects those using it or having it used against them, but it informs many other legal areas, such as employment law or government policies.[34] A feminist expansion into these "masculine" areas creates a more robust and applicable theory that presents challenges that cannot be ignored by the profession.

D Conclusion

This chapter has argued there is a risk that contract law is biased because of the gendered make-up of the judiciary and its blemished past. A feminist critique of contract law is therefore beneficial to contract law because if the law is biased, this would have real implications for its

[31] Christine A Littleton "Reconstructing Sexual Equality" (1987) 75 CLR 1279 at 1321-1322; Robin West *Caring for Justice* (New York University Press, New York, 1997) at 20.
[32] This is not to pretend that this is the first piece to evaluate contract law from a feminist perspective – it is not. This is just to say that a feminist approach to commercial areas of law, like contract law, have not made it into mainstream thinking about those topics. For instance, Mary Joe Frug famously did an analysis of a contracts case book and found that, not only did the authors use masculine pronouns to refer to the abstract reader, but also that women were vastly underrepresented in the selected cases (39 of 138 major cases): Mary Joe Frug *Postmodern Legal Feminism* (Routledge, New York, 1992) at 61 and 73. Further, any analysis of a feminist approach to contract law in a contract textbook is virtually unheard of. One notable exception to this is Robert A Hillman *The Richness of Contract Law: An Analysis and Critique of Contemporary Theories of Contract Law* (Springer Science+Business Media Dordrecht, Netherlands, 1997).
[33] This is not to say that these critiques are not valuable, they certainly are, but they are not the *only* value that feminist jurisprudence can bring to the law.
[34] Sullivan, above n 2, at 113-114.

legitimacy. A critique would also challenge the law to meet its own standards and could be the first step in a reform project. It would also bolster the breadth of feminist jurisprudence.

Chapter II will now consider what a feminist law of contract for interpretation principles would look like, so that the trends outlined in Chapter III can be assessed as to whether they are consistent with feminism.

II A Framework for a Feminist Law of Contract

A Introduction

> The goal of reconstructive feminist jurisprudence is to render feminist reform rational. We must change the fact that, from a mainstream point of view, arguments for feminist legal reform efforts are (or appear to be) invariably irrational.[35]

This chapter will outline a framework of a feminist law of contract which will be used in Chapter IV to assess whether current trends in contract law are consistent with feminism. This chapter provides two main critiques: (1) the law takes a "default male" approach and assumes parties are men; and (2) the ethic of care should be incorporated into judicial reasoning. Before these critiques are expanded upon, this chapter will first position this framework within feminist jurisprudence as a whole.

B Framing the Framework

The framework this chapter outlines is not *the* feminist approach, as there is no such thing.[36] There are many schools of thought within feminism, such as liberal, relational, radical and post-modern variants.[37] Still other feminist scholars do not subscribe to a specific approach at all.[38] This chapter represents *a* feminist approach, and more specifically *my* feminist approach.[39] This recognises that my approach is culturally grounded as I am a Pakeha woman within New Zealand, operating within the law in the year 2021. This does not mean that this approach is not valuable, but it recognises it as a piece of the wider feminist critique of the law, rather than the endpoint of the critique.

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[35] Robin West "Jurisprudence and Gender" (1988) 55 U Chi L Rev 1 at 68.

[36] Barnett, above n 7, at 8; Nancy Levit and Robert RM Verchick *Feminist Legal Theory: A Primer* (2nd ed, NYU Press, New York, 2016) at 9.

[37] See generally Barnett, above n 7; Robin West "Introduction to the Research Handbook on Feminist Jurisprudence" in Robin West and Cynthia G Bowman (eds) *Research Handbook on Feminist Jurisprudence* (Edward Elgar Publishing Ltd, Cheltenham, United Kingdom, 2019) 1; Levit and Verchick, above n 36.

[38] For example, most authors in Rosemary Hunter, Clare McGlynn and Erika Rackley (eds) *Feminist Judgments: From Theory to Practice* (Hart Publishing Ltd, Oxford, 2010) and in Elisabeth McDonald, Rhonda Powell, Māmari Stephens and Rosemary Hunter (eds) *Feminist Judgments of Aotearoa New Zealand – Te Tino: A Two-Stranded Rope* (Hart Publishing, Oxford, 2017).

[39] This acknowledgement has been made in other feminist works: see, for example, Alice Belcher "A Feminist Perspective on Contract Theories from Law and Economics" (2000) 8 Fem LS 29 at 30-31: "My perspective is positioned explicitly by the title of this article as feminist, but it is also positioned in time. It is influenced by the operation of time in at least two ways. Firstly, it is the perspective of Alice Belcher as she sees things in 1999. Secondly, it is Alice Belcher's perspective on contract theories as they have been developed up to 1999; that is contract theories along with their historical baggage."

My approach is feminist because it is "an analysis of women's subordination for the purpose of figuring out how to change it"[40] and is a search for equality within the law.[41] Following Christine Littleton, it aims to make sex differences "costless"[42] so that one is not advantaged or disadvantaged by identifying as male or female or associating with masculine or feminine traits.

To achieve this goal, this dissertation adopts critical legal feminist jurisprudence and relational feminism.[43] Critical legal feminist jurisprudence is a form of the wider critical legal studies (CLS) movement.[44] CLS exposes the hidden ideological function of the law.[45] Critical legal feminists specifically expose the hidden gender bias within purportedly gender-neutral legal language[46] and that this bias is not natural or inevitable, and is a decision made by the law that can be changed.[47] This school of thought is adopted into the "default male" critique below. This dissertation adopts this critique because it represents a low bar the law of contract interpretation must pass in order to be consistent with feminism because it only requires the law to acknowledge its biases.

Relational feminists argue women are fundamentally different from men and subordinated because of women's maternalistic nature resulting from women's disproportionate role in caregiving and reproductive labour.[48] They claim that this maternalism gives women a different moral perspective,[49] referred to as the ethic of care, which is analysed below. They argue the ethic of care should be valued and represented within the law. Relational feminism is controversial because it is seen as entrenching stereotypes about women.[50] This dissertation

[40] Linda Gordon "The Struggle for Reproductive Freedom: The Three Stages of Feminism" in Zillah Eisenstein (ed) *Capitalist Patriarchy and the Case for Socialist Feminism* (Monthly Press Review, New York, 1979) at 107 as cited in Leslie Bender "A Lawyer's Primer on Feminist Theory and Tort" (1988) 38 J Leg Ed 3 at 5.
[41] Barnett, above n 7, at vii; see also Smith, above n 7, at 90.
[42] Littleton, above n 31.
[43] Also known as cultural feminism and difference feminism.
[44] Although the movements are not exactly the same – the difference is that the feminist critical legal scholars focus less on deconstructing rights as compared to CLS scholars: Deborah L Rhode "Feminist Critical Theories" (1990) 42 Stan L Rev 617 at 632.
[45] Barnett, above n 7, at 189; Robert W Gordon "New developments in legal theory" in David Kairys (ed) *The Politics of Law: A progressive critique* (Pantheon Books, New York) 413.
[46] Rhode, above n 44, at 619.
[47] For example, see Hila Keren "Considering Affective Consideration" (2010) 40(2) Golden Gate U L Rev 165 at 188.
[48] West, above n 35, at 13 and 16; Robin West "Relational feminism and law" in Robin West and Cynthia G Bowman (eds) *Research Handbook on Feminist Jurisprudence* (Edward Elgar Publishing Ltd, Cheltenham, 2019) 65 at 71-72; West, above n 37, at 16-17; Barnett, above n 7, at 143-162.
[49] West, above n 35, at 2 and 16; Nancy Chodorow *The Reproduction of Mothering: Psychoanalysis and the Sociology of Gender* (University of California Press, Berkeley, 1978).
[50] This is discussed more below: at 21-22.

adopts it nonetheless because it is the *start* of a feminist critique of contract law, not the *endpoint* of such a critique. If the law cannot value the stereotypical traits of women, then it begs the question whether the law values *anything* about women. Further, it is difficult to imagine a law that fails the relational feminist critique and does not value the stereotypical feminine traits as being feminist.[51] A law that is consistent with the relational feminist critique is not necessarily entirely consistent with feminism *as a whole*, but a law that fails the critique is certainly *not* feminist.

There are other schools of feminism that this dissertation does not adopt – most importantly, radical feminism.[52] Radical feminism argues that the subordination of women stems from their sexuality being alienated from them.[53] This dissertation has not adopted radical feminism because it focuses on the "core structure of society and law",[54] and would aim to de-establish contract law, rather than reform it. This is valuable but is not the focus of this dissertation. Further, the intersection between radical feminism and contract law has not been explored thoroughly in the literature like relational feminism and feminist critical legal studies have,[55] which would make it better suited to a larger project.

C Displacing the Default Male

The "default male"[56] feature of the law is where the law or the judges *assume* that the parties are masculine, have masculine experiences and use masculine reasoning styles.[57] The law makes these assumptions, but purports to be objective and without a particular point of view, which makes these assumptions difficult to challenge. A feminist law of contract demands the

[51] In this dissertation, "feminine" is used to refer to traits associated with women, whereas "feminist" refers to an approach associated with the feminist movement.
[52] Also known as dominance feminism.
[53] West, above n 37, at 11; Barnett, above n 7, at 163-164.
[54] Barnett, above n 7, at 163-164.
[55] See Linda Mulcahy "The Limitations of Love and Altruism – Feminist Perspectives on Contract Law" in Linda Mulcahy and Sally Wheeler (eds) *Feminist Perspectives on Contract Law* (Glasshouse Press, London, 2005) 1; John Wightman "*Baird Textile Holdings v Marks and Spencer Plc:* Commentary" in Rosemary Hunter, Clare McGlynn and Erika Rackley (eds) *Feminist Judgments: From Theory to Practice* (Hart Publishing Ltd, Oxford, 2010) 184; Linda Mulcahy and Cathy Andrews "*Baird Textile Holdings v Marks & Spencer Plc:* Judgment" in Rosemary Hunter, Clare McGlynn and Erika Rackley (eds) *Feminist Judgments: From Theory to Practice* (Hart Publishing Ltd, Oxford, 2010) 189; Beverley Brown "Contracting Out/Contracting In: Some Feminist Considerations" in Anne Bottomley (ed) *Feminist Perspectives on the Foundational Subjects of Law* (Cavendish Publishing Ltd, London, 1996) 5; Patricia A Tidwell and Peter Linzer "The Flesh-Colored Band Aid – Contracts, feminism, dialogue and norms" (1991) 28 Hous L Rev 791.
[56] The "default male" term is from Criado Perez, above n 3.
[57] I use the term "masculine" here to refer to experiences common to men within the current social and political environment we live in in New Zealand. Masculine reasoning refers to an "ethic of justice" and is discussed in more detail below.

"default male" within the law be displaced. This critique is a feminist critical legal studies critique because it exposes the hidden gender bias of the law when it makes these assumptions. It is similar to Bartlett's asking the "woman question" which asks whether women have failed to be considered in making the law,[58] and "is designed to expose how the substance of the law may silently and without justification submerge the perspectives of women and other excluded groups."[59]

The law adopting a "default male" perspective is harmful for two reasons. First, it expects women to conform to an inappropriate standard to which they cannot or do not want to conform. Secondly, the male as a "default" position will always exclude women and consider them as deviations from the norm.[60] This standard is false: women are as different from men as men are from women.[61]

We should not replace the "default male" with a "default female", because that would fail to make sex differences costless by disadvantaging men.[62] Rather, the decisionmaker must justify their decision without relying on sexist assumptions.[63] This critiques the reasoning methods used in cases, not necessarily the outcomes of those cases.

An example of the law assuming the parties were men is seen in *Royal Bank of Scotland v Etridge.*[64] This case involved "surety wives" who put a mortgage on their family home to fund their husbands' business ventures. The ventures failed, and the bank sought to enforce the mortgage. The mortgage contracts were challenged by the wives on the ground that they were unduly influenced by their husbands to enter into the contract and therefore it should be voidable.[65] The House of Lords held that a bank is put on inquiry whenever one domestic

[58] Katharine T Bartlett "Feminist Legal Methods" (1990) Harv L Rev 829 at 837.
[59] At 836.
[60] Graycar, above n 7, at 10; Belcher, above n 39, at 37.
[61] Virginia Held *The Ethics of Care: Personal, Political, and Global* (Oxford University Press, Oxford, 2006) at 142; Smith, above n 7, at 91.
[62] Littleton, above n 31.
[63] Bartlett, above n 58, at 846.
[64] *Royal Bank of Scotland Plc v Etridge (No 2)* [2001] UKHL 44, [2002] 2 AC 773. This case has been examined through a feminist lens: Alison Diduck "*Royal Bank of Scotland Plc v Etridge (No 2):* Commentary" in Rosemary Hunter, Clare McGlynn and Erika Rackley (eds) *Feminist Judgments: From Theory to Practice* (Hart Publishing Ltd, Oxford, 2010) 149; Rosemary Auchmuty "*Royal Bank of Scotland Plc v Etridge (No 2):* Judgment" in Rosemary Hunter, Clare McGlynn and Erika Rackley (eds) *Feminist Judgments: From Theory to Practice* (Hart Publishing Ltd, Oxford, 2010) 155; Rosemary Auchmuty "The Rhetoric of Equality and the Problem of Heterosexuality" in Linda Mulcahy and Sally Wheeler (eds) *Feminist Perspectives on Contract Law* (Glasshouse Press, London, 2005) 51; Belcher, above n 39, at 42-44.
[65] *Royal Bank of Scotland Plc v Etridge (No 2),* above n 64, at [132] per Lord Scott.

partner[66] stood as guarantor of their partner's debt and had to ensure the guarantor had independent legal advice.[67] On the facts of the cases, however, the wives experienced mixed success. To prove presumed undue influence, the wives needed to prove a relationship of influence between them and their husbands,[68] and that the mortgage was a transaction that "called for explanation."[69] Rosemary Auchmuty in her feminist judgment takes issue with the application of these criteria.[70] Their Lordships[71] *assumed* the interests of wives and their husbands align, and that the mortgage transaction is not one that "calls for explanation," as the wives would have entered into the transaction even if they were not unduly influenced.[72] In the Gill appeal, Lord Hobhouse held that Mrs Gill would have agreed to a loan even if she had proper legal advice because she was "enthusiastic" about the project,[73] despite the loan being more than twice the amount she originally agreed to and the fight that the loan sparked between her and her husband.[74] Further, Lord Scott dismissed the Coleman appeal because the wife and husband were Hassidic Jews and therefore, she could not contradict her husband.[75] The application of these elements is made from a masculine perspective assuming what a wife's interests are. As Auchmuty notes: "[t]his may be because most English judges find it hard to imagine what a woman's life is like."[76]

To be consistent with the default male critique, their Lordships should have explicitly pointed to evidence instead of assuming what the wives wanted. These assumptions prevent the wives from challenging them and potentially changing the outcome of the cases, because by the time

[66] The wording of the case is gender-neutral, but all the cases in this appeal were with female guarantors securing their husbands' loans. This gender-neutral wording has been critiqued as obscuring the fact that most undue influencers are men, and those being influenced are women or the elderly, and that if there is a sexual relationship, it is heterosexual: see Auchmuty "The Rhetoric of Equality and the Problem of Heterosexuality", above n 64, at 56-57.

