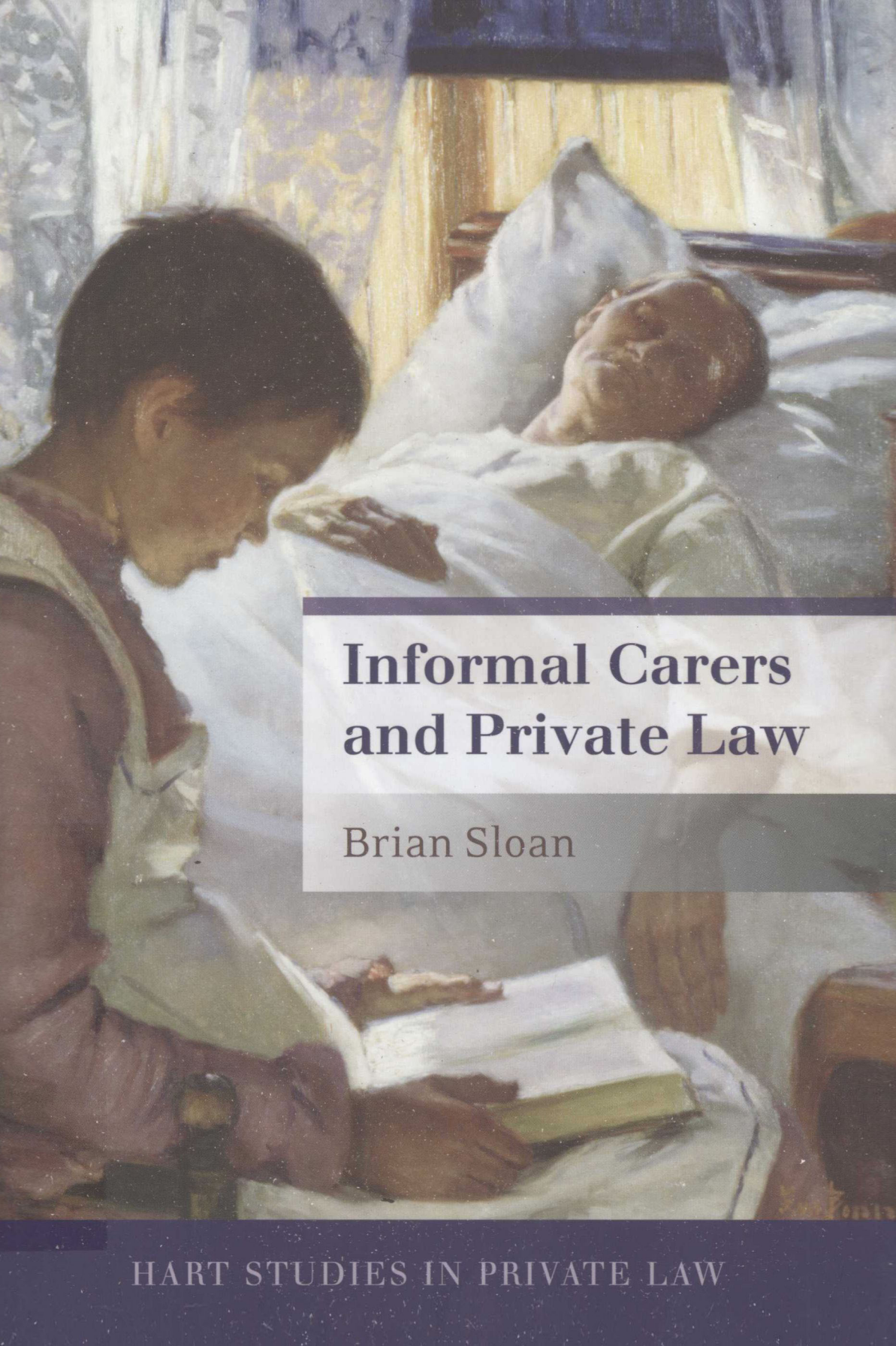




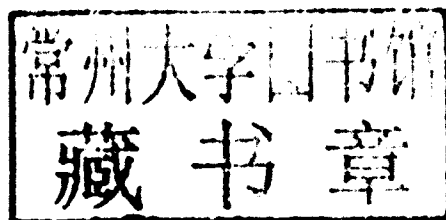
Informal Carers and Private Law

Brian Sloan

HART STUDIES IN PRIVATE LAW

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INFORMAL CARERS AND PRIVATE LAW

