Book Reviews

A Theory of Tort Liability
Allan Beever
Hart Publishing
2016
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Allan Beever's latest book, A Theory of Tort Liability (ATTL), builds on his previous major theoretical works regarding tort law, those being Rediscovering the Law of Negligence,[1] and The Law of Private Nuisance.[2] In the same vein as his earlier projects, Beever defends a rights-based conception of tort law. His ultimate concern in ATTL is to explain 'how [the] rights [that underpin tort law] relate to each other and ground a systematic form of liability'.[3] It is convenient to quote Beever's own summary of the central propositions that he advances in ATTL:

> '*Equal maximum freedom:* individuals are entitled to the maximum amount of freedom possible consistent with the recognition of the same freedom in others.
>
> *Innate right:* individuals are entitled to independence from others, specifically to be subject to constraint.
>
> *Innocence:* individuals commit wrongs—ie, act illegally—only if they violate the rights of others.
>
> These are the building blocks of the theory of tort law that follows.'[4]

With the exception of the preliminary chapters, ATTL comprises a tour of aspects of tort law in which these 'building blocks' are said to be visible. Thus, in Part II Beever discusses 'forms of liability that respond to coercion that occurs directly between the plaintiff and defendant'.[5] Treated within Part II are the torts of trespass to the person, trespass to property and deceit, including several defences to liability arising therein. Part III addresses torts that are committed by exerting control over the claimant indirectly via a third party. These torts are said to comprise the unlawful means tort, inducing a breach of contract and conspiracy.[6] Part IV addresses the law of negligence and Part V concerns 'Miscellaneous Issues Involving Control, Injury and Loss'. In terms of systems of law addressed, Beever draws on materials from Australia, Canada, England and Wales, New Zealand and the US (although sources from England and Wales and the US tend to be his main focus).

There is no doubt that ATTL represents considerable learning regarding tort law. It is a well-written and substantial contribution to thinking about the subject and it deserves to be read by anyone who is interested in tort law's theoretical architecture. It marshals an impressive range of materials. However, rather than extolling ATTL's virtues, it is more worthwhile to offer in this review some critical comments.

1 A Beever, *Rediscovering the Law of Negligence* (Hart Publishing, 2007).
2 A Beever, *The Law of Private Nuisance* (Hart Publishing, 2013).
3 A Beever, *A Theory of Tort Liability* (Hart Publishing, 2016) at p 3.
4 *Ibid* at 24.
5 *Ibid* at 38.
6 *Ibid* at 101.

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Consider, first, Beever's understanding regarding the circumstances in which a theory of the law qualifies as a satisfactory theory. Beever contends that the purpose of a legal theory 'is to provide an accurate account of what exists', just like a scientific theory.[7] However, he seems immediately to depart from that commitment. Thus, Beever contends that the legal theorist must attempt 'to provide the most conceptually satisfying account of the norms found in that law. Importantly, *this may mean deciding that certain elements of the positive law are defective*' (emphasis added).[8] Just a few pages later Beever reverts to saying that a mismatch between a theory and the law precludes the theory from being valid: 'An understanding that presents a principle with exceptions is faulty'.[9] Needless to say, this is extremely puzzling. Beever appears to be inconsistent about a matter that is of central importance for his purposes, namely, the circumstances in which a legal theory is a satisfactory theory. In these circumstances, one cannot but harbour significant doubts about the account that Beever offers.

A second important point concerns the fact that Beever continually contrasts his theory of tort law with what he refers to as the 'loss theory', which is the notion that tort law can be explained as a mechanism for repairing losses. Beever condemns the loss theory on the basis that it does not fit the law. Thus, he writes: 'No objective observer could resist the conclusion that [the loss theory] has failed. The lists of exceptions to its general principles have grown well beyond breaking point'.[10] However, Beever does not stop there. He proceeds to rely on the perceived inadequacy of the loss theory as though it were a reason in support of his rights-based theory. Beever compares tort law with the famous optical illusion that can be understood as either a beautiful woman looking away from the observer or a haggard, old woman looking directly at the observer. He invites the reader to conclude that 'Tort law is not the monstrosity staring at us in the face. It is the sophisticated and beautiful creature looking away'.[11] However, the analogy is a poor one. That is because the validity of Beever's rights-based account (or, for that matter, any theory of tort law) is wholly unaffected by the plausibility of the loss model. The mere fact that theory *x* is unsatisfactory does not establish that theory *y* has any merit at all.

Relatedly, it is odd that Beever considers that the loss model is fatally flawed because the law frequently departs from it but does not consider that his rights-based theory is undermined on the same account. There are many occasions on which Beever's explanation of tort law collides dramatically with the principles found in the law reports. Beever himself often expressly draws attention to the discrepancies. He writes, for example, that his account 'calls for a major overhaul of the law of defamation'.[12] But if that is so, why is it not hypocritical of Beever to dismiss of the loss model? A particularly good illustration of the inability of Beever's theory to account for an important part of tort law is found in Beever's treatment of the law of self-defence. Beever argues that, properly understood, defensive force requires neither justification nor excuse (contrary to orthodox treatments of the subject). In Beever's view, that is because the use of defensive force is not wrong and hence something that is in need of justification or excuse. He writes:

> 'An attempt to prevent you controlling me need not be an attempt to control you. … On

7 *Ibid* at 4.
8 *Ibid* at 5.
9 *Ibid* at 15.
10 *Ibid*.
11 *Ibid* at 251.
12 *Ibid* at 218.