[67] *Royal Bank of Scotland Plc v Etridge (No 2),* above n 64, at [3] per Lord Bingham, at [48], [54]-[57] per Lord Nicholls, at [91] per Lord Clyde, at [100], [110], and [116] per Lord Hobhouse, at [169]-[172] and [191] per Lord Scott.

[68] Which is not presumed in a relationship between spouses: At [18]-[19] per Lord Nicholls and [107] per Lord Hobhouse.

[69] At [3] per Lord Bingham, [14] and [21] per Lord Nicholls, at [91] per Lord Clyde, at [219]-[220] per Lord Scott.

[70] Auchmuty "*Royal Bank of Scotland v Etridge:* Judgment", above n 64. The feminist judgments project is a project where authors rewrite judgments from the perspective of a feminist judge. This project thus shows how more feminist outcomes can be achieved within the constraints of the current legal system: see Rosemary Hunter McGlynn and Rackley, above n 25.

[71] And they were all Lords – no women sat on this bench.

[72] *Royal Bank of Scotland Plc v Etridge (No 2),* above n 64, at [28]-[30] per Lord Nicholls; Auchmuty "*Royal Bank of Scotland v Etridge:* Judgment", above n 64, at 158.

[73] *Royal Bank of Scotland Plc v Etridge (No 2),* above n 64, at [129].

[74] At [275]-[276] per Lord Scott.

[75] At [283] per Lord Scott; Auchmuty "*Royal Bank of Scotland v Etridge:* Judgment", above n 64, at 168: "But I do not think it is for this court to make assumptions about how individuals behave based on a general and incomplete knowledge of religious and cultural norms."

[76] Auchmuty "*Royal Bank of Scotland v Etridge:* Judgment", above n 64, at 158.

they realise the assumptions the judges are making, it is too late. This is one of the key messages of *Etridge*: there should not be presumptions for a domestic relationship being one of undue influence,[77] and in turn, their Lordships should have heeded this advice and not made assumptions about the individuals involved.

D Incorporating an Ethic of Care

The second feminist critique outlined in this chapter is that a feminist approach must incorporate the ethic of care.

The ethic of care is a type of moral reasoning first explored by Carol Gilligan in her book *In a Different Voice.*[78] She developed the ethic of care in response to studies done by Lawrence Kohlberg which concluded that women consistently scored lower on moral development scales. Gilligan hypothesised that the scales were biased because they were developed with exclusively male subjects.[79] She created the feminine ethic of care as an alternative to the masculine models of development.

This section will: (1) define the ethic of care; (2) outline and respond to the critiques of the ethic of care; and (3) outline how the ethic of care will be used in this dissertation.

1 Defining the ethic of care

There are two inter-related parts of the ethic of care: (1) the ethic of care understands the self and others as interdependent; and (2) the ethic of care is a unique way of morally reasoning.

(a) Positionality of the self

The ethic of care sees the self and others as interconnected.[80] Gilligan, unlike other scholars,[81] does not make a claim as to *why* women view themselves this way, but rather notes that this is

[77] Mindy Chen-Wishart "Undue Influence: Beyond Impaired Consent and Wrongdoing towards a Relational Analysis" in Andrew Burrows and Alan Rodger (eds) *Mapping the Law: Essays in Memory of Peter Birks* (Oxford University Press, Oxford, 2006) 201 at 222.
[78] Gilligan, above n 4.
[79] At 14-17. See also Carol Gilligan "Hearing the Difference: Theorizing Connection" (1995) 10 Hypatia 120; Carol Gilligan and Jane Attanucci "Two Moral Orientations: Gender Differences and Similarities" (1988) 34 Merill-Palmer Quarterly 223; Amy M Sullivan, Carol Gilligan, and Jill McLean Taylor *Between Voice and Silence: Women and Girls, Race and Relationship* (Harvard University Press, London, 1995).
[80] Gilligan, above n 4, at 74.
[81] Such as Chodorow, above n 49, and West, above n 35, at 2, who link women's positionality as interdependent on their experiences with mothering and being mothered.

empirically the case.[82] This dissertation will equally not attempt to explain why women are more likely to view themselves this way.

In Gilligan's work, she contrasts the ethic of care with the masculine "ethic of justice." Someone using an ethic of justice views himself as independent from others.[83] He is self-interested and considers others only because their actions have impacts on himself.[84] The ethic of justice is exemplified in legal liberalism.[85]

The critique of legal liberalism that we should and do view ourselves as more interconnected than the reasonable man is found outside feminism. Notably, it is present in the worldview of many indigenous societies. For example, the Māori concept of whanaugatanga views people not only as interdependent with other people, but also with spirits, gods, and the landscape.[86] The intersection between relational feminism, tikanga and contract law is ripe for analysis, however it is outside the scope of this dissertation.[87]

(b) Moral reasoning

Because women perceive themselves as connected to others, they morally reason in a different way to the masculine ethic of justice.

When reasoning, the ethic of care approach starts from a premise that no one should be hurt,[88] and their ideal moral reasoning process is one where everyone is cared for and hurt is minimised.[89] This approach assumes action will be taken, because hurt is caused by a lack of action.[90] However, the mode of action is not assumed,[91] which allows for creative solutions to problems.[92] Instead of focusing on rights like the ethic of justice, the ethic of care focuses on

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[82] Gilligan, above n 4, at 2.
[83] West, above n 35, at 5 and 14; Belcher, above n 39, at 34; Gilligan, above n 4, at 25-28.
[84] Gilligan, above n 4, at 37.
[85] West, above n 35, [Jurisprudence and Gender] at 5.
[86] Law Commission *Māori Customs and Values in New Zealand Law* (NZLC SP9, 2001) at 30-32; Carwyn Jones "A Māori Constitutional Tradition" (2014) 12 NZJPIL 187 at 191-194.
[87] This intersection has been explored in other areas of the law: see Rosemary Hunter, Māmari Stephens, Elisabeth McDonald and Rhonda Powell "Introducing the Feminist and Mana Wahine Judgments" in Elisabeth McDonald, Rhonda Powell, Māmari Stephens and Rosemary Hunter (eds) *Feminist Judgments of Aotearoa New Zealand – Te Tino: A Two-Stranded Rope* (Hart Publishing, Oxford, 2017) 25; Annie Mikaere "Māori Women: Caught in the Contradiction of a Colonised Reality" (1994) 2 Waikato L Rev 125; Leonie Pihama "Mana Wahine: Decolonising Gender in Aotearoa" (2020) 35 Australian Feminist Studies 351.
[88] Gilligan, above n 4, at 174.
[89] At 35.
[90] At 38.
[91] At 31.
[92] Leslie Bender "From Gender Difference to Feminist Solidarity: Using Carol Gilligan and an Ethic of Care in Law" (1990) 15 Vt L Rev 1 at 37.

responsibilities you have to others.[93] Because of the emphasis on minimising hurt and responsibilities to others, ethic of care reasoning is very contextual.[94] Taking one action in one situation may cause hurt, whereas in another situation it may be caring,[95] and therefore it is impossible to rank abstract principles or actions out of context. This also means that there are no moral absolutes.[96]

In contrast, ethic of justice reasoning starts from a premise that everyone should be treated equally.[97] To treat everyone equally, situations must be abstracted into greater rights and principles, which are ranked in order of importance.[98] The ideal of this reasoning is perfection – to find the "correct" moral answer.[99] This formulaic reasoning usually assumes the type action involved, and the moral question is whether one should take it or not involve themselves.[100] This reflects their view of themselves as separate from others and the dispute.

I have included a summary of the main differences between an ethic of care and an ethic of justice below:

Ethic of Care	Ethic of Justice
• Starts from a conception of the self as interdependent with others • Starts from a premise that no one should be hurt • Reasons contextually • Focuses on responsibilities to others • Ideal is care	• Starts from a conception of the self as individualised and self-interested • Starts from the premise that everyone should be treated equally • Reasons from abstraction • Focuses on rights/principles • Ideal is perfection • Hurt is caused from aggression

[93] Gilligan, above n 4, at 38, 73 and 95.
[94] At 50-51.
[95] Nel Noddings gives the example of to kill. An ethic of care reasoner would not say "it is immoral to kill." It depends on context. In most contexts, it is not caring nor moral to kill. In other scenarios, for example where a woman kills her abusive husband in the only way she found to protect her children, she may be acting ethically under a "sadly diminished ethical ideal." See Nel Noddings *Caring: A Relational Approach to Ethics and Moral Education* (2nd ed, University of California Press, California, 2013) at 93-102.
[96] Gilligan, above n 4, at 66.
[97] At 174.
[98] At 32.
[99] At 35.
[100] At 31.

• Hurt is caused from lack of response	

A key addition of Gilligan's work in this area is that caring is an *ethical* action, as compared to an emotional response, which is seen as morally arbitrary by philosophers.[101] It therefore is how we *ought* to reason, instead of just a way we *do* reason.[102]

2 Critiques of the ethic of care

Gilligan's ethic of care has been subject to three main critiques from other feminists. These critiques are: (1) methodological critiques; (2) essentialism critiques; and (3) pragmatic critiques.

(a) Methodological critiques

Gilligan has been subject to several methodological critiques. These are that she: has a small, selective sample size,[103] only uses interview data where she should use more quantitative data,[104] and does not consider whether the answers her subjects give could be due to factors other than gender, such as class or religion.[105] She has been criticised for drawing unjustified conclusions from her data by elevating her subjects' responses to the level of moral theory when her subjects do not see themselves as making moral decisions.[106]

It is important to note that Gilligan made no claims about her work having any wider implication other than proving previous moral development scales were biased.[107] Gilligan has been responsive to these critiques and has conducted subsequent studies with larger sample sizes and explicit breakdowns of age, class, and race that could affect the research's

[101] Robin West *Caring for Justice* (New York University Press, New York, 1997) at 7 and 23.
[102] West, above n 35, at 18.
[103] Catherine G Greeno and Eleanor E Maccoby "How Different is the "Different Voice"?" (1986) 11 Signs 310 at 312.
[104] At 312.
[105] At 312; Judy Auerbach, Linda Blum, Vicki Smith and Christine Williams "On Gilligan's "In a Different Voice"" (1985) 11 Feminist Studies 149 at 155.
[106] Auerbach et al, above n 105, at 156.
[107] Gilligan, above n 4, at 2. It has been largely accepted that those development scales were deficient in this way: Joan G Miller and Malin Källberg-Shroff "Culture and the Development of Moralities of Community" in Lene Arnett Jensen (ed) *The Oxford Handbook of Moral Development: An Interdisciplinary Perspective* (Oxford University Press, New York, 2020) at 57.

conclusions.[108] It is true that more could be done to explicitly study how these factors intersect with gender.[109] For the purposes of this dissertation, the study can be relied upon because it holds true for at least some women.

(b) Essentialism

Essentialism is a key part of the post-modern critique of relational feminism.[110] In the words of Elisabeth Spelman:[111]

> [E]ssentialism invites me to take what I understand to be true of me "as a woman" for some golden nugget of womanness all women have as women; and it makes the participation of other women inessential to the production of the story. How lovely: the many turn out to be one, and the one that they are is me.

In other words, an essentialist theory is a theory that claims there is an "essence" of being a woman that is common to *all* women regardless of culture, time, place, or any other characteristics such as race, class, or sexuality.[112]

Feminists are concerned about essentialism for two reasons. First, there is a concern that associating the ethic of care with women creates a false universalism that equates *all* women with privileged, white women, and thus fails to recognise diversity.[113] This is especially dangerous because it risks turning "a useful critique of one privileged (male) view of reality" into "a substitute claim for a different privileged (female) view of reality."[114] However, the ethic of care does not claim to be universalising.[115] There is a difference between the claim that *many* women reason this way and saying that this is the *only* way that women can reason. To the extent this theory fails to address the subordination of diverse women – such as those of different races, sexualities, and classes – that is a problem of racism and homophobia, not

[108] See Gilligan and Attanucci, above n 79; Sullivan, Gilligan and Taylor, above n 79.
[109] Cressida J Heyes "Anti-Essentialism in Practice: Carol Gilligan and Feminist Philosophy" (1997) 12 Hypatia 142.
[110] Jill Marshall "Feminist Jurisprudence: Keeping the subject alive" (2006) 14 Fem LS 27 at 30.
[111] Patricia V Spelman *Inessential Woman: Problems of Exclusion in Feminist Thought* (Beacon Press, Boston, 1988) at 159.
[112] Bender, above n 92, at 20.
[113] Patricia A Cain "Feminist Jurisprudence: Grounding the Theories" (1989) 4 Berkeley Women's LJ 191 at 204; Mary Joe Frug "Progressive Feminist Legal Scholarship: Can We Claim "A Different Voice"?" (1992) 15 Harv Women's LJ 37 at 64.
[114] Cain, above n 113, at 211.
[115] Gilligan, above n 4, at 2; Bender, above n 92, at 22-25.

essentialism.[116] These claims should be taken seriously, but they do not delegitimise the ethic of care.

