

Prof. RACHAEL MULHERON KC (Hon)

**School of Law
Queen Mary University of London**

LIST OF PUBLICATIONS

(as at July 2023, and in descending chronological order per category)

BOOKS

1. *The Modern Doctrines of Champerty and Maintenance* (Oxford University Press, 2023, forthcoming – submission of manuscript in Jul 2022, due for publication Jul 2023)
2. *Principles of Tort Law* (2nd edn, Cambridge University Press, 2020) lxxiii + 1,036 pp
3. *Class Actions and Government* (Cambridge University Press, 2020) lxii + 412 pp
4. *Principles of Tort Law* (Cambridge University Press, 2016), lxxix + 1,047 pp (18 chapters), plus 10 further chapters available at: www.cambridge.org/mulheron, under the ‘Resources’ tab
5. *Medical Negligence: Non-Patient and Third Party Claims* (Ashgate Publishing, London, 2010), xlix + 419pp
6. *The Modern Cy-Près Doctrine: Applications and Implications* (Routledge Cavendish, London, 2006), lxi + 337pp
7. *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Hart Publishing, Oxford, 2004), lxxvii + 535pp

ACADEMIC ARTICLES

8. ‘*The Perils of Tinkering with Temporal Proximity in Negligence Claims for Psychiatric Injury*’ [2023] *J of Personal Injury Law* 93–111
9. ‘*The Funding of the United Kingdom’s Class Action at a Cross-Roads*’ (2023) *King’s LJ* 1–27 (online publication Jan 2023, hard copy publication to follow)
10. ‘*Modernising the Tort of Wilkinson v Downton*’ [2023] *J of Personal Injury Law* 13–35
11. ‘*Third Party Funding, Class Actions, and the Question of Regulation: A Topical Analysis*’ (2022) *2 Mass Claims Journal* 5–18
12. ‘*Further Impetus for a Statutory Class Action, Post-Lloyd v Google*’ (2022) *42 Civil Justice*

Quarterly 10–31

13. **'The Tort of Malicious Prosecution of Civil Proceedings: A Critique and a Proposal'** (2022) 42 *Legal Studies* 470–90
14. **'A Priceless Opportunity: Class Actions post-Merricks v Mastercard Inc'** (2021) 1 *Mass Claims Journal* 49–64
15. **'Creating, and Distributing, Common Funds Under the English Representative Rule'** (2021) 32 *King's Law Journal* 381–413
16. **'Asserting Personal Jurisdiction over Non-resident Class Members: Comparative Insights for the United Kingdom'** (2019) 15 *J of Private International Law* 445–489
17. **'Revisiting the Class Action Certification Matrix in Merricks v Mastercard Inc'** (2019) 30 *King's Law Journal* 396–425
18. **'Joining the United Kingdom's Class Action as a Non-Resident: A Legislative Drafting Conundrum'** (2020) 39 *Civil Justice Quarterly* 69–89
19. **'Restitutionary Relief in Competition Law Class Actions: An Evolving Landscape'** [2018] *Restitution L Rev* 1–41
20. **'The Mere Mirage of a Class Action? A Challenge to Merricks v Mastercard Inc'** (2018) 37 *Civil Justice Quarterly* 216–256 (co-authored with Douglas Edlin)
21. **'The United Kingdom's New Opt-out Class Action'** (2017) 37 *Oxford Journal of Legal Studies* 814–843
22. **'Has Montgomery Administered the Last Rites to Therapeutic Privilege? A Diagnosis and a Prognosis'** [2017] *Current Legal Problems* 149–188
23. **'Legislating Dangerously: Bad Samaritans, Good Society, and the Heroism Act 2015'** (2017) 80 *Modern Law Review* 88–109
24. **'A Spotlight on the Settlement Criteria Under the United Kingdom's New Competition Class Action'** (2016) 35 *Civil Justice Quarterly* 1–15
25. **'A Channel Apart: Why the United Kingdom has Departed from the European Commission's Recommendation on Class Actions'** (2015) 17 *Cambridge Yearbook of European Legal Studies* 36–65
26. **'Third Party Funding and Class Actions Reform'** (2015) 131 *Law Quarterly Review* 291–320
27. **'England's Unique Approach to the Self-Regulation of Third Party Funding: A Critical Analysis of Recent Developments'** (2014) 73 *Cambridge LJ* 570–597
28. **'The Damages-Based Agreements Regulations 2013: Some Conundrums in the "Brave New**

