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Critical Notices

Jamie Cassels*

The Revival of Tort Theory in
Canada

[*Review of Tort Theory, edited by Ken Cooper-Stephenson and Elaine Gibson, (Toronto: Captus University Publications, 1993). 434 pp.*]

Tort scholarship in Canada has not traditionally been preoccupied with theory. Apart from several fine (doctrinally oriented) texts, by far the greatest amount of tort writing found in the journals is *ad hoc* and responsive to current issues. It consists for the most part of case comments or 'recent development' articles inspired by important decisions from higher courts. Beyond this, a number of substantive topics and problem areas have recently been dealt with in some detail. There is a large amount of literature, for example, on the liability of public authorities and professionals, sporting injuries, asbestos and environmental liability, and associated problems of proving causation. Certain doctrinal problems are also Canadian favourites, perhaps most obviously, the interrelation of contract and tort and associated problems of negligent misstatement, liability for economic loss, and products liability. In recent years certain theoretical orientations (especially feminist theories and economic analysis) have begun to inform the treatment of substantive tort issues. But what is missing is any strong tradition of theoretical inquiry into the fundamental structure and function of the law of tort.¹

One possible reason for the theoretical gap may be that there has been a (relatively) settled consensus on many of the 'theoretical' questions—a consensus shared, by and large, by academics, lawyers and judges. This consensus is formed around a postrealist acceptance of the 'open textured'² (if not indeterminate) nature of legal doctrine and an instrumentalist understanding of its social function. Tort scholars of the sixties and seventies understood tort as a body of law organized around general (and plastic) concepts and principles (foreseeability, fault, intent, causation)

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1. The one exception to this statement is the prodigious output of Ernest Weinrib in his project of establishing a formalist conception of tort law. His contribution to this collection is discussed *infra*.

2. This phrase is drawn from H.L.A. Hart, *Concept of Law* (New York: Oxford University Press, 1961).

capable of elaboration and growth when guided by sound policy considerations. Those considerations include first and foremost the goals of compensation and deterrence. In addition, it was thought, as a method of dispute resolution designed to keep the peace, the elaboration of tort should accord with social norms regarding personal responsibility, fault and corrective justice. In addition, the law serves to highlight certain social ills, educate the public, and provide a mechanism for private citizens to maintain a check on abuses of public and private power.

This understanding of law was sufficiently pluralistic that it offered something for everyone and satisfied most needs for a 'theoretical' orientation for scholarship and practice. It provided judges with both the policies and principles required to bolster their decisions in hard cases. It provided lawyers with good arguments for their clients and with a stronger sense that their work in fact made the world a better place. It provided academics with all of these same benefits, especially the sense that their subject matter was important and that their work made some small contribution to the common good. Thus, with theoretical matters settled, academics, lawyers and judges could simply get on with the task of elaborating what it all meant in practice.

In light of the story so far, the appearance of the recent book entitled *Tort Theory*³ (edited by Ken Cooper-Stephenson and Elaine Gibson) would be surprising. But there is more to the story. As the various works in this collection reveal, the previous theoretical consensus has broken down, giving rise once again to a felt need to re-evaluate fundamental questions in tort law. Once on the margins, but moving towards the centre, two strains of intellectual inquiry have gradually eroded confidence in the largely instrumentalist conception underlying most tort scholarship. On the one hand, empirical work (mostly done elsewhere in the common law world) has called into question whether the law does in fact achieve its stated purposes. And on the other hand, a rather strange alliance of moral philosophers and business lawyers have criticized the 'social engineering' orientation of instrumentalism, and have called into question whether the law even *should* attempt to achieve its stated purposes.

Tort Theory, a collection of fifteen papers from a conference in 1992, represents both of these strands. It also contains essays fighting a rearguard action to uphold the old consensus (though in modified form), as well as several essays exploring whether there might be a new understanding of the social function of tort. The remainder of this essay elaborates upon the themes of contemporary tort theory as they emerge from this collection.