Secondly, the ethic of care is accused of reifying these traits and saying they are socially or biologically determined,[117] which categorises women who stray from the norm as "less than" women[118] and stymies change because the characteristics are seen as unchangeable.[119] However, acknowledging the value in an ethic of care is not deterministic in and of itself. Further, there can still be a political response to something caused by biological or social factors.[120]

Whilst essentialism is a valid concern, it is possible to use the ethic of care without being essentialist. The approach I outline below mitigates the concerns around essentialism.

(c) Pragmatic critique

The third critique is a pragmatic critique, which asks why should the "Victorian standards of the middle-class motherly matrons" be selected as feminine traits when it is easy to "interpret them for exactly the same nineteenth-century effect: the subordination of women"?[121] These traits have been used for centuries to prevent women from competing in the public arena because of their "dislike of competition."[122]

These are real concerns, but relational feminists apply these traits very differently from the patriarchy. Feminists *value* these traits, whereas the patriarchy uses them as a tool of *oppression.*[123] Therefore, this concern is also managed by using the ethic of care carefully.

[116] West, above n 101, at 15.
[117] As mentioned in West, above n 101, at 71; Vicki Schultz "Room to Maneuver (f)or a Room of One's Own? Practice Theory and Feminist Practice" (1989) 14 L & Soc Inquiry 123 at 130.
[118] Linda Alcoff "Cultural Feminism versus Post-Structuralism: The Identity Crisis in Feminist Theory" (1988) 13 Signs 405 at 414.
[119] Schultz, above n 117, at 130.
[120] At 13; West, above n 35, at 71.
[121] Smith, above n 7, at 92; see also Margaret Jane Radin "Reply: Please Be Careful with Cultural Feminism" (1993) 45 Stan L Rev 1567 at 1568; Catherine MacKinnon *Feminism Unmodified: Discourses on life and law* (Harvard University Press, Cambridge (Mass), 1987) at 38-39; Greeno and Maccoby, above n 103, at 315.
[122] For example, see *Equal Employment Opportunity Commission v Sears* 628 F Supp 1264 (ND III 1986), were the caring nature of women and their dislike for competition was used to justify not promoting female employees.
[123] West, above n 101, at 36.

3 Adopting an ethic of care

The approach this dissertation will take is to acknowledge that the ethic of care empirically exists, and that (mostly) women use it to position themselves and reason. Regardless of why it is associated with women, whether that reason be biological or social, it is associated with women. We cannot ignore this social fact. Therefore, the law is not valuing the sexes and their reasoning methods equally if it privileges the ethic of justice over the ethic of care.[124] In order to be feminist, the law should make sex differences "costless" so that one is not punished for associating with either gender.[125]

To make sex differences costless, the ethics must be valued equally.[126] This could be done through choosing which of the ethics should be applied in any given scenario.[127] However, this approach comes with problems. To decide which ethic to adopt in any given scenario, there needs to be an overarching framework. It is not apparent what this would be, and there is a risk that judges would revert to the currently dominant ethic of justice in instances of conflict between the ethics.

The better approach is from Robin West and is to view the ethics as components of each other, so that justice is a component of care and care is a component of justice.[128] This acknowledges that both ethics at their extremes are deficient but can temper each other into an approach that is both caring and just. It mitigates the concern that the ethic of care is a "mush of altruism" and an unrealistic standard.[129] This approach makes gender differences costless because it incorporates the ethic of care to the same extent it incorporates the ethic of justice.

This balancing of the ethics in law takes place along three intersections: impartiality and partiality; reasoning with rules and reasoning from context; and self-integrity and

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[124] This is a similar approach to Mulcahy, above n 55, at 3; and Wheeler, above n 11, at 32-33.
[125] Littleton, above n 31.
[126] Contrast Held, above n 61, at 71-73, who argues that the ethic of care is the primary ethic over the ethic of justice. Some scholars interpret Gilligan's work to support this interpretation because of the positive light she paints the ethic of care in. However, later passages in her book, see at 164 and 167, seem to dispel the notion that she holds the ethic of care as morally superior to the ethic of justice.
[127] Scholars interpret Gilligan's work as supporting this approach: see Marija Urlich "A Short Topology of Feminist Legal Theory" (1992) 7 Auckland UL Rev 483. See, for example, Gilligan, above n 4, at 62 for passages that appear to support this conception.
[128] West, above n 101, at 24 and 38; Grace Clement *Care, Autonomy, and Justice* (Routledge, New York, 1996) at 21.
[129] This is a criticism of the application of the ethic of care in contract law: Mulcahy, above n 55, at 10 and 12; John Wightman "Intimate Relationships, Relational Contract Theory, and the Reach of Contract" (2000) 8 Fem LS 93.

nurturance.[130] The former in each of these pairings represents the ethic of justice, with the latter representing the ethic of care.

Impartial reasoning is at the core of an ethic of justice because of its underlying value of equality. However, being completely impartial is a failure of justice as well as a failure of care.[131] It fails to recognise the relationship a judge has between the particular litigants in a particular case, and instead treats the parties as representative of a class of litigants.[132] This fails to achieve practical justice to those in front of the courts,[133] and fails to ensure women's voices are heard.[134] Similarly, complete partiality is a failure of care, as well as a failure of justice.[135] Untempered partiality shades into nationalism, tribalism and exclusion.[136] If you only care for your own, and care inconsistently, your care is cramped and disingenuous.[137]

Likewise, to be just, an ethic of justice cannot reason entirely from rules. Without seeing who is in front of them, a judge cannot determine whether cases are "alike" to determine which legal principles apply.[138] Justice would therefore fail on its own term and be unable to treat everyone equally. Further, zealously applying rules without regard to their practical outcomes on people "leads not to justice but to a cramped, time frozen, and at times absurd jurisprudence, unbendable and unbending to the changing demands of a changing and complex society."[139] On the other hand, contextual analysis without the application of rules and principles is not only unjust, but also uncaring. It fails to see the wider impact of the judgment on people outside of the judge-litigant relationship, such as holding affirmative action programmes to be discriminatory.[140] Purely contextual reasoning is also impractical within the law – feminists must adopt a level of abstraction to apply consistent doctrine of precedent and separate relevant details from irrelevant ones.[141]

[130] West, above n 101, at 38-91.
[131] At 55.
[132] West, above n 101 [Caring for Justice], at 52-57; Clement, above n 128, at 77.
[133] Bartlett, above n 58, at 158 – she calls this "feminist practical reasoning."
[134] Hunter et al, above n 87, at 26; Rosemary Hunter "An Account of Feminist Judging" in Rosemary Hunter, Clare McGlynn and Erika Rackley (eds) *Feminist Judgments: From Theory to Practice* (Hart Publishing Ltd, Oxford, 2010) at 35-36; Hunter, above n 25, at 11-12.
[135] West, above n 101, at 75.
[136] At 75.
[137] West, above n 101, at 75-80.
[138] At 52-57; Clement, above n 128, at 77.
[139] West, above n 101, at 61.
[140] At 85-88.
[141] Bartlett, above n 58, at 856.

Finally, moral reasoning needs to balance one's integrity to uphold their moral principles,[142] and being willing to nurture others. Too much dedication to the ethic of justice without nurturance would lead decisionmakers to enforce unjust rules.[143] On the other hand, giving yourself completely to those you nurture causes you to lose your sense of self and respect for yourself,[144] necessarily cramping your ability to care.[145]

E Conclusion

This chapter established a framework of what a feminist law of contract would look like. It would aim to make sex differences "costless" by refusing to take a default gendered perspective and by incorporating the ethic of care as a way of mediating the effects of the ethic of justice. Chapter III will outline the trends in contract interpretation principles so that those trends can be assessed against the default male and ethic of care critique in Chapter IV.

[142] The common example given of someone who committed themselves to principles over all else is Gandhi, who was so committed to his ethics that he failed to care for his own family: see West, above n 101, at 40; Clement, above n 138, at 76.
[143] West, above n 101, at 49.
[144] Gilligan, above n 4, at 64-105.
[145] West, above n 101, at 81-82.

III The Trends in Contract Interpretation Principles

A Introduction

The law on contract interpretation is subject to much academic and judicial debate, to the point where it is even disputed whether the law is in dispute.[146] This chapter will wade into this Serbonian Bog to describe the trends over time in New Zealand for the interpretation of written contractual terms.[147] It will argue there was a distinct move towards contextualism in the 1990s and that approach has continued. There has also been a clear shift towards admitting more types of evidence to interpret contracts, including pre-contractual negotiations and post-contractual conduct.

This chapter will consider: (1) the object of contract interpretation; (2) the balance between textualism and contextualism in interpreting contracts; and (3) the admissibility of extra-contractual evidence.

B Object of Contract Interpretation

The object of contract interpretation is relevant for determining what evidence is relevant, and therefore potentially admissible. Contract interpretation is clearly an objective exercise, but there are two different iterations of how this exercise is framed.[148] The first is to find the meaning of the text of the contract in its context and then attribute this as the presumed intention of the parties.[149] The actual intention of the parties, even if expressed, is therefore irrelevant

[146] See *Re Sigma Finance Corp* [2009] UKSC 9, [2010] BCC 40 at [9] ("not in doubt"), Lord Nicholls "My Kingdom for a Horse: The Meaning of Words" (2005) 121 LQR 577 at 577 ("largely settled") and Ryan Catterwall "Striking a Balance in Contract Interpretation: The Primacy of the Text" (2019) 23 Edin LR 52 at 56. Compare David McLauchlan "The lingering confusion and uncertainty in the law of contract interpretation" [2015] LMCLQ 406.

[147] For the purposes of this dissertation, contract interpretation is limited to its narrow meaning of interpreting express written terms. There is a debate within contract law about whether interpretation is more properly grouped with implication and rectification into a wider law of "contract construction:" see *Attorney General of Belize v Belize Telecom Ltd* [2009] UKPC 10, [2009] 1 WLR 1988. However, this is outside the scope of this dissertation.

[148] Helen Winkelmann, Susan Glazebrook and Ellen France "Contractual Interpretation" (2020) 51 VUWLR 463 at 465; *Gibbons Holdings Ltd v Wholesale Distributors Ltd* [2007] NZSC 37, [2008] 1 NZLR 277 at [90] per Thomas J; David McLauchlan "A new conservatism in contract interpretation?" [2020] NZLJ 273 [Part 1] at 275; Rohan Havelock "Return to Tradition in Contractual Interpretation" (2016) 27 KLJ 188 at 196-197; Francis Dawson "Contract Objectivity and Interpretation in the Supreme Court" in A Stockley and M Littlewood (eds) *The New Zealand Supreme Court: The First Ten Years* (Lexisnexis, Wellington, 2015) 219 at 238.

[149] This approach is adopted in the *ICS* principles, above n 5, at 912-913; *Firm PI 1 Ltd v Zurich Australian Insurance Ltd* [2014] NZSC 147, [2015] 1 NZLR 432 [*Firm PI 1*] at [60]; *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] NZSC 5, [2010] 2 NZLR 444 [*Vector Gas*] at [119] per Wilson J; *Wood v Capita Insurance Services Ltd* [2017] UKSC 24, [2017] 2 WLR 1095 at [10].

under this version of contractual interpretation.[150] The second is to find the objective intention of the parties from the perspective of the reasonable man.[151] Under this approach, the reasonable man would consider the subjective *expressed* intentions of the parties,[152] for example as found in pre-contractual negotiations or post-contractual conduct.[153]

The current law in New Zealand is unsettled. There is authority for both approaches.[154] *Bathurst Resources Ltd v L&M Coal Holdings Ltd*[155] is the most recent leading case from the Supreme Court regarding contract interpretation. In that case, the Court holds the approach of *Firm PI 1 v Zurich Australian Insurance Ltd*[156] to find the meaning of the contract and attribute that as the intentions of the parties,[157] is the leading approach.[158] However, the Court also holds that expressed and shared subjective intentions of the parties are admissible evidence,[159] which would only be relevant under the second approach.

C Textualism and Contextualism

Strict textualism is where ostensibly only the words contained "in the four corners" of the document purporting to be the contract are used to interpret it.[160] Contextualism, on the other hand, considers factors outside of these "four corners," including: background facts, for example industry practice or facts about the subject matter of the contract; and common sense,

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[150] *Attorney General of Belize v Belize Telecom,* above n 147, at [16] per Lord Hoffmann: "However, that meaning [of the contract] is not necessarily or always what the parties to the document would have intended."; *Brynes v Kendle* [2011] HCA 26, (2011) 279 ALR 212 at [100] per Heydon and Crennan JJ which cites Holmes "The Path of the Law" (1897) 10 Harv LR 457 at 463-464: "[P]arties may be bound by a contract to things which neither of them intended […]"; see further David McLauchlan "The Contract That Neither Party Intends" (2012) 29 JCL 26.

[151] This approach is adopted in *Vector Gas,* above n 149, at [19] per Tipping J; *Gibbons Holdings Ltd v Wholesale Distributors Ltd,* above n 148, at [94], [96], [97] and [122] per Thomas J; *Arnold v Britton* [2015] UKSC 36, [2015] 2 WLR 1593 at [15].

[152] This is also referred to as the parties' actual intention, where it exists.

[153] Andrew Burrows "Construction and Rectification" in Andrew Burrows and Edwin Peel (eds) *Contract Terms* (7th ed, Oxford University Press, Oxford, 2007) 77 at 82-83; Winkelmann, Glazebrook and France, above n 148, at 466.

[154] For example, *The Malthouse Ltd v Rangatira Ltd* [2018] NZCA 621 at [18] cites both *Vector Gas* and *Firm PI 1.* Some commentators argue that *ICS,* above n 5, which is a leading case for contract interpretation principles as discussed below, itself attempts to combine these two approaches: see Dawson, above n 148, at 242; Havelock, above n 148, at 196-197.

[155] *Bathurst Resources Ltd v L&M Coal Holdings Ltd* [2021] NZSC 85.

[156] *Firm PI 1,* above n 149.

[157] At [62].

[158] *Bathurst,* above n 155, at [43].

[159] At [76].

[160] Many commentators have questioned whether it is possible to interpret a contract acontextually: see Lord Nicholls, above n 146, at 79; Stanley Fish *The Law Wishes to Have a Formal Existence* (University of Toronto, Toronto, 1990) for a discussion of how in applying the parol evidence rule, judges assume a context instead of interpreting the text acontextually.

including commercial common sense. The admissibility of pre-contractual negotiations and post-contractual conduct is controversial and will be discussed in more detail later.

