What Tort Law Is

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Date : October 15, 2019

Gregory C. Keating, *Is Tort Law "Private"?*, in **Civil Wrongs and Justice in Private Law** (Paul B. Miller & John Oberdiek, eds.) (forthcoming Oxford University Press), available at SSRN.

Tort law is no stranger to controversy. What duty does an employer owe to children sickened by workplace carcinogens brought home on parents' clothing? What damages appropriately punish actors for willful and malicious conduct, or for non-economic harm? How far should liability extend when actors make dangerous products available to others who, in turn, choose to use or abuse them? But all of these freighted disputes pale in comparison to the larger question—what is tort law, or perhaps, what is tort law for? Although the questions seem intractable, Greg Keating's recent article, *Is Tort Law "Private"?*, methodically guides readers through the theoretical claims.

The dividing lines have been staked out for some time. The instrumentalist camp sees tort law as one of many means for achieving optimal deterrence. Meanwhile a "contemporary revival" of traditional views sees tort as private law. Professor Keating wastes no time dismantling both assessments. Private law theorists miss the extent to which "modern tort law emerged as a response to the law having accidental injury thrust upon it as a pressing problem." (P. 2.) Moreover, tort law's "core domain is not optional," but instead "protects persons against various forms of impairment and interference by others as they go about their lives as members of civil society." (*Id*.)

According to Keating's criticism of the private law camp, tort law is neither voluntary, nor wrongful, in any robust sense. Legal fault for tortious wrongs bears only slight relation to moral fault. Negligence liability is conduct that fails to meet an objective standard of care with respect to risks of harm to others, even when the conduct is not blameworthy. Moreover, tort law imposes liability not based on wrongful conduct alone, but only when fate has coupled that wrongful conduct with harm. (P. 3, n. 7) (invoking a thoughtful example of Jeremy Waldron's regarding two identical wrongful acts, only one of which produced harm). In Keating's view, accidental harms "command the attention of the legal system . . . not because they are characteristically very *wrongful* but because they are characteristically seriously *harmful*," causing injury and death. (*Id*.)

But Keating's private law critique does not lead to his full-scale endorsement of an instrumentalist program. The economic account of tort liability proposes that "the role of tort adjudication is to deter the squandering of social resources going forward." (P. 5.) However, "[l]ooking backwards is instrumentally irrational" as a method of future risk-reduction. (*Id*.) In addition, the parties are not merely "vessels through which the socially desirable end of wealth-maximization is served." (*Id*.) Instead, "harm's distinctive moral significance can be grasped only within a deontological framework that takes persons and their lives as fundamental objects of concern, and the relations among persons as the fundamental subject of morality." (P. 6.)

Despite this dual critique, the majority of Keating's criticism is aimed at the failings of private law theory. Keating writes that a taxonomy that differentiates private law and public law misses the constant historical dialectic between the two. In tort law, private actions have often been considered alongside administrative alternatives—workers compensation and vaccine injury funds for example. They have also been compared to direct regulation of risk, as through environmental law. (P. 12.) Neither can tort law disentangle the interests of the parties to a suit from larger questions of social justice altogether. (P. 11.)

Amidst the criticism, a reader senses the mixed theory that animates Professor Keating's own views. "The law of torts protects persons against various forms of impairment and interference by others as they go about their lives as

members of civil society. The obligations that it imposes and the rights that it recognizes, play central roles in establishing people's freedom to realize diverse conceptions of the good and lead independent and equal lives." (P. 16.) This view treats the parties to the action as important objects of concern and yet simultaneously invokes questions of social justice—for example, what interests of the parties ought to be protected against interference by others? It also views tort law as an important player on the team, but not without possible stand-ins.

If I have a quarrel with Professor Keating's work, it is not so much dispute as request. The appeal is to show the way in which Keating's own mixed theory of tort law drives, and should drive, outcomes in particular cases and doctrines. In other words, If tort law is social and instrumental but simultaneously concerned with interests of the parties, how does that view shape what tort law does and should do? Professor Keating's lucid criticism makes me look forward to his own endeavor to build and explain a guiding principle for the field.

Editor's note: Gregory Keating had no role in selecting this article to be reviewed.

Cite as: Ellen Bublick, *What Tort Law Is*, JOTWELL (October 15, 2019) (reviewing Gregory C. Keating, *Is Tort Law "Private"?*, in **Civil Wrongs and Justice in Private Law** (Paul B. Miller & John Oberdiek, eds.) (forthcoming Oxford University Press), available at SSRN), https://torts.jotwell.com/what-tort-law-is/.