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> this analysis, [an aggressor,] *A*[,] attempts to exercise control of *B*'s body. *B*, however, neither attempts to exercise nor exercises control over *A*'s body (though he effects that body). *B* merely prevents *A*'s control of his body, preserving *B's* control of his own body. … It is not therefore an act that needs to be justified or excused.'[13]

This line of analysis was suggested by George Fletcher in a famous article.[14] An obvious problem with it (which Fletcher highlighted) is that it does not explain why, among other things, the law grants the defence of self-defence subject to the force used being reasonable. If the rationale for the self-defence defence is *B*'s interest in protecting his own autonomy, the basic principle of law that the force used must be reasonable is hard to explain. Beever does, it is true, say: 'imagine that *B* is not threated with death or serious injury and strikes *A*, killing or seriously injuring him. Here, it is arguable that, though *B* acts to prevent *A* gaining control over her, she does so in a way that exerts control over *A*' (footnote omitted).[15] However, the argument is not developed, and it is not even clear what it might look like.

Another point of interest concerns the relationship between explanation and prescription. It is commonplace for scholars who, like Beever, promote a theory that purports to explain the whole of tort law to contend that, to the extent that tort law does not fit the theory, tort law should be brought into greater conformity with the theory. Thus, Beever asserts that the fact that theory *x* is the best explanation of the law as we find it means that it would be a good thing if deviant parts of the law were brought into alignment with the theory. In his words: 'if *x* is indeed the best account of the judge's decision [in a given case], then it would make sense for the judge to base future decisions of a relevantly similar kind on *x* and not on *y*'.[16] One thing to note about this proposition, which Beever apparently regards as being of pivotal importance for his purposes, is that he leaves it entirely undefended. It is simply a bald assertion. Moreover, it is doubtful that the proposition should be accepted. At the very least, some simple examples should cause one to look askance at it. Suppose, for example, that a feminist theory of tort law was the best explanation available. Were Beever's claim correct, it would follow that it would be *desirable* if tort law did a better job than it already does of discriminating against women.

As is invariably the case with theoretical works regarding tort law, there are many errors in ATTL in terms of how the positive law is described. Consider, for example, Beever's discussion of the infamous decision of the Irish Court of Appeal in *Hegarty v Shine*.[17] In *Hegarty*, a woman sued her de facto partner, who had infected her with a sexually transmitted disease. Beever makes it clear that he thinks that the case was about whether consent to sex had been vitiated on account of the partner having concealed the fact that he was carrying the disease. Beever then writes: 'had the plaintiff sued on the basis that the defendant infected her with venereal disease, then she should have succeeded, and she should have succeeded in battery'.[18] However, the first sentence of the Lord Chancellor's judgment

13 *Ibid* at 88–89.

14 G Fletcher, 'Proportionality and the Psychotic Aggressor: A Vignette in Comparative Criminal Theory' (1973) 8 *Israel Law Review* 367, 376–380.

15 A Beever, *A Theory of Tort Liability* (Hart Publishing, 2016) at p 90.

16 *Ibid* at 7.

17 (1878) 4 LRI 288.

18 A Beever, *A Theory of Tort Liability* (Hart Publishing, 2016) at p 84.

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makes it clear that that is precisely for what the claimant sued: 'This action is brought by a female Plaintiff against a male Defendant … for infecting her with venereal disease'.[19]

An error regarding the positive law that has more widespread implications for Beever's analysis is found in his discussion of the torts of conspiracy and unlawful means. Beever writes:

> 'Conspiracy comes in two guises. Unlawful means conspiracy has the same form as causing loss by unlawful means, with the exception that two or more people must enter into some kind of agreement with the common design of injuring the plaintiff. … Lawful means conspiracy has the same form as unlawful means conspiracy with the exception that here is no requirement that the means employed vis-a-vis the third party be illegal.'[20]

However, conspiracy and the unlawful means tort do not have the same structure at all: the latter but not the former requires the involvement of a third party. As Lord Mance explained in *Revenue and Customs Commissioners v Total Network SL*, there is: 'a distinction between the infliction of harm through the intermediary of a third party [i.e., the unlawful means tort] … and the present situation where two wrongdoers join and act together to inflict injury directly upon another person or body … [i.e., conspiracy]'.[21] Beever's error in this regard has significant ramifications for the arrangement of ATTL. The problem is that his analysis of conspiracy features in Part III of ATTL, which addresses torts concerned with circumstances in which the defendant has exercised indirect control over the claimant. Conspiracy, of course, does not belong in Part III at all, as the passage from Lord Mance makes clear. Lord Mance emphasises that conspiracy (unlike the unlawful means tort) involves a combination to inflict injury *directly*.

Notwithstanding the critical points that have been made in this review, and even if ATTL ultimately fails in its explanatory endeavour, it is clear that the book offers a sustained and highly sophisticated defence of a rights-based theory of tort law. It deserves to be read widely.

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19 (1878) 4 LRI 288, at 292.
20 A Beever, *A Theory of Tort Liability* (Hart Publishing, 2016) at p 102.
21 [2008] UKHL 19; [2008] 1 AC 1174 at 1261 [124].

Damages and Compensation Culture: Comparative Perspectives
Eoin Quill and Raymond J Friel (Eds)
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'Compensation culture' tends to refer to a perceived social problem of large scale and unnecessary litigation for even the most minor of inconveniences: it encapsulates the idea that for every accident, someone other than the victim is to blame; the mantra that for every injury, someone other than the victim must pay.[1] Compensation culture is generally believed to be a bad thing, and has been blamed for all sorts of societal evils, including an explosion in personal injury claims, ballooning insurance premiums,

1 Lord Dyson MR, 'Compensation Culture: Myth or Reality?' Holdsworth Club Lecture, 15 March 2013.

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