Every day, large numbers of altruistic individuals, in the absence of any legal duty, provide substantial and essential services for elderly and disabled people. In doing so, many such informal carers suffer financial and other disadvantages. This book considers the scope for a 'private law' approach to rewarding, supporting or compensating carers, an increasingly vital topic in the context of an ageing population and the need for savings in public expenditure. Adopting a comparative approach, the book explores the recognition of the informal carer and his or her relationship with the care recipient within diverse fields of private law, from unjust enrichment to succession. Aspects of the analysis include the importance of a promise of a reward from the care recipient and the appropriate measure of any remedy. In considering the potential for expansion of a 'private law' approach for carers, the book addresses the fundamental and controversial question of the price of altruism.

Volume 4 in the series Hart Studies in Private Law

This book is dedicated to the memory
of my grandparents

Charlie Sloan
(1918–2007)

and

Agnes Sloan (née Mason)
(1925–2011)

Preface

*Do not call me the carer. I am not the carer. I hate caring. I hate the thought.
I hate the word. I do not care and I do not care for. I am here; she is there.*

Alan Bennett, *The Lady in the Van: A Play*, Act Two

Every day, whether they acknowledge it or not, large numbers of altruistic individuals provide substantial and essential services for elderly and disabled people in the absence of any legal duty. In doing so, many such informal carers suffer financial and other disadvantages. This book considers the scope for a 'private law' approach to rewarding, supporting or compensating carers in their vital role, in English law and beyond.

As most of those who knew me in 2007 can attest, finding a topic for my doctoral thesis was a painful process. I was fascinated by the issues raised by the sorts of personal relationships, typified by that between the Burden sisters,¹ that are not usually a target of family law at all. Some of my contemporaries seemed to think I was writing a whole thesis on the *Burden* case, but the focus of my inquiry ultimately became a small aspect of one of the great questions of our time. That may sound rather big-headed, but any big-headedness is balanced by two major factors. First, I make no claim to have solved what I might call the 'conundrum' of providing and paying for the social care upon which increasing numbers of us will depend in the decades to come. Indeed, the thesis that was somehow submitted in August 2010, and is now presented in a revised, expanded and updated form, probably raised more questions than it answered. No doubt that will annoy many readers of the resulting book and at least one of my supervisors, but it is a symptom of the reality that the solution to the complex social 'problem' of care cannot be left solely, or even mainly, to lawyers. Secondly, some will find my decision to focus on private law at best strange and at worst offensive. Nevertheless, I still maintain that the 'private law of carers' was a subject worthy of investigation, not least because there is so much of it out there. I hope this book will be of some use to those working in private law and others who have an interest in social and legal perspectives on care.

It would be seriously remiss if I did not express gratitude to a number of people, without seeking to diminish my responsibility for what follows. My greatest academic debt is undoubtedly owed to my doctoral

¹ *Burden v United Kingdom* App no 13378/05 [2007] 1 FCR 69 and [2008] 2 FLR 787, discussed in section 6.2.2 below.

supervisors, Professor Kevin Gray and Dr Jens M Scherpe. I have learned a very great deal from them over the past five or more years (though I have perhaps absorbed less than they would have liked), and thanks to their input this book is infinitely less garbled and error-ridden than it otherwise would have been. Sincere thanks are owed to my examiners, Professors Alison Clarke and Jonathan Herring; I hope I have made good use of their constructive comments in the following pages.

I am very grateful to the Trustees of the WM Tapp Fund at Gonville and Caius College for funding a significant portion of the research presented in this book, and to the Fellowship there for accommodating me as a research student.

Thanks are also due to the Trustees of the Bob Alexander Fund at King's College, Cambridge, where I was a Fellow when I completed the manuscript for this book. My colleagues there were an invaluable source of support, understanding and advice while I wrote up the thesis upon which this book is based. Particular mention must be made of Jake Rowbottom (now at University College, Oxford), Advocate General Eleanor Sharpston QC and Jim Trevithick.