3. K. Cooper-Stephenson & E. Gibson, eds., (Toronto: Captus University Publications, 1993) [hereinafter *Tort Theory*].

I. *The Crumbling Consensus: Tort Under Attack*

The first cracks in the tort consensus began to appear as much as two decades ago as 'law and society' scholars, with an emerging empirical orientation, began to hint at the possibility that tort law did not always keep its promises; indeed, that its goals might in fact be contradictory (for example insurance versus deterrence, compensation versus corrective justice) and unachievable. In the past decade, the cracks have become massive fissures, and the critics of tort law (joined in recent years by critical legal studies scholars) have in fact moved to the centre of tort scholarship. They point out that the law is doctrinally incoherent, that there is little evidence that it achieves deterrence,⁴ that it is a total failure in terms of providing compensation,⁵ that it is an extraordinarily expensive way⁶ to get inadequate compensation⁷ to a minuscule fraction of the people who might need it,⁸ and that the primary beneficiaries of the system are lawyers. In the result, a new counter-consensus has emerged that tort law does not work, or worse, that it works positive harm.

Several of the essays in *Tort Theory* are representative of this counter-consensus. As such, they are in some ways the most radical and the most conventional. They are radical in that they call for the restriction or outright abolition of tort law in certain fields. They are conventional, in that they draw upon the above-mentioned scholarly consensus to make their case. In "Tort Law and the Crown: Administrative Compensation and the Modern State"⁹ David Cohen argues against the expansion of

4. See, for example, D. Dewees & M. Trebilcock, "The Efficacy of the Tort System and its Alternatives: a Review of Empirical Evidence" (1992) 30 Osgoode Hall L. J. 57-138.

5. See, for example, T. Ison, *The Forensic Lottery: a Critique on Tort Liability as a System of Personal Injury Compensation* (London: London Staples Press, 1967).

6. Even in the relatively straightforward area of automobile accidents, studies estimate that less than 50 cents of every dollar ultimately goes to providing compensation. Ontario, *Report of Ontario Task Force on Insurance* (Toronto: Ministry of Financial Institutions, May 1986) (Chair: D.W. Slater) at 66-67.

7. The inadequacy of compensation stems from a variety of sources. First, most victims of injury receive no compensation whatever through the tort system. Second, those who do will have to pay legal fees in the order of 20-40% of their awards. Third, because of the 'crystal ball gazing' required by the lump sum compensation system, awards are bound to be inaccurate (too high and too low) (see the comments in *Andrews v. Grand and Toy Alberta Ltd.*, [1978] 2 S.C.R. 229 at 251; 83 D.L.R. (3d) 452). Finally, most cases never reach court and are settled for less than adequate compensation (see D. Harris *et al.*, *Compensation and Support for Illness and Injury* (London: Oxford University Press, 1984) at 92-123.

8. Studies in England have found that nearly 90% of accident victims receive no compensation through the tort system, and if the definition of "accident" were broadened to include victims of non-traumatic (but socially caused) illness and injury, the figure would be much higher. See D. Harris *et al.*, *Compensation and Support for Illness and Injury* (London: Oxford University Press, 1984); and J. Stapleton, *Disease and the Compensation Debate* (Oxford: Clarendon Press, 1986).

9. *Tort Theory*, *supra* note 3 at 361-393.

crown liability in tort suggested by *Just v. British Columbia*.¹⁰ He argues that the policy/operational distinction is unworkable, and is simply a cover for conclusions reached on other grounds that certain governmental functions should or should not be subject to tort review. He argues that the intrusion of tort into governmental functions ignores the fact that there are better ways to solve the problem of government-caused harm, and that it expresses a very conservative agenda or ideology. Given the realities of the bureaucratic context, tort law is unlikely to be effective at any rate. It ignores the fact that individual-government relations are entirely unlike private relations because the modern state is “engaged in a range of interventionist activities which have no private analogues.”¹¹ Cohen is not arguing that individuals injured by government action should not receive compensation; only that tort law is inadequate and inappropriate to the task. Indeed, he argues that tort law necessarily compensates too few people, privileging only a very small minority of the population. He suggests, instead, that losses caused by government actions might be widely compensable through a public benefits program that recognizes that such losses are the inevitable consequence of government action and should be borne widely by the taxpayers who are the beneficiaries of such programs. He goes on to examine what those alternative programs and institutions might look like.

Bruce Feldthusen, in an essay entitled “If This is Torts, Negligence Must Be Dead,”¹² paints an even bleaker picture with an even broader brush. He argues that “personal injury negligence law is at best useless, and more probably harmful, and ought to be abolished on that account.”¹³ Negligence law is irrelevant in about 90% of cases involving accidental injury, and in almost all cases of illness however caused. Workers compensation and other no-fault schemes limit tort rights considerably, and in most other cases of injury there is simply no one to sue. Even in the residual area where negligence law is operative, it is unnecessary, and little would be lost by abolishing negligence. Entitlement to compensation is a lottery and, argues Feldthusen, “No rational citizen would conceive of the right to sue in negligence as a form of accident insurance. No one rationally eschews accident insurance on the ground that she or

10. [1989] 2 S.C.R. 1228 at 1244, in which the Supreme Court suggested that “in general the duty of care owed in tort by the government is the same as that owed by one private person to another.”