1 Shift away from strict textualism

The traditional era of contract interpretation in the 19th century in England was largely textualist. This era is characterised by the plain meaning rule and the parol evidence rule. The plain meaning rule provides that if the words of the contract are plain and unambiguous, then evidence of external context cannot be admitted to displace the plain meaning of the contract.[161] The parol evidence rule requires that if a document represents a contract, then external evidence is inadmissible to add to, subtract from, or vary the express terms of the contract.[162]

These rules had many exceptions.[163] These[164] included adducing extrinsic evidence before a court to prove the contract was not wholly represented by the written document for the parol evidence rule[165] and proving that a word had a specialised "trade usage" to avoid the plain meaning rule.[166]

In the United Kingdom, Lord Wilberforce's jurisprudence in the 1970s started to shift the law towards contextualism. In *Prenn v Simmonds,*[167] he confirmed that contracts must be interpreted in light of their "matrix of facts" rather than on purely linguistic considerations.[168] In *Reardon Smith Line v Hansen-Tangen*[169] he held context is always relevant to the task of contract interpretation: "[n]o contracts are made in a vacuum: there is always a setting in which they have to be placed."[170]

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[161] Matthew Barber "Contents of the Contract" in John Burrows, Jeremy Finn, and Matthew Barber *Law of Contract in New Zealand* (6th ed, Lexisnexis, Wellington) 177 at 184; *Shore v Wilson* (1842) 9 Cl & Fin 355 at 356.
[162] Law Commission (United Kingdom) *Law of Contract: The Parol Evidence Rule* (Law Com No 154) at [2.7]; *Bank of Australasia v Palmer* [1897] AC 540 (PC).
[163] Barber, above n 161, at 181 describes the plain meaning rule as having been "emasculated."
[164] See generally Barber, above n 161, at 178-181; J W Carter and John Ren *Carter's guide to New Zealand contract law* (Lexisnexis, Wellington, 2016) at [10-17]-[10-20]; Edwin Peel and G H Treitel *The law of contract* (14th ed, Sweet & Maxwell, London, 2015) at [6-014]-[6-030].
[165] *Gillespie Bros & Co v Cheney, Eggar & Co* [1896] 2 QB 59 at 62 as cited in Peel and Treitel, above n 164, at [6-015].
[166] *Partenreederei M S Karen Oltmann v Scarsdale Shipping Co Ltd* [1976] 2 Lloyd's Rep 708 at 712 per Kerr J.
[167] *Prenn v Simmonds* [1971] 3 All ER 237 (HL).
[168] At 239.
[169] *Reardon Smith Line Ltd v Hansen-Tangen* [1976] 1 WLR 989 (HL).
[170] At 995.

Lord Hoffmann's classic restatement of the principles of contract interpretation in *Investors Compensation Scheme Ltd v West Bromwich Building Society*[171] (the "*ICS* principles") in 1998 made clear that the pure textualist approach had been abandoned.

The *ICS* principles are as follows.[172] First, the task of interpretation is to ascertain "the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract." Secondly, the "background knowledge" for this purpose includes "absolutely anything" which would affect the way a reasonable man would understand the document.[173] Thirdly, despite the second principle, previous negotiations and declarations of subjective intent are not admissible for contractual interpretation.[174] Fourthly, the reasonable man can choose between potential meanings of the contract where the words are ambiguous, or even conclude that the parties used the wrong words or syntax. Fifthly, although there is a "rule" that parties in formal documents do not commonly make linguistic mistakes and therefore the "natural and ordinary meaning" of the contract should be adopted, it is possible to conclude from the background of a contract that something has gone wrong with the contractual language. Lord Hoffmann quoted Lord Diplock in *Antaios Compania Naveria SA v Salen Rederierna AB*[175] as noting:[176]

> [I]f detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense.

The principles were adopted in New Zealand by the Court of Appeal in *Boat Park Ltd v Hutchinson*,[177] although it is notable that these principles were present in New Zealand pre-

[171] Above n 5.
[172] At 912-913.
[173] The term "man" is used in *ICS*.
[174] Note – this is not the case in New Zealand, see below at 31-33.
[175] *Antaios Compania Naveria SA v Salen Rederierna AB* [1985] AC 191.
[176] At 201 per Lord Diplock.
[177] *Boat Park Ltd v Hutchinson* [1999] 2 NZLR 74 (CA) at 81-82.

ICS.[178] The Supreme Court in *Vector Gas Ltd v Bay of Plenty Energy Ltd*[179] confirmed that an ambiguity in the contract is not required for context to be considered.[180]

2 A shift back to textualism?

Several commentators have argued the recent cases of *Firm PI 1*[181] in New Zealand and *Arnold v Britton*[182] in the United Kingdom[183] represent a shift towards a textualist approach and away from the *ICS* principles.[184] The commentators often compare *Firm PI 1* and *Arnold v Britton* to *Rainy Sky SA v Kookmin Bank*[185] in the United Kingdom and *Vector Gas* in New Zealand, which they consider to represent the peak of contextualism.[186] The shift towards a more textualist approach is said to be shown in two ways. First, *Firm PI 1* and *Arnold v Britton* explicitly prioritise the text more than *ICS*, *Rainy Sky* and *Vector Gas.*[187] For example, the majority in *Firm PI 1* explicitly noted the text remains "centrally important" and:[188]

> If the language at issue, construed in the context of the contract as a whole, has an ordinary and natural meaning, that will be a powerful, albeit not conclusive, indicator of what the parties meant.

Secondly, these cases limit the weight of commercial common sense as compared to *Rainy Sky* and *Vector Gas*.[189] For example, in *Rainy Sky* the United Kingdom Supreme Court noted:[190]

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[178] See *Blakely and Anderson v De Lambert* [1959] NZLR 356 as cited in *Vector Gas*, above n 149, at [59] per McGrath J.
[179] Above n 149.
[180] At [4] per Blanchard J (with whom Gault J agrees at [151]), at [22] per Tipping J, and at [62] per McGrath J. Wilson J dissents at [119]-[120].
[181] Above n 149.
[182] Above n 151.
[183] This dissertation assumes that the approach to contract interpretation principles in New Zealand and the United Kingdom are consistent.
[184] Havelock, above n 148, at 189 and 198; Richard Calnan *Principles of Contractual Interpretation* (2nd ed, Oxford University Press, Oxford, 2017) at [Pr.42]; Geoffrey Vos "Contractual Interpretation: Do Judges Sometimes Say One Thing and Do Another?" (2017) 23 Canta LR 1; Lord Sumption "A question of taste: the Supreme Court and the interpretation of contracts" (2017) 17 OUCLJ 301 at 302; Tim Smith and Sam Cathro "The interpretation of contracts: A lordly extrajudicial conflict, and its potential significance for New Zealand" (2019) 925 LawTalk 49; R Craig Connal "Has the Rainy Sky Dried Up? *Arnold v Britton* and Commercial Interpretation" (2016) 20 Edin LR 71.
[185] *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50, [2011] 1 WLR 2900.
[186] Smith and Cathro, above n 184, at 51; Sumption, above n 184.
[187] Smith and Cathro, above n 184, at 51, Calnan, above n 184, at vii; Havelock, above n 148, at 198 and 201.
[188] *Firm PI 1*, above n 149, at [63].
[189] Havelock, above n 148, at 201; Sumption, above n 184.
[190] *Rainy Sky*, above n 185, at [30].

> [W]here a term of a contract is open to more than one interpretation, it is generally appropriate to adopt the interpretation which is more consistent with business common sense.

In comparison, the Supreme Court in *Firm PI 1* notes "there is reason to be cautious […] because commercial absurdity tends to lie in the eye of the beholder."[191]

Firm PI 1 and *Arnold v Britton*, amongst other cases,[192] do emphasise the primacy of the text and caution against over-enthusiastic use of commercial sense. However, this does not necessarily mean these cases represent a shift in the law.[193] The emphasis on the primacy of the text has been *consistently* present in the law since *ICS*, and before then too. Pre-*ICS*, in *Mannai Investment v Eagle Star Assurance*,[194] Lord Hoffmann notes "[w]e start with an assumption that people will use words and grammar in a conventional way."[195] In *ICS* itself his Lordship notes there is a rule that words are given their "natural and ordinary meaning" reflecting the fact that "we do not easily accept that people have made linguistic mistakes, particularly in formal documents."[196] Post-*ICS*, in *Bank of Credit and Commerce International SA v Ali*,[197] his Lordship said, "the primary source for understanding what the parties meant is their language interpreted with conventional usage."[198] Lord Hoffmann also cautions against over-emphasis of commercial sense in *Chartbrook* where he notes, "the fact that a contract may appear unduly favourable to one of the parties is not a sufficient reason for supporting that it does not mean what it says."[199] This case is cited by *Firm PI 1* for support in cautioning the use of commercial sense.[200] Thus, the expressions of law throughout these cases has remained largely consistent

[191] *Firm PI 1*, above n 149, at [90].
[192] For example, *Lakes International Golf Management Ltd v Vincent* [2017] NZSC 99, [2017] 1 NZLR 935, *M v H* [2018] NZCA 525, and *The Malthouse Ltd v Rangatira*, above n 154, as cited in Smith and Cathro, above n 184, at 51. For the United Kingdom, see *FSHC Group Holdings Ltd v GLAS Trust Corpn Ltd* [2019] EWCA Civ 1361, [2020] 2 WLR 429 as cited in David McLauchlan "A new conservatism in contract interpretation?" [2020] NZLJ 312 [Part 2] at 336.
[193] See also David McLauchlan "A Sea Change in the Law of Contract Interpretation?" (2019) 50 VUWLR 657; David McLauchlan "Continuity, Not Change, in Contract Interpretation?" (2017) 133 LQR 546; Catterwall, above n 146; Leonard Hoffmann "Language and Lawyers" (2018) 134 LQR 553.
[194] *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] 2 WLR 945 (HL).
[195] At 967 per Lord Hoffmann.
[196] *ICS*, above n 5, at 912-913.
[197] *Bank of Credit and Commerce International SA v Ali* [2001] UKHL 8, [2001] 2 WLR 735.
[198] At [39] per Lord Hoffmann.
[199] *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 3 WLR 267 at [20] per Lord Hoffmann.
[200] *Firm PI 1*, above n 149, at [90].

after *ICS*, which is reflected in the fact that *ICS* is still cited in the leading contract cases in New Zealand,[201] and within *Firm PI 1* itself.[202]

Some commentators still argue the application of this law is inconsistent,[203] with more recent cases prioritising the plain language of the contract over commercial sense and potential unfairness to the parties.[204] These differences can be explained by a varying balance between textualism and contextualism[205] depending on the circumstances:[206]

> The extent to which [textualism and contextualism] will assist the court in its task will vary according to the circumstances of the particular agreement or agreements. Some agreements may be successfully interpreted by textual analysis, for example because of their sophistication and complexity and because they have been negotiated and prepared with the assistance of skilled professionals. The correct interpretation of other contracts may be achieved by a greater emphasis on the factual matrix, for example because of their informality, brevity or absence of skilled professional assistance.

This has been recognised in *Firm PI 1* as the majority notes "[t]o some extent, then, the scope for resort to background is itself contextual."[207]

D Admissibility of Extra-Contractual Evidence

There has been a trend in New Zealand towards admitting more types of extra-contractual evidence, including pre-contractual negotiations and post-contractual conduct.

During the traditional era of contract interpretation with the plain meaning and parol evidence rules, extra-contractual evidence was inadmissible.[208] The plain meaning rule clearly no longer

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[201] For example, *Bathurst Resources Ltd v L&M Coal Holdings Ltd*, above n 155.
[202] *Firm PI 1*, above n 149, at [60].
[203] See Connal, above n 184, at 76: "An avid follower of case law would have noted that courts at various levels often repeat a similar list of principles of construction, yet reach radically different results when these are applied to an individual document." See also Calnan, above n 184, at vii; Hoffmann, above n 193.
[204] Calnan, above n 184, at [Pr.42]; Vos, above n 184.
[205] See Mindy Chen-Wishart *Contract Law* (6th ed, Oxford University Press, Oxford, 2018) at 389; McLauchlan, above n 193, at 678; McLauchlan, above n 146, at 434.
[206] *Wood v Capita*, above n 149, at [13].
[207] *Firm PI 1*, above n 149, at [62]. This statement was affirmed in *Bathurst*, above n 155, at [47]. See also Winkelmann, Glazebrook and France, above n 148, at 481; and *Green Growth No 2 Ltd v Queen Elizabeth the Second National Trust* [2018] NZSC 75, [2019] 1 NZLR 161 for the restriction of using contextual evidence to interpret and rectify a registered document.
[208] See above n 161 and 162 and associated text.

applies post-*ICS.* The status of the parol evidence rule was uncertain for a period,[209] but the Supreme Court in *Bathurst* confirmed it is a rule of evidence and therefore is displaced by the Evidence Act 2006,[210] which governs all matters of admissibility.[211]

New Zealand has departed from the United Kingdom approach by admitting pre-contractual negotiations and post-contractual conduct. In *Gibbons Holdings Ltd v Wholesale Distributors Ltd*, four out of five Supreme Court Judges held post-contractual conduct is admissible for interpreting contracts.[212] Tipping and Anderson JJ held the conduct must be mutual.[213] Tipping J ruled it is admissible because the court should not deprive itself of any material that may be helpful in ascertaining the parties' common intention.[214] In comparison, in the United Kingdom post-contractual conduct is inadmissible because it would risk the result that "a contract meant one thing the day it was signed, but by reason of subsequent events meant something different a month or a year later."[215] It is also inadmissible because it only tends to prove parties' subjective intentions.[216] The first concern is mitigated because the New Zealand courts have been explicit that post-contractual conduct can only be used to interpret the meaning of the contract as at the date it was created.[217]

The admissibility of pre-contractual negotiations was uncertain for a time. In *Vector Gas*, four of five Supreme Court Judges held negotiations were admissible,[218] but two Judges held they were only admissible to establish the context and background of the contract.[219] However, the admissibility of negotiations was still treated as unsettled by subsequent courts and commentators.[220]

