Key Ideas in Law

TORT LAW

Peter Cane

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'In this masterful and engaging survey, Peter Cane provides an array of illuminating perspectives on the law of torts, laying bare its nature, structure and functions, as well as its legal, social and political context.'

ANDREW ROBERTSON, PROFESSOR OF LAW,
MELBOURNE LAW SCHOOL

This book offers nine key ideas about tort law that will help the reader to understand its various social functions and evaluate its effectiveness in performing those functions. The book focuses, in particular, on how tort law can guide people's behaviour, and the political and social environments within which it operates. It also provides the reader with a wealth of detail about the ideas and values that underlie tort 'doctrine'—tort law's rules and principles, and the way those rules and principles operate in practice. The book is an accessible introduction to tort law that will provide students, scholars and practitioners alike with a fresh and engaging view of the subject.

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For Jane,
who has taught me much of what I know about tort law

CONTENTS

1. Nine Key Ideas 1
2. Tort Law 5
3. Torts 13
4. Torts Unpacked 21
5. Torts Repackaged 53
6. Wrongs 73
7. Out and About with Tort Law 83
8. Politics 101
9. Uses 111
10. The Political Economy of Compensation Schemes 121
11. The Future of Tort Law 129

Bibliography 133
Table of Cases 135

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1

Nine Key Ideas

This book is about tort law—English tort law, to be more precise. Laws come in 'legal systems', and legal systems are traditionally associated with political communities. For instance, Scotland has (and has always had) its own legal system, as do the USA, Australia, China and so on. Laws differ to a greater or lesser extent from one system to another. For instance, US tort law is significantly different in many ways from English tort law, which is very different from Chinese tort law, reflecting the fact that the USA, England and China are different political communities and have different cultures. We might say that this book is about 'one of many tort laws'.

It is addressed primarily to readers who know something about law in general, and tort law in particular, but who find what they do know puzzling, or simply want to know more. The book presents nine 'key ideas' about tort law:

KI 1 Tort law is law.

KI 2 Tort law is the law of torts.

KI 3 Each tort has two main elements: (1) conduct that is classified by tort law as wrongful and (2) one or more interests with which that conduct has interfered in ways specified by tort law.

KI 4 Torts are only one species of legal wrongs.

KI 5 Tort law is rarely enforced.

KI 6 Tort law is political.

KI 7 Tort law 'has its uses'.

KI 8 Tort law is not 'the only game in town'.

KI 9 Tort law is here to stay—live with it!

I expect that you will find at least some of these ideas paradoxical, if not downright weird. I hope that this will spark your interest in reading further because each of these ideas hints at important truths about tort law. They will not all receive the same amount of development, if only because some of them raise profoundly complex and difficult issues that cannot be fully explored in a book such as this. The overall aim is to provide background to what is sometimes called 'legal doctrine' and to breathe life into the sometimes rather bloodless words on the pages of tort books.

It is worth reflecting for a minute on this word 'doctrine', which might strike you as a rather odd one to use. Surely the contents of tort books are not to be compared to the contents of sacred texts such as the Christian Bible or the Muslim Koran? In fact, however, law and religion share at least one basic characteristic: both are based on authority. Just as sacred texts are invested with the authority of some holy person or supernatural God, so legal texts are invested with the authority of the legal officials and institutions that make them—notably, legislatures and courts. Devout Christians and Muslims invest their sacred texts with the authority of God and treat the contents as 'God's word'. In a somewhat similar way, 'law-abiding' people, who 'take law seriously', treat what its makers have said—'the law'—as authoritative. Law, we might say, requires 'a leap of faith' (Gardner 2012a).* Legal officials who implement and enforce the law must take it seriously in this way, at least when they are performing their official functions. Whatever they may actually think about the law, if law is to operate as it is meant to, they must behave as if they were true believers. However, law students and legal scholars as such do not have official responsibilities of this sort, and they are free (and may be thought to have an obligation) to stand back from the law and treat it not (only) as an authoritative regime of rules but (also) as an object of dispassionate study in much the same way as historians and sociologists of religion study the beliefs and behaviour of Christians, Muslims and so on.