- World” of Funding’* (2013) 32 *Civil Justice Quarterly* 241–55
29. *‘The Recognition, and Res Judicata Effect, of a United States Class Actions Judgment in England: A Rebuttal of Vivendi’* (2012) 75 *Modern Law Review* 180–211
 30. *‘Rewriting the Requirement for a “Recognized Psychiatric Injury” in Negligence Claims’* (2012) 32 *Oxford J of Legal Studies* 1–36
 31. *‘Recent Milestones in Class Actions Reform in England: A Critique and a Proposal’* (2011) 127 *Law Quarterly Rev* 288–315
 32. *‘A Missed Gem of an Opportunity for the Representative Rule’* [2012] *European Business L Rev* 49–60
 33. *‘Opting In, Opting Out, and Closing the Class: Some Dilemmas for England’s Class Actions Law-Makers’* (2011) 50 *Canadian Business LJ* 376–408
 34. *‘Trumping Bolam: A Critical Legal Analysis of Bolitho’s “Gloss”’* (2010) 69 *Cambridge LJ* 609–638
 35. *‘Emerald Supplies Ltd v British Airways plc: A Century Later, the Ghost of Markt Lives On’* (2009) 8 *Competition LJ* 159–179
 36. *‘Cy-Près Damages Distributions in England: A New Era for Consumer Redress’* (2009) 20 *European Business L Rev* 307–342
 37. *‘The Case for an Opt-out Class Action for European Member States: A Legal and Empirical Analysis’* (2009) 15 *Columbia J of European Law* 419–462
 38. *‘The “Primary Victim” in Psychiatric Illness Claims: Reworking the “Patchwork Quilt”’* (2008) 19 *King’s College LJ* 81–112
 39. *‘Third Party Funding of Litigation: A Changing Landscape’* (2008) 27 *Civil Justice Quarterly* 312–341 (co-authored with Peter Cashman)
 40. *‘Justice Enhanced: Framing an Opt-out Class Action for England’* (2007) 70 *Modern Law Review* 550–580
 41. *‘A New Framework for Privacy? A Reply to Hello!’* (2006) 69 *Modern Law Review* 679–713
 42. *‘Some Difficulties with Group Litigation Orders—and Why a Class Action is Superior’* (2005) 24 *Civil Justice Quarterly* 40–68
 43. *‘From Representative Rule to Class Action: Steps rather than Leaps’* (2005) 24 *Civil Justice Quarterly* 424–449
 44. *‘Some Comparative Observations On Res Judicata for Canada’s Newest Class Action Regime’* (2004) 30 *Manitoba LJ* 171–195

45. *'The Defence of Therapeutic Privilege'* (2003) 11 *J of Law and Medicine* 201–213
 46. *'Secondary Victim Psychiatric Illness Claims Revisited'* (2003) 14 *King's College LJ* 213–224
 47. *'Contributory Negligence: Should Professional Fiduciaries Accept All the Blame?'* (2003) 19 *Tolley's J of Professional Negligence* 422–438
 48. *'The March of Pure Economic Loss ... but to Different Drums'* (2003) 7 *Canberra L Rev* 87–108
 49. *'Access to Essential Infrastructure: Proposals and Precepts for Part IIIA of the TPA'* (2003) 77(9) *Law Institute Journal* 34–38 (co-authored with Brenda Marshall)
 50. *'Declarations Under Part IIIA of the Trade Practices Act: The Case for Abolishing the Public Interest Criterion'* (2003) 15 *Bond L Rev* 284–301 (co-authored with Brenda Marshall)
 51. *'Declarations of Essential Services Under Part IIIA of the Trade Practices Act: A 'Discipline' on Access Reform'* (2003) 31 *University of Western Australia L Rev* 226–265 (co-authored with Brenda Marshall)
 52. *'Access to Essential Facilities under Section 36 of the Commerce Act 1986: Lessons from Australian Competition Law'* (2003) 9 *Canterbury L Rev* 248–267 (co-authored with B Marshall)
- Prize:** Winner of The Hon Rex Mason Prize (for best New Zealand legal article of 2003)
53. *Web Companion for Equity and Trusts* (Butterworths Sydney 2002) electronic, available at www.lexisnexis.com.au/aus/academic/default.asp, by subscription only (approx 80,000 words).
 54. *'Loans, Losses and Liability: Lessons from Foreign Currency Litigation in Australia'* (2000) 11 *J of Banking and Finance Law and Practice* 175–200 (co-authored with Brenda Marshall)
 55. *'Twelve Factors to determine whether a Medical Risk is Material'* (2000) *National L Rev* 1 (available online at: <http://pandora.nla.gov.au/parchive/2001/Z2001-Mar-13/web.nlr.com.au/nlr/HTML/Articles/mulheron/mulheron.htm>)
 56. *'Recent Observations Upon "Failure to Warn" Cases'* (2000) *National L Rev* 2 (available online at: <http://pandora.nla.gov.au/parchive/2001/Z2001-Mar-3/web.nlr.com.au/nlr/HTML/Articles/mulheron2/mulheron2.htm>)
 57. *'Juries, Medical Negligence and Causation in the High Court of Australia'* (2000) 8 *Tort L Rev* 19–23 (co-authored with John Gordon)
 58. *'The Availability of Exemplary Damages in Negligence'* (2000) 4 *Macarthur L Rev* 61–85
 59. *'The Money in the Briefcase: Flack and Title to Sue in Conversion'* (2000) 5 *Deakin L Rev* 205–216
 60. *'Exemplary Damages in Tort: An International Comparison'* (2000) 2 *University of Notre Dame*