Bathurst brought certainty in this area. The Supreme Court was unanimous in holding the admissibility of pre-contractual negotiations, and post-contractual conduct, is to be determined

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[209] Winkelmann, Glazebrook and France, above n 148, at 503-504.
[210] *Bathurst,* above n 155, at [56]-[57].
[211] Evidence Act 2006, s 7.
[212] *Gibbons Holdings,* above n 148, at [7] per Elias CJ, at [52] per Tipping J, at [73] per Anderson J, and at [114] per Thomas J.
[213] At [52] per Tipping J, at [73] per Anderson J.
[214] At [52] per Tipping J.
[215] *James Miller & Partners Ltd v Whitworth Street Estates (Manchester) Ltd* [1970] AC 583 (HL) at 603 per Lord Reid.
[216] *Schuler v Wickman Machine Tool Sales Ltd* [1973] 2 WLR 683 (HL) at 705 per Lord Simon.
[217] *Bathurst,* above n 155, at [89].
[218] *Vector Gas,* above n 149, at [13]-[14] per Blanchard J, at [31] per Tipping J, at [122] per Wilson J, and at [151] per Gault J.
[219] At [13]-[14] per Blanchard J with whom Gault J agreed at [151].
[220] *Bathurst,* above n 155, at [74]; Barber, above n 161, at 198; Winkelmann, Glazebrook and France, above n 148, at 483.

under ss 7 and 8 of the Evidence Act 2006.[221] Thus, relevant evidence that tends to prove or disprove anything that affects the determination of the contract's meaning from the perspective of a reasonable person is admissible.[222] This includes evidence showing what a party intended their words to mean so long as this intention was communicated and mutually understood, with silence from the receiving party being sufficient to prove the meaning was mutually understood.[223] The Court considered that s 8 of the Evidence Act, which excludes evidence that would needlessly prolong the proceeding,[224] would mitigate the practical concerns around wasting time and resources.[225]

This can be contrasted with the approach in the United Kingdom, where pre-contractual negotiations are inadmissible because they; are seen as irrelevant to interpreting the final contractual document;[226] they cause uncertainty;[227] add to the cost of litigation and legal advice;[228] force courts to distinguish between the parties' aspirational meanings and intended meanings of the contract;[229] and add risk for third parties relying on the contract.[230]

E Conclusion

Overall, this chapter has argued the law shifted from strict textualism to a more contextualist approach in the 1990s, and has remained consistently contextualist. The law also shifted towards allowing more types of contextual evidence to assist in contract interpretation, including pre-contractual negotiations and post-contractual conduct.

Chapter IV will now go on to assess whether these trends are consistent with the ethic of care and default male critiques set out in Chapter II.

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[221] *Bathurst*, above n 155, at [57], [62] and [64].
[222] At [62].
[223] At [76].
[224] Evidence Act 2006, s 8(1)(b).
[225] At [64].
[226] *Prenn v Simmonds*, above n 167, at 240-241 per Lord Wilberforce.
[227] *Chartbrook*, above n 199, at [35].
[228] At [35].
[229] At [38].
[230] At [40].

IV A Feminist Analysis of Contract Interpretation Principles

A Introduction

> Perhaps nothing could better embody – or, more precisely, disembody – men's abstracted relations with each other than the model of the discrete transaction, [the focal point] of the law of contract.[231]

This chapter will apply the feminist critiques outlined in Chapter II, namely the ethic of care and default male critiques, to the trends within the law of contract interpretation principles outlined in Chapter III. This chapter will argue that the major shifts from textualism to contextualism and towards admitting more types of evidence for contract interpretation, are consistent with the feminist critiques. However, feminism did not motivate these trends, meaning that the law of contract interpretation principles is not entirely consistent with the feminist critiques.

To prove this thesis, this chapter will: (1) explain what the object of a feminist law of contract would be; (2) assess whether the shift from textualism to contextualism can be seen as consistent with the ethic of care; and (3) assess whether the shift towards admitting more types of evidence can be seen as displacing the default male.

B Object of Contract Interpretation

Chapter III outlined that the object of contract interpretation within the traditional orthodox paradigm is not universally agreed: some argue its aim is to find the objective intentions of the parties and attribute that as the meaning of the contract; while others insist that interpretation involves determining the meaning of the text of the contract and attributing this as the presumed intentions of the parties.[232] For those who ascribe to a feminist approach, there is a different tension as to the purpose of contract interpretation. This tension is between obtaining outcomes that take into account the particularities of the parties to the relevant contract,[233] including the intentions of the parties; and interpreting the contract in a way that would minimise harm.[234] These two feminist goals are not always consistent. It is entirely possible to intend to do

[231] Brown, above n 55, at 5.
[232] Above pages 25-26.
[233] Gilligan, above n 4, at 50-51 and 66. Bartlett, above n 58, at 158 (feminist practical reasoning); Hunter, above n 134, at 35-36; Hunter, above n 25 at 11-12.
[234] Gilligan, above n 4, at 174.

something which could cause harm either to yourself or others.[235] This incongruity may be caused by an inequality in bargaining power, the circumstances around a contract changing,[236] or perhaps from the selflessness of one of the parties.

An example of the orthodox contract dilemma would be where there are private communications between the parties that a price is inclusive of GST, but the common practice in the industry is that prices are calculated exclusive of GST.[237] In this case, the parties' objective intentions of the parties is that the price is inclusive of GST given their communications. The interpretation of the *contract* would likely be exclusive of GST given the industry convention. This would be the presumed intention of the parties and thus the meaning of their contract. In interpreting this contract, assuming there are no other details a feminist may want to consider,[238] they would prefer the outcome that valued the parties' actual intentions, consistent with getting an outcome that suits the parties' particularities.

In comparison, an example of the feminist dilemma would be where there is a surrogacy contract where the surrogate mother decides she wants to keep the baby.[239] It would be unfair and cause significant harm to the surrogate mother to enforce the contract and either require the surrogate mother to give the child to the paying couple or monetarily compensate them. However, it would disregard the surrogate mother's intentions when entering the contract to give away the child and could "infantilise" her by refusing to enforce this choice.[240] An orthodox contract scholar would only care about the parties' intentions, and thus the unfairness would not be a consideration for interpretating the contract.[241]

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[235] Hadfield, above n 2, at 1236-1237; Gillian K Hadfield "The Dilemma of Choice: A feminist perspective on the Limits of Freedom of Contract" (1995) 33(2) Osgoode Hall LJ 337 at 341: "Choice promotes her autonomy on the one hand but diminished her welfare on the other." This point will be dealt with in more detail in Chapter V.

[236] Common examples here include pre-nuptial agreements for the separation of property upon the break-up of a relationship – see for example, Thompson, above n 2; and Sharon Thompson "Using Feminist Relational Contract Theory to Build upon Consentability: A Case Study of Prenups" (2020) 66 Loy L Rev 55; or surrogacy contracts – see Hadfield, above n 2.

[237] This is very loosely based off the facts of *Vector Gas*, above n 149, as the dispute in that case was about whether a price was inclusive or exclusive of GST and involved a considering pre-contractual negotiations. There was, however, a dispute in that case about what the pre-contractual negotiations meant. This is therefore a simplified version of the facts of that case.

[238] The level of context a feminist would consider is discussed in more detail below: at 36-37.

[239] Hadfield, above n 2, at 1240-1242.

[240] Charles Fried *Contract as Promise: A Theory of Contractual Obligation* (2nd ed, Oxford University Press, Oxford, 2015) at 20-21.

[241] This is assuming that such a contract is not generally unenforceable due to public policy concerns or legislation – as they are in New Zealand, see Human Assisted Reproductive Technology Act 2004, s 14(1), although this is currently under review by the Law Commission: see Law Commission *Te Kōpū Whāngai: He Arotake – Review of Surrogacy* (NZLC IP47, 2021).

Different feminist theories take different approaches to the prioritisation of these goals when they conflict. The relational feminist approach taken in this dissertation prioritises the ethic of care and although it considers both the particularities of the parties and the minimisation of harm, the latter is the core goal of the ethic of care.[242] This does not mean the parties' intentions are irrelevant. If the parties have a shared subjective mutual intention, then it would likely hurt the parties for the court to adopt a meaning of the contract that goes against both parties' expectations.[243]

C Contextualism, Textualism and the Ethic of Care

Chapter III concluded that the law of contractual interpretation principles shifted from textualism to contextualism, and despite arguments to the contrary, has remained consistently contextualist. This section will argue this shift is consistent with the ethic of care critique, but the current law of contract is not entirely consistent with feminism because the contextualist approach is filtered through the reasonable man, who reasons with an untempered ethic of justice. This dissertation argues that although the law is not currently feminist, the contextualist approach of orthodox contract law provides the tools for a truly gender-neutral reasonable *person* approach.

1 Shift to contextualism

The shift from textualism to contextualism is consistent with feminism because the ethic of care is fundamentally inconsistent with textualism. However, this change was not initiated by feminist concerns, but to assist the courts in interpreting the contract, either by determining the objective intentions of the parties or finding the meaning of the contract as interpreted by the reasonable person.[244] This means that although contract law and the ethic of care both involve parties reasoning "contextually," the "contextual" reasoning processes under the ethic of care and contract law are slightly different.

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[242] Gilligan, above n 4, at 174.

[243] This is similar to David McLauchlan's argument that it would be *unreasonable* to not take into account the shared subjective intentions of the parties in interpretating a contract: McLauchlan, above n 150, at 41.

[244] *ICS*, above n 5, per Lord Hoffmann: when saying why it is important to use context and the matrix of fact: "Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, [the matrix of facts] includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable *man*." [Emphasis added].

Orthodox contractual contextualism involves considering "the matrix of facts" outside the document purporting to be the contract to interpret it.[245] In contrast, the ethic of care reasons contextually by making bespoke solutions to each problem by weighing varying considerations, such as the intentions of the parties or their vulnerabilities, and those considerations being more or less important depending on the circumstances. There are no moral absolutes or abstracted rules to follow when reasoning from this form of contextualism.[246] It considers *more* than just the "matrix of facts" traditionally considered,[247] and includes factors like the fairness of the bargain,[248] the vulnerabilities of the parties, and other characteristics of the parties.[249]

2 The reasonable man

The reasonable man in the touchstone for contextualism because he interprets the contract:[250]

> Interpretation is the ascertainment of the meaning which the document would convey to a *reasonable person* having all the background knowledge which would reasonable have been available to the parties in the situation in which they were at the time of the contract.

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[245] *Vector Gas,* above n 149, at [23] per Tipping J: "Context is always a necessary ingredient in ascertaining meaning. You cannot claim to have identified the intended meaning without reference to context"; *Firm PI 1,* above n 149, at [60] per McGrath, Glazebrook and Arnold JJ: "This objective meaning is taken to be that which the parties intended. […] Accordingly, the context provided by the contract as a whole and any relevant background informs meaning."

[246] Gilligan, above n 4, at 50-51 and 66; Noddings, above n 95, at 93-102.

[247] This usually involves, inter alia, the background of the industry, commercial common sense, the communications between the parties in negotiations and subsequent actions, and the purpose of the contract.

[248] Fairness is explicitly not a relevant consideration in contract interpretation, as per *Attorney General of Belize v Belize Telecom Ltd,* above n 147, at [16]: "The court has no power to improve upon the instrument which it is called upon to construe […]. It cannot introduce terms to make it fairer or more reasonable. It is concerned only to discover what the instrument means." Compare the limited use of reasonableness in *Wickman Machine Tools Sales Ltd,* above n 216, at 689: "The fact that a particular construction leads to a *very unreasonable* result must be a relevant consideration. The more unreasonable the result the more unlikely it is that the parties can have intended it, and if they do intend it, the more necessary it is that they shall make that intention abundantly clear." [Emphasis added]. Commercial sense is a relevant consideration under current contract law, but this is not necessarily the "fairness" of the bargain, but whether it is feasible for the parties to have agreed to the contract. It has also been urged to be used with caution: *Arnold v Britton,* above n 151, at [19]; *Wood v Capita,* above n 149, at [28]. Compare *Rainy Sky,* above n 185, at [30].

[249] See, for example, the example given in Patricia J Williams "Alchemical Notes: Reconstructing Ideals form Deconstructed Rights" (1987) 22 Harv CRCLL Rev 401 at 406-408 where an informal lease between a black woman and a landlord represents a lack of trust because of historical abuses, whereas an informal lease between a white man and a landlord is a representation of trust that the relationship does not need to be formalised.

[250] *ICS,* above n 5, at 912 [emphasis added]. Note that Lord Hoffmann adopts the approach to contract interpretation that the goal of contract interpretation is to find the meaning of the contract and attribute it as the presumed intentions of the parties, but because the alternative approach is to find the *objective* intentions of the parties, it would also take place through the lens of the reasonable man.

This quote uses the term "reasonable person" instead of "reasonable man," but these two terms are interchangeable.[251] This is evident in the *ICS* judgment itself, where Lord Hoffmann uses the term "reasonable person" in principle 1, but in principles 2 and 4, uses the term "reasonable man."[252] Presumably these notations refer to the same hypothetical conception.[253] The term "reasonable person" has been subject to feminist critique on the basis that it is deceptive because it is the reasonable *man*, in gender as well as in name,[254] masquerading as gender-neutral, therefore immunising it from a gendered critique.[255]

The reasonable man[256] has been subject to feminist critiques in tort,[257] criminal,[258] and employment law.[259] In tort law, the reasonable man standard is explicitly normative because it represents a standard people are expected to meet,[260] otherwise they will fail to take reasonable care and breach the law. Because it is explicitly normative, it involves policy decisions about what community standards it should incorporate.[261] This makes it easier to critique it from a feminist perspective, because feminists can argue the policy making *choices* exclude women.

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[251] Bender, above n 40, at 21-22; Caroline Forell "Essentialism, Empathy, and the Reasonable Woman" (1994) U Ill L Rev 769 at 772; Alena M Allen "The Emotional Woman" (2021) 99 NC L Rev 1027 at 1046; Naomi R Cahn "Looseness of Legal Language: The Reasonable Woman Standard in Theory and in Practice" (1992) 77 Cornell LR 1398 at 1405.

[252] *ICS*, above n 5, at 921-913.