The key ideas presented in this book could be summed up in **One Really Big Idea** (the **ORBI**) that (tort) law is an authority-based phenomenon that can be, and is best, understood both 'from the inside' as an authoritative source of guidance about how to behave and also 'from the outside', taking into account tort law's character as law, the political and social environments in which tort law operates, tort law's uses, and its

* Throughout this book, full references to books and articles referenced in the text can be found by consulting the Bibliography at the back of the book.

competitors. From this 'external' perspective, authoritative legal doctrine is only one aspect of tort law's social nature. It is law's authority that enables it to perform the social functions we can use it fulfil. Understanding the doctrine is important, but so is appreciating the environments and contexts in which the doctrine is embedded and in which it comes to life off the page. Understanding (tort) law in all its doctrinal and social richness and diversity teaches us something about the 'human condition', about what it means to be human. The hope is that this book will encourage readers to begin that exciting, life-long task of discovery.

2

Tort Law

KI 1: Tort law is law

How, you will immediately protest, can such a tautologous banality teach us anything about tort law, let alone about 'the human condition'? A simple, but adequate, answer is that philosophers and lawyers have argued for millennia—and still argue vigorously today—about what law is. Law is such a complex and sprawling social phenomenon that providing a convincing account of its nature is a very tall order indeed; and various different accounts compete with one another for acceptance. Since tort law is (by definition) an aspect of the larger body of 'the law', it is useful to begin by focusing our attention on the whole rather than on the particular part.

Law, in the sense we are thinking about it in this book, is a product of human social life and interaction. It is, we might say, a 'human social practice' and an aspect of a society's 'culture'. We do not know when, in the course of human history, this social practice first appeared; but we can be confident that the human species has existed for much longer than what we are calling 'law'. It has been speculated that law appears only when human social groups reach a certain size, and their activities a certain level of complexity.

Law is a social practice of a particular sort that we might call 'normative'. At its core, what this means is that law is about how human beings living in societies should behave towards one another—what they may, ought and ought not to do; what is permitted, required and prohibited in our dealings with one another. Besides law, another very important normative, social practice is morality. Like law, the nature of morality has been a subject of intense debate for thousands of years, as has the nature of the relationship between law and morality. Therefore, what I say here on these (as on many other) topics should be treated as a point of view,

not 'the truth' in any absolute or unquestionable sense. As a first thought, you might suppose that law and morality are obviously very different things. In fact, it turns out to be quite difficult to distinguish one from the other.

Law is a social practice in at least two distinct senses: first, it is made by humans; and secondly, it is an aspect of social life. As for the first, many people think that morality is not 'made' by humans. Some believe that it is made 'by God', while others believe that 'true morality' is not made by anyone and, like the natural world, exists independently of human activity. A good reason to take one or the other of these two views is that one of the uses of morality in our lives is to supply a set of 'norms' to which individuals are personally committed, and which they can use as a benchmark against which to assess the validity and legitimacy of demands made on them by other individuals and by society as a whole. Morality, if you like, provides individuals with a shield against what they consider to be unreasonable external pressure to behave in certain ways and not others. It is, at least, comforting to think that such 'personal morality' consists not merely of one's own, perhaps idiosyncratic, views about what one may do, and ought or ought not to do, but that they are, in some sense, valid and binding for everyone. After all, unless you think that the norms you personally subscribe to are objectively correct in some sense, what right do you have to complain when other people demand that you act inconsistently with one of those norms or, conversely, to expect others to comply with them?

For present purposes, it is not necessary to answer this question because all we need to say to distinguish morality from law is that personal morality may be used as an ultimate standard against which to assess and judge the acceptability of law. Put differently, personal morality provides individuals with norms that they believe they themselves should conform to and, more importantly, that everyone else as well should conform to, regardless of what the law says. If you thought that you alone were required to conform to a particular norm, you might not think of that norm as 'moral'.

The second sense in which law is a social practice is that it is an aspect of social life. In this sense, morality, too, is a social practice. Philosophers sometimes say that morality tells us 'what we owe to each other' (Scanlon 1998). We may distinguish between personal morality, in the sense explained in the previous paragraph, and 'social morality'. One way of thinking about social morality is that it is 'made' by society; but it is

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