

A Theory of Tort Liability

Alan Beever

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Conventional conceptions of tort law as a raft of civil wrongs with exceptions has attracted increasing academic and judicial criticism, largely because such views spur a tendency to rely on policy to justify decisions. Alan Beever's *A Theory of Tort Liability* compellingly challenges these orthodox understandings of liability in tort law.¹ The book aims to reorient traditional perceptions of tort law as a legal mechanism for responding to civil loss. Beever argues that the orthodox understanding is theoretically insufficient, largely because the policy reliance it incites leads to ambiguous and arbitrary decision-making.² He persuasively writes that a deeper theoretical understanding will provide a more coherent and unified understanding of tort law, and that his proposed theory can provide this.

Beever's proposed theoretical framework is based on Kantian notions of freedom. It asserts that the focus of tort law should be constraint of a plaintiff's fundamental freedoms, not harm caused by wrongs. In this sense, the book is hardly a trailblazer; Beever himself admits that it builds on his own previous work³, as well as that of theorists such as Benson⁴ and Weinrib⁵, who submit that the focus of tort law should instead be on the fundamental rights underpinning wrongs. However the application of Kantian thinking in the book is refreshing, and provides an innovative and nuanced contribution to the area.

The theory and its application are cleverly argued and well articulated. Kant's principle of law maintains that any action is lawful insofar as it can co-exist with our understandings of freedom. Freedom in this context is defined as 'independence from being constrained by another's choice'. According to the principle, individuals should be able to assert this freedom if and when they choose.⁶ Beever writes that this theory can be adapted to serve as an explanation of tort liability. His argument is that constraint is not wrongful when preserving universal freedoms; the law only imposes liability where such restraint becomes coercive in that the defendant either exercised unsolicited control over the plaintiff or injured the plaintiff in some way. Whilst it is difficult to see how such a view would alter outcomes for future plaintiffs, this is not the task of the book. Beever's aim

¹ Allan Beever, *A Theory of Tort Liability* (Hart Publishing, 2016).

² Ibid 14–16.

³ Ibid 2.

⁴ P Benson, 'The Basis for Excluding Liability for Economic Loss in Tort Law' in D Owen (ed) *Philosophical Foundations of Tort Law* (Oxford University Press, 1995).

⁵ Ernest J Weinrib, *The Idea of Private Law* (Harvard University Press, 1995).

⁶ Beever, above n 1, 19–20.

is to provide a more cohesive mechanism for *justifying* such outcomes to avoid conventional policy-based reasoning⁷ and in this he is successful.

Beever's thoughts are illustrated particularly well in the chapter on battery. Where a perpetrator intentionally inflicts force to the victim's body, it is no longer under their own control and free from the perpetrator's purpose. It can be seen therefore that their freedom has been constrained. It also explains why it is not a battery when we accidentally bump someone or lightly touch someone to attract his or her attention; such contact is not a coercive constraint of freedom. This conception of assault is much tidier than its conventional counterpart, which is underpinned by the negative notion that a battery is inherently wrong, except in a lengthy list of circumstances. Beever's work here is sophisticated and persuasive.

The book's structure is also commendable. Beever goes through almost the entire catalogue of torts, with a dedicated chapter to each. He is meticulous in his application of the theory, using compelling hypothetical scenarios to illustrate how the proposed theory can be applied to explain liability under each tort to reinforce the thesis that the orthodox theoretical explanation is inadequate. Where this is done particularly well is in relation to cases concerning intentional infliction of emotional distress by reference to the case of *Wilkinson v Downton*.⁸ Here, Beever comments on the difficulty experienced by decision makers when faced with cases of this kind. He attributes this incoherency to a tendency to explain the action as an intentional infliction of harm, and writes that a better conception would be that the defendant exercised control over the mind of the plaintiff, thereby threatening her ability to reason.

A minor criticism does attend this however, as this is one of only few examples where cases were used to illustrate the shortcomings of the orthodox view, before validating the superiority of the proposed theory by demonstrating how its application could have led to more cohesive reasoning. Such illustrations would have been especially insightful with regard to the policy argument. As noted by Beever, the law of torts is rife with contentious decisions where the use of policy is questionable.⁹ This is especially relevant with regard to negligence, yet this is not taken advantage of in the book. Though the examples used are compelling, frequent use of examples such as this would have elevated the argument.

Discussion of contemporary issues facing Australian tort law, such as codification or compensation schemes, is also noticeably absent. Such discussions may well have been beyond the scope of the book, however acknowledgement of such issues would have augmented the relevance of

⁷ Ibid 15.

⁸ Ibid 72

⁹ *Sullivan v Moody* (2001) 207 CLR 562; *Harrington v Stephens* (2006) 226 CLR 52; see also Christian Witting, 'Tort Law, Policy and the High Court of Australia' [2007] 31 *Melbourne University Law Review* 569.

the book in contemporary torts discourse. However, such topics are covered extensively in the literature,¹⁰ and therefore this delimitation in scope is justified.

The book is conceptually challenging and employs complex and technical language. Whilst it is coherent and clever, its density hinders its accessibility. It is therefore recommended to the legal profession and the highly engaged student interested in the debates surrounding tort liability. Those that accept the conceptual challenge will be rewarded by this thorough and insightful exposition of liability in tort law.

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¹⁰ See Peter Cane, *Atiyah's Accidents, Compensation and the Law* (Cambridge University Press, 8th ed, 2013); Spigelman JJ 'Negligence: the Last Outpost of the Welfare State' (2002) 76 *Australian Law Journal* 432.

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