[253] The term is also used in other cases, see, for example *Wickman*, above n 216, per Lord Wilberforce at 700: "I would only add that, for my part, to call the clause arbitrary, capricious or fantastic, or to introduce as a test of its validity the ubiquitous *reasonable man* (I do not know whether *he* is English or German) is to assume, contrary to the evidence, that both parties to the contract adopted a standard of easygoing tolerance rather than one of aggressive, insistent punctuality and efficiency." [emphasis added.]

[254] Bender, above n 40, at 22; Joanne Conaghan "Tort Law and the Feminist Critique of Reason" in Anne Bottomley (ed) *Feminist Perspectives on the Foundational Subjects of Law* (Cavendish Publishing Ltd, London, 1996) 47 at 47.

[255] Bender, above n 40, at 21; Conaghan, above n 254.

[256] This dissertation will use the term "reasonable man" when discussing the gendered critique of the reasonable man, to distinguish it from "reasonable person" which is used to refer to a truly gender-neutral (or gender-equal) reasoning method.

[257] See, for example: Conaghan, above n 254; Bender, above n 40; Allen, above n 251; Mayo Moran "The Reasonable Person: A Conceptual Biography in Comparative Perspective" (2010) Lewis & Clark L Rev 1233.

[258] See, for example, Allen, above n 251; Moran, above n 257; Lexia Kirkconnell-Kawana, Alarna Sharratt "Commentary: Finding a credible and plausible narrative of self-defence" and Brenda Midson "Judgment: *R v Wang*" in Elisabeth McDonald, Rhonda Powell, Māmara Stephens, Rosemary Hunter (eds) *Feminist Judgements of Aotearoa New Zealand: Te Tino: A Two-Stranded Rope* (Hart Publishing, Oxford, 2017) 497.

[259] See, for example, Forell, above n 251.

[260] Chris Dent "The 'Reasonable Man', his Nineteenth-Century 'Siblings', and their Legacy" (2017) J of Law and Society 406 at 419; Larry A DiMatteo "The Counterpoises of Contracts: The Reasonable Person Standard and the Subjectivity of Judgment" (1997) 48 S C L Rev 293.

[261] Atiyah has described the reasonable man as one of a range of legal devices that serves to "obscure the policy content of judicial decision-making": P S Atiyah *Accidents, compensation, and the law* (3rd ed, Weidenfeld and Nicolson, 1980) at 42 as cited in Conaghan, above n 40, at 52.

The reasonable man in contract law is purportedly a descriptive standard as he describes the bargain the parties have come to.[262] One could argue this descriptive function does not make policy decisions. This is obviously untrue. It is impossible to avoid making policy decisions. For example, this chapter outlined four different conceptions of the object of contract interpretation, which would reach different results in some cases. This is a policy decision, for even choosing the least interventionist object is a policy decision not to be interventionist. Further, the process of determining the meaning of a contract is also normative. Orthodox contractual contextualism still involves weighing potentially conflicting considerations, such as commercial sense and the plain meaning of the contract, without any obvious criteria to resolve the conflict. It is inevitable that in making this decision, the reasonable man will make normative decisions about what he thinks should be prioritised.[263]

Therefore the reasonable man in contract makes normative policy *choices* and can be subject to a feminist critique. He should reason like the reasonable *person* and aim to make sex differences costless. In tort law, feminist scholars argue the reasonable man is male because of his characteristics and descriptions. In the United Kingdom in negligence law, he is described as "the man on the Clapham Omnibus" and "the man who takes the magazines at home, and in the evenings pushes the lawn mower in his shirt sleeves."[264] These are a far cry from, for example, "the reasonable man who works part-time at a care home, picks the children up from school, and in the evenings cooks dinner and vacuums." The standard depictions of the reasonable man's life entrench the traditional public-private divide that is the domain of men, the public sphere being where they make money, and the private sphere where they can relax afterwards.[265] These descriptions are not present for contract law.

There are three other critiques made against the reasonable man in tort that are relevant to a contract critique. The first is that the reasonable man has an "exclusively male parentage",[266] meaning he was written by men with their own lives in mind.[267] Secondly, feminists point to the concept of reason itself being gendered.[268] The philosophical concept of "reasonableness"

[262] DiMatteo, above n 260, at 298.
[263] DiMatteo, above n 260, at 315; Dent, above n 260, at 419.
[264] *Hall v Brookland Auto Racing Club* [1933] 1 KB 205 per Greer LJ at 224 as cited in Conaghan, above n 254, at 52.
[265] Conaghan, above n 254, at 52.
[266] Conaghan, above n 254, at 52.
[267] Allen, above n 251, at 1046-1048.
[268] Conaghan, above n 254, at 54; Bender, above n 40, at 23.

traditionally believed only men had the capacity for "reason," whereas women were ruled by non-moral "emotion."[269] For example, Kant wrote:[270]

> I hardly believe that the fair sex is capable of principles … in place of it Providence has put in their breast kind and benevolent sensations.

Thirdly, and most significantly, the reasonable man is required to reason with an untempered ethic of justice. He does this both in the way he views himself and how he reasons morally.

The reasonable man's perception of himself reflects the paradigm of contract law, which is that contracts are between autonomous parties negotiating at arms-length acting rationally in their own best interests.[271] He sees contracts as transactions, not as relationships: they serve the outcome they were originally intended to and do not develop over time.[272]

The reasonable man's method of moral reasoning, consistent with an untempered ethic of justice, is mostly rule based. These rules were discussed in Chapter III, such as prioritising the plain meaning of the text of a contract and minimising use of commercial sense unless in extreme circumstances. This emphasis on rules and consistency can cause him to inappropriately apply rules created for different circumstances to the cases in front of him – failing in terms of justice and care.[273] He also employs orthodox contractual contextualism, but not ethic of care contextualism.

The reasonable man prioritises traditionally masculine reasoning methods and therefore does not make sex differences costless.[274] This holds women to a standard they will often fail to meet. However, the law contains the tools required to become feminist. The concept of "reasonableness" is flexible and different reasoning methods *could* be used.[275]

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[269] Held, above n 61, at 59 [Ethics of Care.]; Allen, above n 251, at 1047.
[270] Emmanuel Kant *Observations on the Feeling of Beautiful Sublime and Other Writings* (John T Goldthwait (translator), University of California Press, 1960) at 77 as cited in Mari Mikkola "Kant on Moral Agency and Women's Nature" (2011) 26 Kantian Review 89 at 90.
[271] Belcher, above n 39, at 34; Brown, above n 55, at 12; DiMatteo, above n 260, at 341; Debora L Threedy "Feminists & Contract Doctrine" (1999) 32 Ind L Rev 1247 at 1257.
[272] Brown, above n 55, at 12.
[273] West, above n 101.
[274] Littleton, above n 31.
[275] Tidwell and Linzer, above n 55; Peter Linzer and Patricia A Tidwell "Letter to David Dow – Friendly Critic and Critical Friend" (1991) 28 Hous L Rev 861 at 862.

3 Case studies

This chapter will now provide two case studies to illustrate how orthodox contractual contextualism and ethic of care contextualism apply differently, and to show how the reasonable man reasons with an untempered ethic of justice. These are *Arnold v Britton*[276] and *Firm PI 1 Ltd v Zurich Australian Insurance Ltd.*[277] These case studies also demonstrate how the concept of reasonableness is flexible enough to incorporate an ethic of care. I will then briefly consider what a feminist approach to contract interpretation would look like in other scenarios.

(a) *Arnold v Britton*

Arnold v Britton concerned a dispute between a landlord and tenants over the interpretation of a services charge in a 99-year lease for holiday chattels.[278] The clause in dispute read:[279]

> without any deductions in addition to the said rent *as* a proportionate part of the expenses and outgoings incurred by the lessors in the repair maintenance renewal *and renewal of the facilities of the estates* and the provision of services hereafter set out the yearly sum of £90 and VAT (if any) for the first year of the term hereby granted increasing thereafter by ten pounds per hundred for every subsequent year *or part* thereof.

An earlier version of the lease increased the charge by the same 10% triennially.[280] The rent for the chattels per year was £10 and increased by £5 every 21 years.[281]

The dispute was whether the service charge was an upper limit or a set charge.[282] The calculated sum was far out of line with inflation[283] and more than was required to service the chattels.[284]

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[276] Above n 151.
[277] Above n 149.
[278] At [3].
[279] *Arnold v Britton*, above n 151, at [7]. The words in italics were included in 14 leases, but not the other 7.
[280] At [6].
[281] At [3].
[282] At [10].
[283] For example, in the year 2012, the leases calculated on the triennial formula would pay a service charge of £311. If the charge increased in line with actual inflation, the lessee would pay £794. The leases on the annual formulation would pay £3,366. As these were 99-year leases calculated on compound interest, the disparity gets worse – in 2072, the triennial lessees would pay £1,900, whereas the annual lessees would pay £1,025,004. For comparison, they would pay £30 a year in rent: see at [100].
[284] At [80].

The majority decision, delivered by Lord Neuberger required the lessees to pay the full sum calculated by the term in the contract. In coming to this conclusion, his Lordship reasons with an untempered ethic of justice. First, Lord Neuberger reasons contextually in the orthodox contract sense, but not in an ethic of care sense. He considered the "matrix of facts" by considering the business conditions and inflation rates at the time of contracting.[285] This is consistent with the ethic of justice because his Lordship considers these factors whilst applying abstracted, unchanging rules that rank the relevant contractual interpretation principles. In this case, the judgment prioritises the strict interpretation of words according to their[286] "plain meaning"[287] over interpreting the contract to get a "satisfactory outcome in common sense terms," which his Lordship expressed "considerable sympathy for."[288]

Ethic of care contextualism would consider more factors including: the post-agreement inflation rates,[289] that the tenants were purchasing holiday chattels, which doubled as a place of relaxation for their families and an investment;[290] that some of these leases were not negotiated at arms-length,[291] which is significant for all the leases because they were intended to largely mirror each other;[292] these clauses were inserted for the benefit of the tenants;[293] and the landlord was presently receiving more funds than required to service the chattels. There are almost certainly other contextual factors an ethic of care would consider, such as how this dispute arose and how these particular litigants use and rely on their holiday chattels, but it appears this information was not provided to the Court.[294]

Secondly, the majority judgment conceptualises the parties as self-interested individuals with conflicting interests, consistent with an ethic of justice. Lord Neuberger describes the negotiation process of the leases thus:[295]

[285] At [35].
[286] Or at least the meaning that the Lords themselves considered "plain" – there is certainly an argument that the part of the lease that refers to the tenants paying "a proportionate part of the expenses" means the plain meaning of the clause is that the charge is a maximum cost.
[287] At [17] and [29] per Lord Neuberger.
[288] At [62] per Lord Neuberger.
[289] At [101].
[290] At [107] per Lord Carnwath.
[291] At [147] per Lord Carnwath.
[292] At [86] per Lord Carnwath.
[293] At [128] per Lord Carnwath.
[294] At [81] per Lord Carnwath. His Lordship here notes that this dispute arrived before the Court with little context.
[295] At [44]. Emphasis added.

> [T]hese leases involve long term commitments on both sides. […] [A] prospective lessee of a flat in a block or the like (as here) will normally be likely to have less negotiating freedom as to the terms than in relation to a free standing property. But so will the lessor, and *either is free to walk away if he* [sic] *regards the terms as unsatisfactory.*

The ethic of care would attempt to find a creative solution instead of saying that the parties could have walked away,[296] such that the contract should be interpreted strictly on its terms. One particular approach some feminist scholars adopt is Ian Macneil's relational contract theory,[297] which argues contracts should be viewed as relationships instead of transactions. Relational contract theory rejects the notion of "presentiation" whereby future events are consented to as if they were in the present.[298] This is never fully possible because unexpected events can cause the future to be different from expected, meaning consent is never fully achieved.[299] This is especially the case for relational contracts which are long-term, complex and subject to change.[300] Relational contract theory argues that contracts should not be interpreted from the moment of conception,[301] but allowed to evolve in their meaning as time progresses.[302] This allows greater levels of context to be considered in interpreting the contract, consistent with the ethic of care. This would allow the meaning of the contract to evolve with the circumstances, such as the current inflation rates.

A feminist judge would consider that the slight indication from the previous inflation rates and the wording of the contract points towards the charge being a set charge, but the potential harm to the tenants of paying higher and higher charges and the landlord getting money under a service charge they do not require would be a stronger factor towards the calculation being an upper limit. This would be the "reasonable" interpretation of the contract, that a 99-year lease

[296] Thomson, above n 236, at 69-70; Bender, above n 92, at 37.
[297] For example, Wightman, above n 55; Wightman, above n 129; Mulcahy, above n 55; Tidwell and Linzer, above n 55; Thompson, above n 2; Thompson, above n 236. However, not all feminist scholars agree with relationship contract theory, and have expressed concerns because it is not explicitly a feminist theory: Thompson, above n 2, at 630-631.
[298] Ian R Macneil "Restatement (Second) of Contracts and Presentiation (1974) 60 Va L Rev 589 at 589-590.
[299] Ian R Macneil "A Primer of Contract Planning" (1975) 48 S Cal L Rev 627 at 663-664.
[300] Macneil, above n 298, at 593-594.
[301] This is how contracts are currently interpreted under the law: see *Bathurst*, above n 155, at [46] and [89]; *Gibbons Holdings*, above n 148, at [59] per Tipping J.
[302] See Thompson, above n 2, and Thompson, above n 236.

would evolve to match the changing circumstances, rather than being set in the 1970s. The strict adherence to rules in this case over context is a failure of care *and* a failure of justice.[303]

The acknowledgment by Lord Neuberger of the minority decision's practical justice[304] illustrates how the ethic of justice can be constrained by its reliance on reasoning by rules. It is possible to get the minority's outcome through an ethic of justice, but only with different rules. Lord Carnwath, in the minority, seems to interpret the law more leniently than the majority,[305] but as outlined in Chapter III, the emphasis on plain meaning has been largely accepted in contract interpretation, consistent with the majority decision in this case. However, Lord Carnwath ultimately relies upon the responsibility of the court to the parties in the case – which is ethic of care reasoning.[306]

Lord Carnwath's judgment has parts that reflect an untempered ethic of justice, such as treating the parties as representatives of a class of parties and not individuals,[307] but it goes much further in being consistent with a feminist critique than the majority judgment.