Australia L Rev 17–51

61. ‘*The Interplay of Quiet Enjoyment and Assignment*’ (2000) 8 *Australian Property LJ* 181–184
62. ‘*The MUA Litigation: Marrying Injunctive Relief and Labour Supply Contracts*’ (1999) 6 *James Cook University L Rev* 152–164
63. ‘*Solicitors’ Conflicts of Duty and Interest: Some Recent Cases*’ (1999) 1 *University of Notre Dame Australia L Rev* 83–93
64. ‘*New Forays of Equitable Remedies into Commercial “Personal Service” Contracts*’ (1999) 4 *Newcastle L Rev* 19
65. ‘*Charging for Admission: A Lawyer’s Guide to Access Pricing under Part IIIA of the Trade Practices Act 1974*’ (1998) 6 *Trade Practices LJ* 132–141 (co-authored with Brenda Marshall)
66. ‘*Partnership Land and Caveats—An Uneasy Alliance*’ (1998) 18 *Queensland Lawyer* 212–219
67. ‘*Access to “Essential Facilities” under Part IIIA of the Trade Practices Act: Implementing the Legislative Regime*’ (1998) 10 *Bond L Rev* 99–117 (co-authored with Brenda Marshall)
68. ‘*Quantum Meruit upon Discharge for Repudiation*’ (1997) 16 *Australian Bar Rev* 150–180
69. ‘*Good Faith and Commercial Leases: New Opportunities for the Tenant*’ (1996) 4 *Australian Property LJ* 223–250
70. ‘*Survey Evidence in Passing-off and Trademark Litigation—Admissibility and Weight*’ (1996) 26 *Queensland Law Society Journal* 449–460
71. ‘*Criminal Enforcement of Environmental Law: Limitations and “Flat Earth Thinking” Sanctions*’ (1996) 26 *Queensland Law Society Journal* 427–444

PROFESSIONAL JOURNALS AND CASENOTE CONTRIBUTIONS

72. ‘*Robinson v Liverpool Hospital (Case Comment)*’ [2023] *J of Personal Injury Law* [forthcoming]
73. ‘*Schoultz v Ball (Case Comment)*’ [2023] *J of Personal Injury Law* C10-C14
74. ‘*HXA v Surrey CC (Case Comment)*’ [2022] *J of Personal Injury Law* C196-C200
75. ‘*Hoyle v Hampshire Ccl (Case Comment)*’ [2022] *J of Personal Injury Law* C141-C145
76. ‘*The Damages-Based Agreements Regulations 2013: A Rocky Road Ahead?*’ (Practical Law Co, article identifier: 4-523-7972, Feb 2013) 1–7
77. ‘*Building Blocks and Design Points for an Opt-out Class Action*’ [2008] *J of Personal Injury Law* 308–325