11. *Tort Theory*, *supra* note 3 at 366.

12. *Tort Theory*, *supra* note 3 at 394–416.

13. *Tort Theory*, *supra* note 3 at 396.

he already has sufficient protection through the tort system.”¹⁴ Nor does negligence law promote any form of deterrence, given the presence of insurance and the realities of most forms of accident causing behaviour. The types of incentives imagined by deterrence theory are effective only in the very small number of accidents caused by advertent or decisional negligence.

This is not to say, however, that negligence law is merely useless and benign. Feldthusen argues that it generates positive social costs. The fear of liability and uncertainty created by law impose significant defensive costs on shareholders and consumers, and valuable social resources and energies are used up in the maintenance of the tort system that might be more effectively deployed on other safety and compensation initiatives. As a path to reform, Feldthusen recommends entirely abolishing negligence law (even without replacing it with public no-fault)¹⁵ or at least reformulating it in such narrow terms that it would hardly be recognizable.

Robert Maisey and Allan Hutchinson add some weight to the skeptical position with a Critical Legal Studies inspired account of tort law entitled “Blurred Visions: The Politics of Civil Obligation.”¹⁶ Using cases concerning economic loss and the relation between contract and tort as their vehicle, they demonstrate that tort law is doctrinally indeterminate; yet because it is not autonomous from other socio-economic forces, it has a certain coherence and predictability within its wider social context. Ultimately, they contend tort law is but one arena within which contending individualist and communitarian visions of social life struggle for recognition. The recent restriction of liability for economic loss, and resurgent judicial enthusiasm for contractual forms of social ordering is, they contend, largely explicable in terms of a general ideological shift in western politics generally. We thus learn that while doctrinally incoherent, tort law is at least partly determined by ideology, and that ideology is likely to be the one most congenial to those with power. Thus, not only does tort law then fail in its compensation and deterrence goals, but as a political arena with limited access, it is also unlikely to offer much scope for social change.

14. *Tort Theory*, *supra* note 3 at 407. Indeed, argues Feldthusen, the reality of many large-stakes negligence claims is that they are often simply disputes between two insurers about who should bear the loss.

15. As Feldthusen points out, the primary compensation system already exists in terms of a mix of public programs and private insurance, and any gap could be filled by small extensions of either.

16. *Tort Theory*, *supra* note 3 at 276–311.

II. *The Crumbling Consensus: Formalist Revision*

At this point, one might think it is time to abandon the law of tort altogether, as something which displays no intellectual coherence, and fails to achieve any worthwhile goals. But, as mentioned above, there is another recent critical strand of tort scholarship which takes a surprisingly different tack. While agreeing that tort law fails to achieve the goals set for it by earlier writers, some see this not as a failure of tort, but rather a failure of theory. Instead of dancing on the grave of tort law, they celebrate the opportunity for the law to cast off its tired sixties garb and to reveal its true inner essence, unclouded by concerns about social justice.

The clearest example of this line of scholarship in *Tort Theory* is the essay by Ernest Weinrib, entitled "Formalism and its Canadian Critics."¹⁷ Formalism is the view that the law, (in this case tort law), can be understood as an autonomous body of knowledge and practice on its own terms. For Weinrib, the key to a formalist understanding of tort law is the Aristotelian concept of corrective justice.¹⁸ Weinrib states that the essence of tort law cannot be found in 'external' social or substantive goals, but rather in the 'internal' formal characteristics of the law itself, and in the moral structure of the relationship between the injurer and victim. Tort law, as a branch of private law, distinct from public law is a form of social ordering that reflects the formal relationship between individuals. It has but one function, which is to achieve corrective justice when that relationship is disrupted through a wrong. The structure of tort is bipolar, and unified only by the direct relationship between injurer and sufferer and the correlative of act and harm, liability and entitlement.

All the goals—deterrence, compensation, punishment, loss-spreading, wealth maximization, cheapest cost avoidance—routinely adduced or proposed for tort law are inadequate because they interrupt the direct relationship of doer and sufferer. Such goals, accordingly, are incompatible with the coherence of the private law relationship.¹⁹

Weinrib thus agrees with other critics of tort law, that neither deterrence nor compensation can justify tort. But from here on they part company. For the critics, tort law's failure to promote human well-being through the reduction of accidents or the promotion of safety is a failure, and a reason to reform or abolish torts. For Weinrib, however, tort does not need such

17. *Tort Theory*, *supra* note 3 at 6–23.