(b) *Firm PI 1 Ltd v Zurich Australian Insurance Ltd*

Firm PI 1 concerned the interpretation of an insurance contract drafted by an insurance broker for an apartment block damaged in the Christchurch earthquakes.[308] The building was insured for a value of $12.95 million,[309] but its total replacement value was around $25 million.[310] The dispute was about whether the $12.95 million was inclusive or exclusive of the statutory cover under the Earthquake Commission Act 1993.[311] The relevant clause in the contract read:[312]

> In the event of the Insured having insured residential property for which compulsory Natural Disaster Damage cover under the Earthquake Commission Act 1993 applies then in the event of such property suffering Natural Disaster Damage during the Period of Cover and covered by Natural Damage cover,

[303] West, above n 101, at 61.
[304] At [62] per Lord Neuberger.
[305] See Lord Carnwath's description of the law in *Arnold v Britton,* above n 151, at [108]-[115] per Lord Carnwath.
[306] At [123] per Lord Carnwath.
[307] West, above n 101, at 52-57; Clement, above n 128, at 77.
[308] At [1].
[309] At [86].
[310] At [41].
[311] At [1].
[312] At [4] and [64]. The altered text (inserting the comma) is present in the case, but not in the clause in the contract.

> then the Insurer[']s liability will be limited to the amount of loss in excess of the Natural Disaster Damage cover.

The majority held the cover was inclusive of the statutory entitlement, and therefore the homeowners were only entitled to $6.8 million from the insurer.[313] The majority reasoned with an untempered ethic of justice. They reasoned from rules, emphasising the importance of the "ordinary and natural meaning" of the contract[314] which is significant because there were obvious drafting errors within the contract, as noted by the Court's grammatical correction of the clause. They emphasised the words "limited to" and that the "l" in the word "loss" in the clause was uncapitalised, and therefore it was not the defined term "Loss or Damage."[315] They also considered that the words "limited to" were significant.[316] This emphasis over the "plain meaning" of the words over anything else is significant, especially given there were obvious drafting errors within the contract, as noted by the Court's correction of a lack of apostrophe in the clause.[317]

The majority Judges treat the parties impartially. This dispute was between an insurance broker and the insurer, both traditionally seen as commercially sophisticated parties.[318] However, it is clear the homeowners were directly involved and brought the suit in the lower courts.[319] The ethic of care approach would consider the homeowners are more vulnerable and require more protection and nurturance because they have a lot more to lose,[320] potentially their homes.[321] It is worth noting the insurers also have the potential to experience harm. The important point here for the ethic of care is they have *less* to lose and will experience a lesser degree of harm

[313] At [99].
[314] At [63].
[315] At [71].
[316] At [71].
[317] At [4] and [64].
[318] At [71].
[319] *Body Corporate 398983 v Zurich Australian Insurance Ltd* [2013] NZHC 1109 [High Court Judgment]; *Zurich Australian Insurance Ltd (t/as Zurich New Zealand) v Body Corporate 398983* [2013] NZCA 560, [2014] 3 NZLR 289 [Court of Appeal Judgment]. In the Supreme Court judgment, the body corporate is joined as a respondent to the case against the broker, whereas in the lower courts they were against the insurer. It is unclear why they ended up being against the broker, perhaps because of individual settlement agreements. This is a factor that would be considered by a feminist judge, but as there is a lack of information, this dissertation will proceed as if the dispute was the same as it was in the lower courts as insured and broker against insurer.
[320] West, above n 101, at 52-57.
[321] This is an assumption that the people owning the apartments were living in them, rather than using them for commercial use. This is not a point that the case addresses, but this would be relevant context using an ethic of care approach.

from a decision being made against them because of their commercial wealth and the fact they are in the business of taking risks. As noted in the minority judgment:[322]

> It is true that in a case which has turned out to be one where the insured was underinsured, the statutory cover has reduced the loss the Body Corporate might have otherwise suffered. But what proper complaint about that result does the insurer have?

It is true that a decision against an insurer may result in them recalculating their premiums to account for changing risk. This will be a lesser concern in this case because the dispute arose because the property was *unknowingly* underinsured, which is not the case for most insurance claims. Regardless, the ethic of care views the judge as *only* having a responsibility to the parties they have a relationship with.[323]

Under the ethic of justice approach, vulnerabilities of the parties cannot be considered. The only possible orthodox rule that could assist a judge reasoning with an ethic of justice is contra proferentum, which allows a judge to prefer the interpretation of the party that did not draft the contract where that interpretation is available.[324] However, as the insurance broker drafted this contract, the contra proferentum rule would advantage the insurer in this case.[325]

Overall, the reasonable homeowner is unlikely to consider that their ability to rebuild their home should be determined based on a capital letter drafted by someone else. The disparity in vulnerability and harm would be more important to a judge reasoning with an ethic of care than the pedantic textualist reasoning used by the majority.

(c) Other circumstances

Under the ethic of care approach, the same rules do not have to apply for all contracts. It is not my contention that all of contract law must be changed, but rather that there are certain cases that because of the reasonable man's rigid adherence to rules result in unjust and uncaring

[322] *Firm PI 1,* above n 149, at [15] per Elias CJ and William Young J.
[323] West, above n 101, at 52: "The judge is in a relationship – a judicial rather than parental relationship, but a relationship nonetheless – with *these* litigants, not with the "public" at large, and not even with the class of similarly situated individuals the litigant may in some way resemble, just as a parent is in a relationship with her children, not children at large." See also Clement, above n 128, at 80.
[324] Stephen Todd "Exclusion clauses" in John Burrows, Jeremy Finn, and Matthew Barber *Law of Contract in New Zealand* (6th ed, Lexisnexis, Wellington) 227 at 241.
[325] *Firm PI 1,* above n 149, at [66].

outcomes. Equally there are cases where orthodox rules can achieve just and caring outcomes, such as where there is a question as to what a feminist approach would be for other cases where there are two commercial parties with roughly equal bargaining power who want certainty for their future dealings. The key is that the rules must be flexible, which can only occur through ethic of care contextualism.

4 Feminist objections to an objective theory

The standard of reasonableness this dissertation endorses, of a truly gender-neutral reasonable person balancing ethics of justice and care, is still an objective standard in the sense that it interprets a contract from an outside perspective. Some feminist theories object to objective reasonableness standards because they cannot be truly objective, and as outlined above, the concept of reasonableness is inherently gendered.[326]

It is true that objective standards can never be fully objective when it has to be filtered through the judicial mind.[327] The standard therefore is at risk of contamination by the judge's limited experiences.[328] This is especially dangerous when "reasonableness" is perceived as an intuitive and unquestioned response,[329] despite sometimes being far from "common" sense.[330] It is then impossible to separate this objective standard from the judge's subjective perceptions, and thus the judge's subjective perceptions are applied with an air of neutrality and correctness, making them difficult to challenge. MacKinnon describes objectivity as "a strategy of male hegemony" because:[331]

> [M]en *create* the world from their own point of view, which then *becomes* the truth to be described. […] *Power to create the world from one's point of view is power in its male form.*

This is a legitimate concern. It means a feminist approach relies on the sympathies of the largely male judiciary. However, we do not have a better alternative. Some feminists argue we should adopt a subjective or inter-subjective standard,[332] but this dissertation rejects this approach for

[326] See above n 270 and accompanying text.
[327] DiMatteo, above n 260, at 345; Mulcahy, above n 55, at 15.
[328] Winkelmann, above n 15; Moran, above n 15; Winkelmann, Glazebrook and France, above n 148 at 472.
[329] Allen, above n 251, at 1036.
[330] Winkelmann, Glazebrook and France, above n 148, at 472.
[331] Catherine A MacKinnon "Feminism, Marxism, Method, and the State: An Agenda for Theory" (1982) 7 Signs 515 at 537. Emphasis in original.
[332] For example, see Conaghan, above n 254, at 65.

four reasons. First, it is unclear what a subjective or intersubjective approach for contract interpretation principles would involve – is it a subjective approach from the parties? Or does it directly acknowledge the subjectivity of the judge? Second, a subjective approach is still filtered through the judicial mind, it is just done so explicitly. This immunises the judge from critique because it is impossible to argue they are applying the wrong standard. Third, the concept of objectivity and "reason" *does* lend legitimacy to the standard it applies and is, in the words of Forell, "a mythology too powerful to be abandoned."[333] If we can legitimise the feminist argument by arguing it aligns with how the reasonable person actually reasons, then we should take that opportunity. Fourth, a subjective standard can conflict with the ethic of care. It would strip the judge of the ability to interpret the contract with the aim of minimising harm when the parties intended a result that causes harm. It would also prevent the enforcement of a contract where a party claims they were crossing their fingers behind their back.[334] A better way to give effect to the ethic of care is through the relationship between judge and parties, where the judge is under a responsibility to balance the ethics.

This dissertation continues to adopt the concept of "reason" despite its sexist origins because incorporating the ethic of care into the concept of "reason" includes women where they were previously excluded. This can start to reclaim the concept of reason as a feminist concept.

5 Conclusion

Overall, the shift from textualism to contextualism creates the ability to apply the ethic of care to contract interpretation. However, when looked at more closely, the contextualism in recent leading cases is incongruent with ethic of care contextualism because it primarily reasons through rules and treats parties with rigid impartiality. This chapter has argued that through incorporating an ethic of care to temper the ethic of justice, a standard can be applied that makes sex differences costless through the pre-existing language of reasonableness.

D Admissibility and the Default Male

Chapter III outlined the clear trend towards admitting more types of evidence for interpreting contracts. This is consistent with the default male critique. Under the parol evidence rule, judges had room to import the default male into their reasoning because they were not provided

[333] Forell, above n 251, at 802.
[334] Gerald McMeel *McMeel on the Construction of Contracts* (3rd ed, Oxford University Press, Oxford, 2017) at [3.13].

with contextual evidence, and would have to assume what the goals of the contract were, the likely business background, and the relationship between the parties. These assumptions were likely to be typically masculine, and because they were not subject to submissions, irrefutable. When more evidence is admissible, the judges can no longer make those assumptions and have this evidence before them, which helps them come to more accurate conclusions for the parties.[335]

There is a question about whether the law could go further to be more consistent with the default male critique. Currently, pure subjective intentions are inadmissible to interpret contracts because they are seen as irrelevant.[336] However, subjective intentions would be relevant to a feminist approach with a touchstone of prevention of harm because to interpret a contract against the shared mutual intention of the parties is "repugnant to any concept of fairness, common sense and the reasonable expectations of honest men and women."[337] The next step is considering parties' subjective *un*communicated intentions, which gives judges the necessary information for applying an ethic of care contextualism. This information would include the parties' expectations, their characteristics, and their vulnerabilities.

There are legitimate concerns for admitting subjective evidence, being that parties, with the benefit of hindsight, can present a rosy picture of their intentions when entering into the contract.[338] However, the courts are capable of dealing with the reliability of evidence, and do so with regard to subjective intentions in other areas of the law, such as many areas of criminal law. This will also be a less significant problem given intention is not the touchstone for contract interpretation under a feminist approach. There is also a concern with the increased cost and complexity of litigation in admitting such evidence.[339] This is an unavoidable concern, although it is one that already exists for the amount of evidence admissible under the current law of contract.

[335] Winkelmann, Glazebrook and France, above n 148, at 472.
[336] *Bathurst,* above n 155, at [46]: "[the objective approach] rejects the parties' subjective evidence of intent as irrelevant to what both parties meant and as generally unreliable."
[337] *Gibbons Holdings,* above n 148, at [122] per Thomas J; see also McLauchlan, above n 150.
[338] *Bathurst,* above n 155, at [46]; D W McLauchlan "Objectivity in Contract" (2005) 24 U Queensland LJ 479 at 482-483; David McLauchlan "A Contract Contradiction" (1999) 30 VUWLR 175 at 182.
[339] *Vector Gas,* above n 149, at [22] per Tipping J.

E Conclusion

Overall, the law of contractual interpretation principles, in shifting from textualism to contextualism, and in allowing more admissible contextual evidence, is now more capable of supporting a feminist approach. However, it is not yet consistent with a feminist approach because of the lingering masculinity of the reasonable man. The law could be more consistent with a feminist approach, such as by incorporating a direct consideration of fairness and harm, incorporating relational contract theory, and admitting subjective evidence from the parties. Chapter V will evaluate the impact of this feminist theory of contract interpretation principles on the law of contract and feminist jurisprudence.

V Implications of a Feminist Law of Contract Interpretation Principles

A Introduction

This chapter will consider the implications of the feminist approach to interpretation principles outlined in Ch IV. It will consider whether such a critique should be adopted when the underlying principles of contract law are so entrenched and what the implications are for the legitimacy of contract law. It will also consider whether the feminist approach advocated for in Chapter IV is truly *contract* law, or whether it changes it beyond recognition. It will finally consider the implications of a feminist analysis of contract interpretation principles on feminist jurisprudence more generally.

B Implications for Contract Law

1 "More spokes on the wheel"?

As outlined in Chapter I, one concern with a feminist law of contract is that it would not provide value because "the principles and underlying premises [of contract law] are so firmly entrenched and so fundamentally sound that no good would be achieved by attempting to re-invent the wheel, even if the revised version did have a few more spokes on it."[340]

Two responses can be made to this objection. First, reforming the law of contract interpretation principles to be more feminist is important because it is crucial to the parties to the contract. As seen in the examples given in Chapter IV, the difference between interpretations can be millions of dollars, which for the individual parties, may enable them to rebuild their home after an earthquake. There is value in reforming this to better reflect the range of reasoning that exists in society. Just because an untempered ethic of justice is the entrenched norm in the law does not mean that norm is correct. This is not reason in and of itself to reject a feminist approach as not valuable.

Secondly, a feminist approach would be more than "a few more spokes" on the wheel of contract law. The objection assumes contract interpretation principles would not be significantly impacted by such an approach, but as shown in the differences in outcomes in Chapter IV, this is not the case. Even if there was not a drastic change, the reasons for making a decision are important. As outlined in Chapter I,[341] the law develops in accordance with

[340] Wilson, above n 15, at 515.
[341] Above at 8-9.

principles, and therefore if the underlying principles are inconsistent with feminism, the law is still at risk of being inconsistent with feminism.