78. **‘Antitrust Litigation: A White Paper Tinged with Green?’** *Brussels Agenda*, May 2008 (the invited ‘Viewpoint’ contribution)
79. **‘Australia’s National Access Regime: Review and Recommendations’** (2003) 6(4) *Global Competition Rev (The International J of Competition Policy and Regulation)* 30–34 (co-authored with Brenda Marshall)
80. **‘Twenty Bricks Towards a Chinese Wall’** (2001) 23(1) *Bulletin of the Law Society of South Australia* 33–35
81. **‘Golf, Kangaroos and Negligence “Down Under”’** (2000) 144 *Solicitors’ Journal* 494–495
82. **‘Arguments For and Against the Construction of Chinese Walls’** (2000) 22(8) *Bulletin of the Law Society of South Australia* 18–20
83. **‘Anyone for Golf? ... But mind the Kangaroos’** (2000) 27 (5) *Brief (Journal of the Law Society of Western Australia)* 18–20, and reprinted by request of the Hong Kong Lawyer Editorial Board in (2000/Sep) *Hong Kong Lawyer* 38–39, and with the author’s permission
84. **‘Progress Certificates—Deduction for Defects’** (1999) 66 *Australian Construction Law Newsletter (ACLN)* 58–59
85. **‘Solicitors’ Conflicts of Duty and Interest: Three Different Conundrums’** (1999) 21(9) *Bulletin of the Law Society of South Australia* 34–36
86. **‘Solicitors’ Conflicts: The Other Scenarios’** (1999) 21(10) *Bulletin of the Law Society of South Australia* 29–31
87. **‘Nine Lives for a Contractor to Avoid or Reduce Liquidated Damages’** (1998) 61 *Australian Construction Law Newsletter* 18–34
88. **‘The Subcontractors’ Charges Act 1974: Yet More Judicial Clarification’** (1997) 55 *Australian Construction Law Newsletter* 52–58

CHAPTERS IN BOOKS

89. **‘Third Party Funding, Class Actions, and the Task of Statutory Interpretation’**, in M Legg and J Metzger (eds), *The Australian Class Action – A 30-Year Reflection* (Federation Press, 2022), ch 11, 276–91
90. **‘Lord Woolf, Multi-Party Situations, and Limitation Periods’**, in A Higgins *et al* (eds), *The Civil Procedure Rules at Twenty* (OUP, Oxford, 2020), ch 11, 133–51
91. **‘Duties in Contract and Tort’** in J Laing and J McHale (eds), *Principles of Medical Law* (4th edn, OUP, Oxford, 2017) (updating of Mulheron’s 3rd edn chapter), ch 3
92. **‘Class Actions and Law Reform: Insights from Australia and England, a Quarter of a Century Apart’** in D Graves and H Mould (eds), *25 Years of Class Actions in Australia* (Ross Parsons,

Sydney, 2017), ch 14, 303–23

93. **‘Recent United Kingdom and French Reforms of Class Actions: An Unfinished Journey’** in E Lein *et al* (eds), *Collective Redress in Europe: Why and How?* (BIICL, London, 2015), Pt II, 97–115
94. **‘Damages-based Agreements’** in R Pirozzolo (ed), *Litigation Funding Handbook* (Law Society of England and Wales, London, 2014), ch 7, 105–119
95. **‘In Defence of the Requirement for Foreign Class Members to Opt-in to an English Class Action’** in D Fairgrieve and E Lein, *Extraterritoriality and Collective Redress* (OUP, Oxford, 2012), ch 14, 245–266
96. **‘The Impetus for Class Actions Reform in England Arising From the Competition Law Sector’** in S Wrba *et al* (eds), *Collective Actions: Enhancing Access to Justice and Reconciling Multilayer Interests?* (CUP, Cambridge, 2012), ch 15, 385–412
97. **‘Disgruntled Customers and Bank Charges: Class Actions (Reform) Activity’** in S Grundmann *et al*, *Financial Services, Financial Crisis and General European Contract Law: Failure and Challenges of Contracting* (Wolters Kluwer, The Hague, 2011), ch 11, 279–298
98. **‘Duties in Contract and Tort’** in A Grubb, Laing and J McHale (eds), *Principles of Medical Law* (3rd edn, OUP, Oxford, 2010) (updating of 2nd edn chapter), ch 3, 133–192
99. **‘Costs Shifting, Security for Costs, and Class Actions: Lessons from Elsewhere’** in D Dwyer (ed), *The Tenth Anniversary of the Civil Procedure Rules* (OUP, Oxford, 2010) ch 10, 183–228
100. **‘Medical Negligence, Secondary Victims, and Psychiatric Illness: Family Tragedies and Legal Headaches’** in R Probert (ed), *Family Life and the Law* (Ashgate, London, 2007), ch 5, 61–76