Many conversations and other interactions have influenced the book. I hope that inclusion in the following (inevitably non-exhaustive) list gives at least some recognition to those who have helped to shape my work: Guy Adams, Professor Neil Andrews, Dr Andrew Bainham, Neil Beresford, Professor Hugh Bevan, His Honour Judge (Stuart) Bridge, Professor Michael Bryan, Professor Peter Cane, Dr Mindy Chen-Wishart, Dr Isabel Clare, Paul Davies, Professor Simon Deakin, Dr Martin Dixon, Dr Anatol Dutta, Dr Matt Dyson, Professor Eilís Ferran, Dr John Ford, Dr David Fox, Amy Goymour, Andrew Hayward, Professor Tony Holland, Ruth Hughes, Professor David Ibbetson, Paul MacMahon, Nick McBride, Robin McCaig, Professor Ben McFarlane, Professor John Mee, Jo Miles, Professor Charles Mitchell, Richard Nolan, Jane Oakes, Dr Mika Oldham, Dr Janet O'Sullivan, the late Dr Amanda Perreau-Saussine de Ezcurra, Professor Rebecca Probert, Dr Pippa Rogerson, Professor Francis Rose, Professor Bob Rowthorn, Professors Johan and Susan Scott, Dr Andrew Simpson, Professor Jane Stapleton, Professor Masayuki Tamaruya, Professor Nathan Tamblyn, Dr Peter Turner, Professor Andre van der Walt, Professor Graham Virgo, Dr Emma Waring and Dr Mary Welstead.

As a research student I had the distinct pleasure of spending some time as a Visiting Scholar at the Catholic University of Leuven's Instituut voor Familiaal Vermogensrecht. I wish to express sincere gratitude to Professor Walter Pintens for hosting me in Leuven, and for all he has done for me subsequently.

Closer to 'home', Hazel Dean, Kay Naylor, Kathy Wholley, David Wills and Peter Zawada at the Squire Law Library have been immensely helpful,

and my students have kept me both entertained and intellectually stimulated. Aspects of the research contained in this book have been presented in Cambridge at Caius Graduate Arts Society (CGAS), the Centre for Corporate and Commercial Law (3CL), the Centre for Public Law, the Centre for Research in the Arts, Social Sciences and Humanities (CRASSH), a colloquium held at Clare College in memory of Professor Kurt Lipstein, the Comparative Law Discussion Group, the Fourth Conference of the Commission on European Family Law, a Goodhart Seminar and the Interdisciplinary Graduate Conference. I must acknowledge the invitations to present my work and the contributions of the various participants.

I could not have started, let alone finished, this book without the unfailing encouragement of the Warden and Fellows of Robinson College, Cambridge, where I took my undergraduate degree and my LL.M. Particular credit goes to Dr Isabella Alexander (soon to be at the University of Technology, Sydney), Revd Dr Maggi Dawn (now at Yale), Professor Christopher Forsyth, Dr Markus W Gehring (soon to be at Hughes Hall, Cambridge), Dr Joanna Page, Dr Rebecca Williams (now at Pembroke College, Oxford) and Professor David Yates. It is fitting that by the time this book sees the light of day I will have returned to Robinson as a Fellow.

Richard Hart and Rachel Turner at Hart Publishing have bravely and expertly allowed my endeavours to be released into the public domain. On a more personal level, my PhD contemporaries at Cambridge facilitated the welcome distractions of food, wine and laughter (all in copious quantities). My parents, my brother Brendan, my grandmother and my extended family have not only tolerated but enthusiastically supported my various ambitions. Dr Kirsty Hughes has been instrumental in enabling me (successfully?) to retain my sanity even while I wrote a thesis and then a book. To all of them I owe more thanks than I can express.

Finally, and perhaps more by way of apology than thanks, I must recognise Siôn Hudson's unending patience.

My aim in this book is to engage with law and policy as they stood on 30 April 2012, although it has been possible to incorporate some later developments.

Brian Sloan
King's College, Cambridge
6 August 2012

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