2 The touchstone of contract law

Some scholars have raised concerns that a feminist law of contract would not be "contract" at all, because the touchstone of contract law is respect for parties' autonomy and a feminist law of contract does not share that same respect.[342]

Feminist theorists do value autonomy.[343] As discussed in Chapter II and IV, a key objective of the ethic of care is to achieve practical justice for the parties to the contract,[344] which will value the choices that the parties have made.[345] For other areas of contract law, feminist scholars have argued that autonomy should be conceptualised differently,[346] including valuing the parties' autonomy to change their mind.[347]

Autonomy, when discussed by contract scholars, usually means a pre-eminent value on the choices made by the contracting parties at the time of entering the contract.[348] It is different to freedom of contract, which relates to the ability to enter into a contract.[349] In contrast, autonomy is about promoting and having choices to exercise *within* the contract. It is described by Winkelmann et al thus:[350]

> One of the fundamental tenets of a liberal democracy is that an individual should have control over his or her capital […] [P]eople should be free to make bargains

[342] David Campbell "Afterword: Feminism, Liberalism and Utopianism in the Analysis of Contracting" in Linda Mulcahy and Sally Wheeler (eds) *Feminist Perspectives on Contract Law* (Glasshouse Press, London, 2005) 161 at 165 and 172; see also Dermot Feenan "Linda Mulcahy and Sally Wheelers eds) Feminist Perspectives on Contract Law" (2008) 17(2) S&LS 285 at 286: "[criticising] feminism's failure to place pre-eminent value on autonomy […] might seem a little like criticising anarchists for failing to sanctify order…".
[343] See generally Catriona Mackenzie and Natalie Stoljar "Autonomy Refigured" in Catriona Mackenzie and Natalie Stoljar (eds) *Relational Autonomy: Feminist Perspectives on Autonomy, Agency and the Social Self* (Oxford University Press, Oxford, 2000) 3; see generally Hadfield, above n 2; Gilligan discusses the importance of autonomy herself, see generally Gilligan, above n 4, at 71, 129-149, and 155-174.
[344] Bartlett, above n 58, at 158; Hunter et al, above n 87, at 26; Hunter, McGlynn and Rackley, above n 25, at 35-36.
[345] As discussed in Chapter IV, above at 36.
[346] See Thompson, above n 236.
[347] See Hadfield, above n 2.
[348] Stephen A Smith *Contract Theory* (Oxford University Press, Oxford, 2004) at 139-140.
[349] At 139-140.
[350] Winkelmann, Glazebrook and France, above n 148, at 516 [emphasis added]. Similar definitions of autonomy are found in Dori Kimel "Neutrality, Autonomy, and Freedom of Contract" (2001) 21 OJLS 473 at 482.

> affecting their own resources, however improvident, and the related idea *that the courts should not be in the business of remaking bargains.*

Autonomy requires that parties should be able to make choices and the courts should not remake them, and respect the choices the parties have made. How this is exercised in practice is slightly more complicated. If we take the "choices" of the parties to mean their intentions as to what the contract is to mean, and what they are bound by, this requires the choices of the parties to be enforced regardless of if circumstances change or parties regret their earlier choices:[351]

> [T]o respect those determinations of the self is to respect their persistence over time. If we decline to take seriously the assumption of an obligation because we do not take seriously the promisor's prior conception of the good that led him to assume it, to that extent we do not take *him* seriously as a person. We infantalize *him*…

This assumes that parties have intentions as to what the words of their contract are to mean, which is often not the case, as parties do not contemplate how their contract would respond to all possible future events. If the parties do not have an intention for the meaning of their contract given the unexpected event that caused the dispute, considering fairness when interpreting the contract is not contrary to the parties' autonomy. Where fairness and intentions do conflict, a feminist law of contract does not *always* value autonomy over everything else, and it is therefore not the touchstone of contract. This does not mean that a feminist approach does not value autonomy – it rather reasons contextually, and just because a party has previously agreed to something does not mean that enforcing it is respecting their autonomy.[352] Feminists conceptualise autonomy as a spectrum, and not all choices are representative of the autonomy of the parties because they are not acting rationally in their best interests,[353] as the contractual paradigm assumes them to be acting.[354] In different circumstances, it will be more or less appropriate to value the parties' intentions. This will, in some circumstances make contract law paternalistic by correcting bargains for those who made bargains they should not have, particularly if those choices were made because of the parties' own vulnerabilities.

[351] Fried, above n 240, at 20-21.
[352] Hadfield, above n 2; Thompson, above n 236, at 69-70.
[353] Thompson, above n 236, at 69-70.
[354] Unless a contract fails due to a vitiating factor, such as undue influence or duress – which are high burdens to meet, the autonomy or consent of the parties entering in contract is not relevant.

This does not make feminist contract law an oxymoron,[355] because under this definition of autonomy, orthodox contract law *also* does not value autonomy.[356] Unexpressed subjective intentions are not relevant under the status quo,[357] and arguably these best represent the *choices* that the parties thought they were making.[358] Objective intentions are admissible, but these are often not the same as the parties' choices, and not every approach to contract law values these intentions.[359]

On the other hand, if we take the "choices" of the parties to mean the way they chose to formalise their bargain, which is more accepted in the literature,[360] then the parties have already exercised their autonomy in entering the contract. They have little autonomy or choice over how it is interpreted – they exercise their autonomy to enter into a bargain which they consent to being interpreted objectively by the courts.[361] This is a reliance based standard – the parties are bound because others should be able to rely on the reasonable interpretation of their words.[362]

The court then "remakes" the bargain when it determines what the bargain meant at the outset. The parties consent to their agreement meaning "what it is *reasonably* understood to mean rather than what the speaker intended (or, confusingly, 'meant') it to mean."[363] If the courts are interpreting the bargain in a *reasonable* manner, the parties cannot complain that their autonomy has suffered. The parties' autonomy is already threatened by the traditional approach. Chapter IV aimed to prove that the feminist method of interpreting contracts *is* a reasonable means of interpretation that reflects how *people* would interpret a contract. Because this is a reasonable interpretation of the contract, it is not remaking the bargain, and still values the parties' autonomy. It does not *impose* obligations onto the parties that are not reasonable corollaries of the bargain that they voluntarily entered into.

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[355] As claimed by Campbell, above n 342, at 165.
[356] Stephen, above n 348, at 271-272.
[357] *Bathurst*, above n 155, at [46].
[358] Smith, above n 348, at 271.
[359] See above at 25-26.
[360] Smith, above n 348, at 272-273.
[361] Smith, above n 348, at 272; Clare Dalton "An Essay in the Deconstruction of Contract Doctrine" (1985) 94 Yale LJ 997 at 1043-1044.
[362] McMeel, above n 334, at [3.01]; Smith, above n 348, at 271; Clare Dalton "An Essay in the Deconstruction of Contract Doctrine" (1985) 94 Yale LJ 997 at 1043-1044.
[363] Smith, above n 348, at 272. Emphasis added.

Taking the subjective or objective choices of the parties and implementing them is not the ultimate touchstone of contract interpretation under a feminist approach, and nor is it under the orthodox approach. The ultimate touchstone has always been to give effect to the reasonable interpretations of honest men *and women.*[364]

3 Legitimacy of contract law

> Honest men and women expect to perform the promises they have made and expect the other contracting party to do the same. The law cannot, and should not, appear indifferent to these reasonable expectations.[365]

Contract law purports to work in the interests of all and reflect the interests of the community[366]– scholars do not claim contract law should only work for men. Therefore, if it only works for men, contract law is failing on its own terms. Contract interpretation reasons with an untempered ethic of justice, and only fulfils the reasonable expectations of honest *men.*[367] Honest *women* who consent to contracts are not having their contracts interpreted in a way that they would consider reasonable. The interpretation of their contracts does not reflect their reasonable expectations. Contract law is working for men, but it is not working for all.[368]

Proving that the law is biased towards men undermines the legitimacy of contract law. The justification for contract law binding parties' actions is that it works for the interests of all by fulfilling the reasonable expectations of honest men and women. If that basis is not fulfilled, it is shown that contract law only works to further the aims of men to the detriment of all others, and the basis for respecting its ruling is removed.

This does not mean that contract law will collapse. As quoted at the beginning of Chapter I:[369]

> Feminist law reform advocacy offers the legal system two choices: live up to your promises, or be exposed as a naked system of power and domination. While we

[364] Lord Steyn "Contract Law: Fulfilling the Reasonable Expectations of Honest Men" (1997) 113 LQR 433, edited by Thomas J in *Gibbons Holdings,* above n 148, to include women explicitly at [122] and [148]; see also McLauchlan "Objectivity in Contract", above n 338 at 488.
[365] *Gibbons Holdings,* above n 148, at [148] per Thomas J.
[366] Dow, above n 30, at 830; Steyn, above n 364, at 434.
[367] An obviously gender-biased legal system also creates legitimacy concerns in and of itself: see Lady Hale, Judge on the Supreme Court of the United Kingdom and Wales "Judges, Power and Accountability: Constitutional Implications of Judicial Selection" (speech to Constitutional Law Summer School, Belfast, 11 August 2017).
[368] Tidwell and Linzer, above n 55, at 806.
[369] Littleton, above n 6, at 5.

> should not expect the imminent demise of an exposed system, neither should we lose an opportunity to point out that the emperor is inadequately clothed.

The emperor is inadequately clothed. Contract law requires reform - this dissertation begins the conversation about what reform is needed, but is not the end of that conversation.

C Implications for Feminist Jurisprudence

There are two interrelated concerns with a feminist critique that seeks to reform contract law, like this one, rather than a critique that is aimed at dismantling contract law. The first concern is that it will unintentionally legitimate contract law, and secondly that it will never be effective.

The first concern is that by assuming that contract law can be reformed to be feminist, this legitimates contract law unjustifiably.[370] Accepting that contract law can continue to apply legitimates its existence and can give it a "feminist" stamp of approval. This is problematic because of the second concern that feminists articulate – that contract law can *never* be made to be feminist.

The second concern has primarily been raised by Carole Pateman in her book *The Sexual Contract.*[371] Pateman frames her analysis on the concept of the social contract; that the State legitimately exercises power over its citizens because they have entered into a social contract whereby they give up their liberty in exchange for the State acting on behalf of its citizens. Pateman argues that the social contract is also a *sexual* contract between men that establishes men's political and sexual rights over women.[372] This can be seen in the public-private divide relegating women to the private sphere[373] and the fundamental conception of the self-interested individual as central to the social contract.[374] Pateman argues that this exchange is also mirrored in everyday contracts:[375]

> [T]he social contract enables individuals voluntarily to subject themselves to the state and civil law; freedom becomes obedience and, in exchange, protection is provided. On this reading, the actual contracts of everyday life also mirror the

[370] Barnett, above n 7, at 13-14.
[371] Carole Pateman *The Sexual Contract* (Polity Press, Cambridge, 1988). See also Goodrich, above n 11, who argued that the original contract was the "sexual-social pact" of marriage: at 19-26.
[372] Pateman, above n 371, at 2-3; Sullivan, above n 2, at 114-115.
[373] Pateman, above n 371, at 11.
[374] At 14-15.
[375] At 7 [emphasis in original].

> original contract, but now they involve an exchange of obedience for protection […].

Because the roots of contract are entrenched in masculine power, it is necessary to "cast aside" the notion of contract as we know it "to create a free society in which women are autonomous citizens."[376] This is the idea that the master's tools (contract law) cannot dismantle the master's house (female disempowerment): the tools "may allow us temporarily to beat him at his own game, but they will never enable us to bring about genuine change."[377]

This is an important critique, because it indicates that from a feminist perspective, a critique to bring reform to the law may be futile. However, this dissertation argues this is not the case. There are parts of contract law, such as the objective standard and the concept of contextualism, that are salvageable for feminist interests. It is important to attempt to reform the law to these ends, because the entrenchment of contractual norms makes it unrealistic to overhaul the entire law of contract. We are left only with the option of reforming it. The feminist approach advocated for in this dissertation will not fix the problem of masculine bias within contract law – it will not even come close – but it is a start. The master's tools may not be able to completely dismantle the master's house, but the master's tools are the only ones we have.

D Conclusion

The implications of a feminist law of interpretation principles are broad both for contract law and for feminist jurisprudence. For contract law, if one accepts that the law is biased towards men, it de-legitimates contract law, for it would fail on its own terms to meet the reasonable expectations of honest *people* by only meeting the reasonable expectations of honest *men.* This dissertation challenges the claim that contract ideals are too entrenched to be reformed. It is because they are so entrenched and important that they must be reformed. It has also rejected the idea that a feminist law of contract fails to meet the definition of "contract." In relation to feminist jurisprudence more generally, this chapter has argued that although a reform project may not be able to completely remove the masculine bias of the law, it is the best chance we have at doing so.

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[376] At 220.
[377] Audre Lorde *Sister Outsider: Essays and Speeches* (The Crossing Press, New York, 1984) at 112.

Conclusion

This dissertation started by outlining the risk of contract law being biased because of its almost exclusively male creators and its sexist origin. There are potentially large implications if contract law is biased – it questions the legitimacy of the law which purports to be gender neutral and unbiased.

This dissertation has argued that the law of contract interpretation has been trending towards being more consistent with feminism, by displacing the default male in allowing more context to be admissible for interpreting the contract, and by allowing for the possibility of incorporating an ethic of care through a contextualist approach to interpretation. However, the law is not entirely consistent with these critiques. Whilst more evidence is admissible, the law could go further in admitting evidence of the parties' subjective intentions to further prevent judges making assumptions about the parties. Whilst the law is contextualist, the reasonable man reasons with an untempered ethic of justice by viewing the parties as self-interested, autonomous individuals and by reasoning with rules rather than an ethic of care contextualism.

Contract law is more consistent with feminism than it has been in the past, but it is not yet fully consistent. We must now question the legitimacy of contract law – if it purports to work for all, but only works for men, then it fails on its on terms and it must be reformed. This dissertation proposes how the law of interpretation principles can be reformed to meet two feminist critiques, but this is not the end of the road. There is more to contract law than interpretation principles, and there is more to feminism than the two critiques this dissertation has posed. There is more work to be done in this area, as contract law is after all, an area ripe for feminist critique.

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