PUBLISHED RESEARCH PAPERS (FOR GOVERNMENT AND NGOs)

101. ***The DBA Reform Project Supplementary Report 2021: An Independent Review of the DBA Regulations 2013*** (Jun 2021)
102. ***An Analysis of Questionnaire Feedback from Legal Practitioners: Third Interim Report*** (authored as Official Monitor of the Disclosure Pilot in the Business and Property Courts, 25 February 2020)
103. ***The Damages-based Agreements Regulations Reform Project 2019: An Independent Review of the DBA Regulations 2013*** (co-authored, with Nicholas Bacon QC, as independent reviewer of the DBA Regulations, Oct 2019)
104. ***An Empirical Study of the Disclosure Pilot: Second Interim Report*** (authored as Official Monitor of the Disclosure Pilot in the Business and Property Courts, 1 July 2019)
105. ***Court Processes and the CE File: First Interim Report*** (authored as Official Monitor of the Disclosure Pilot in the Business and Property Courts, 26 March 2019)
106. ***The Law and Practicalities of Before-the-event Insurance: An Information Paper*** (principal

- author, as Chair of the Civil Litigation Review Working Group of the Civil Justice Council, Oct 2017), ix + 168 pp [Nov 2017]
107. ***Concurrent Expert Evidence and ‘Hot-tubbing’ in English Litigation Since the ‘Jackson Reforms’: A Legal and Empirical Study*** (principal author (excluding App D), as Chair of the Civil Litigation Review Working Group of the Civil Justice Council, 25 Jul 2015), xii + 80 pp + App D (available at: <https://www.judiciary.gov.uk/wp-content/uploads/2011/03/cjc-civil-litigation-review-hot-tubbing-report-20160801.pdf>)
 108. ***The Damages-based Agreements Reform Project: Drafting and Policy Issues*** (principal author, as Chair of the Damages-based Agreements Working Group of the Civil Justice Council, Aug 2015), xi + 145 pp (available at: <https://www.judiciary.gov.uk/wp-content/uploads/2015/09/dba-reform-project-cjc-aug-2015.pdf>)
 109. ***Victims of Human Rights Abuses by Transnational Companies*** (commissioned by Oxfam, Cafod, and UK Amnesty Intl, London, 5 Sep 2011), 27 pp (available at: <http://corporate-responsibility.org/recent-publications/recent-publications/>)
 110. ***Costs and Funding of Collective Actions: Realities and Possibilities*** (commissioned by the European Consumers’ Organisation (BEUC), Brussels, Feb 2011), vii + 133 pp
 111. ***Draft Rules of Court for Collective Proceedings*** (co-author, as a member of a working group commissioned by the Ministry of Justice, draft rules released Feb 2010) (available at: http://www.civiljusticecouncil.gov.uk/files/CJC_Draft_Rules_for_Collective_Actions_Feb_2010.pdf)
 112. ***Improving Access to Justice Through Collective Actions: Developing a More Efficient and Effective Procedure for Collective Actions: Final Report*** (A Series of Recommendations to the Lord Chancellor, November 2008), 488 pp (contributing author to Report) (available at: http://www.civiljusticecouncil.gov.uk/files/Improving_Access_to_Justice_through_Collective_Actions.pdf)
 113. ***Competition Law Cases under the Opt-out Regimes of Australia, Canada and Portugal*** (commissioned by the Department of Business, Enterprise and Regulatory Reform, October 2008), ix + 76 pp (available at: <http://www.berr.gov.uk/files/file49008.pdf>)
 114. ***Reform of Collective Redress in England and Wales: A Perspective of Need*** (commissioned by the Civil Justice Council of England and Wales, February 2008), ix + 163 pp (available at: <http://www.judiciary.gov.uk/NR/rdonlyres/D6AF1588-20FA-4286-8447-0B80E6471EDA/0/reformofcollectiveredress.pdf>)
