TORT IN PRIVATE LAW THEORY: WHERE ARE WE NOW?

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The full paper is available at stevehedley.com/IALT/tort_full_paper.pdf - page references below are to that downloadable version.

CONTEXT

(1) The rise of Private Law Theory as a distinct academic discipline (pp 2-3). See especially Hanoch Dagan and Benjamin Zipursky (eds), *Research Handbook on Private Law Theory* (Elgar 2020); Simone Degeling, Michael Crawford and Nicholas Tiverios (eds), *Justifying Private Rights* (Hart 2020); Andrew Gold, John Goldberg, Daniel Kelly, Emily Sherwin and Henry Smith (eds), *The Oxford Handbook of the New Private Law* (OUP 2021); Stefan Grundmann, Hans-W Micklitz and Moritz Renner, *New Private Law Theory – A Pluralist Approach* (CUP 2021).

(2) Widespread public dissatisfaction with tort (pp 3-4). Complaints of 'compo culture' and undeserving claims (eg Annette Morris, 'Deconstructing Policy on Costs and the Compensation Culture' in Eoin Quill and Raymond Friel (eds), *Damages and Compensation Culture – Comparative Perspectives* (Hart 2016) ch 8). Lack of unanimity of what tort is for; consequent paralysis of would-be reformers. It may be that future developments will see the absorption of tort liability into wider regulatory schemes, making the existence and rationale of a distinct 'law of tort' moot (pp 28-29).

(3) Fierce academic debates over tort's rationale (pp 5-7). Initial emergence of opposing camps (corrective justice vs law and economics); though more recently this has cooled down, as those arguing have realised that these two schools are clearly not addressing the same questions. *De facto*, those addressing descriptive questions ('What is tort?') communicate very little with those asking normative questions ('What is tort for, and how well is it doing it?') (see eg Barbara Fried, 'The Limits of a Nonconsequentialist Approach to Torts' (2012) 18 *Legal Theory* 231; Kenneth Abraham and George White, 'The Inward Turn and the Future of Tort Theory' (2021) 14 *Journal of Tort Law* 245).

Different Schools of Thought

Law and economics in relation to tort is now essentially a normative exercise, analysing the costs and incentives of the system with a view to improving or replacing it, but not treating questions of how we *conceptualise* tort as very illuminating (eg Jennifer Arlen (ed), *Research Handbook on the Economics of Torts* (Elgar 2015)) (pp 25-26).

Proponents of ***access to justice*** increasingly complain that tort actions are unaffordable, and that the system is institutionally biased against claimants (on racial and/or economic lines) (pp 26-27). Much feminist writing also complains about access: what was wrong with the traditional law of tort was not so much the substantive law, as that women weren't in practice able to invoke it (eg Anita Bernstein, *The Common Law Inside the Female Body* (CUP 2019)). Relatedly, the *emotional* cost of bringing an action is emerging as a substantial obstacle (eg Mary-Elizabeth Tumelty, 'Exploring the emotional burdens and impact of medical negligence litigation on the plaintiff and medical practitioner: Insights from Ireland' (2021) 41 *Legal Studies* 633) (p 27).

Corrective justice and related theories are a major presence in this field – they are now almost invariably merely descriptive, and typically insist that torts are wrongs *against particular classes of people* (rights-holders), with distinctive consequences (quite different from punishment for wrongs) (pp 15-18). The leading exposition is currently John Goldberg and Benjamin Zipursky's *Recognizing Wrongs* (Harvard UP 2020), which maintains that torts/wrongs have four key features: (a) the wrong is *legally* recognised, (b) there is a definable injury, (c) wrongs are 'relational' (they are against *a definable person*), and (d) civil rather than criminal consequences follow (pp 21-24). There is some dissent within the corrective justice school, questioning whether there are adequate accounts of (1) the variety of torts, (2) 'wrongfulness', and (3) the link between the wrong and the remedy (pp 16-17). The major problems with the corrective justice approach, I suggest, lie not so much in what it asserts about tort, as in the increasingly narrow range of issues it examines (pp 18-21).

Those I'm calling '***middle grounders***' stand between these various theories, insisting that all of them are wrong as general explanations of tort (because they over-simplify), but they can be of some value on narrower issues (eg Jane Stapleton, *Three Essays on Torts* (OUP 2021) essay 1) (pp 8-13). Despite the apparently absolutist rejection of 'grand theory', I suggest that this point of view is in fact substantially represented in theoretical writings, most obviously those of John Gardner (eg his *Torts and Other Wrongs* (OUP 2019)) (pp 13-15).

The dominance of descriptive approaches: Should we conclude simply that questions of what tort law is *for* are for legislatures, not lawyers (eg Peter Cane, 'Taking Disagreement Seriously: Courts, Legislatures and the Reform of Tort Law' (2005) 25 OJLS 393)? But legislatures seem equally confused. They typically intervene only as fire-fighters, to deal with some immediate problem that the law of tort has posed to the community, such as insurance costs being somewhat too high – without addressing the point that tort as currently constituted will *always* generate such problems (pp 24 and 29).