18. Weinrib's other articles include: "The Special Morality of Tort Law" (1989) 34 McGill L.J. 403; "Two Conceptions of Tort Law" in R. Devlin, ed., *Canadian Perspectives on Legal Theory* (Toronto: Emond Montgomery, 1991) 29; "Legal Formalism: On the Immanent Rationality of Law" (1988) 97 Yale L.J. 949; "Corrective Justice" (1992) 77 Iowa L.R. 403.

19. *Tort Theory*, *supra* note 3 at 11.

'external' justifications because it is not about 'social' or distributive justice. It is solely about corrective justice. It expresses and enforces the "right," which is the structure of norms that govern the interrelationship between free agents.²⁰ It has nothing to do with promoting the "good." Thus, he concludes, "Seen as corrective justice, tort law is not an enterprise in social engineering but an elaborate exploration of what one person can demand from another as of right."²¹

Weinrib is joined in his quest for a formal understanding of tort by Stephen Perry in "Loss, Agency and Responsibility for Outcomes: Three Conceptions of Corrective Justice."²² While Perry offers a critique of Weinrib's notion of corrective justice, he also seeks to provide a similar account of tort law, although one that accords human well-being some moral significance. Perry's premise is that if corrective justice starts with a focus on agency and wrongful conduct, it cannot move to a duty to compensate for loss of well-being (which is what tort law actually does). Perry concludes that corrective justice must accord significance to both agency and to loss of well-being and suggests his own "comparative" account of liability.

In "Tort Law Reasoning and the Achievement of Good",²³ Bruce Chapman also 'supports' Weinrib by arguing that tort law reasoning is incapable of promoting any goals of public policy or distributive justice, or indeed, any specific human good at all. Chapman argues that a program of distributive justice requires deductive legal reasoning, that tort law is not deductive, and that tort law cannot, therefore, serve distributive goals. Instead, argues Chapman, tort law rests upon non-deductive formal reasoning.²⁴ In common law adjudication, the rules are not prior to the cases in the way required by deductive reasoning. Instead they are constructed out of the cloth of cases, leaving much room for non-deductive normative creativity. Any "rule" is usually a conclusion about interpretation, rather than a reason for a decision. Tort law rests upon too many "irreducibly defeasible" concepts which are incapable of being reduced to the necessary and sufficient conditions required by deductive

20. Free agency is expressive of and should be expressive of practical reason which, in turn, is expressive of universality, the Kantian requirement that "the principle on which a purposive being chooses to act be capable of functioning as a principle valid for all purposive beings, whatever their inclinations or circumstances and whatever the specific purposes that might promote their well-being." in *Tort Theory*, *supra* note 3 at 12.

21. *Tort Theory*, *supra* note 3 at 23.

22. *Tort Theory*, *supra* note 3 at 24–47.

23. *Tort Theory*, *supra* note 3 at 73–103.

24. Chapman uses the case of *Caparo Industries v. Dickman*, [1990] 2 W.L.R. 358 as his primary illustration of non-deductive formal reasoning.

reasoning.²⁵ Joe Smith adds some apparent support for this view in his essay “Action Theory and Legal Reasoning”²⁶ in which he argues that formal legal reasoning is effective because it is more efficient than other forms of reasoning better suited to the achievement of justice:

Legal doctrine serves to avoid better, but completely economically unfeasible, forms of reasoning such as practical reasoning and reasoning from principles of moral philosophy. Legal doctrine permits precedent to function without resort to policies or principles, except in exceptional circumstances.²⁷

While formalists such as Weinrib rarely search for it, there is much ‘external’ theoretical support for their view that the common law of tort is not, in its social function, aimed at the promotion of redistributive or egalitarian goals or, indeed, any significant enhancement of human welfare. First, there is its socio-economic orientation. Common law is roughly co-extensive with the marketplace, and there is a contradiction between market freedom and most definitions of substantive equality. Common law defines and protects proprietary endowments (through property and tort law), and provides for their discretionary use and transfer (through contract law). It thus constitutes and reflects the norms of the marketplace.²⁸ It is thought to create a realm of individual autonomy within which individuals may pursue their own interests and, within classically liberal boundaries, treat others as they wish. Seen in this light, private law does not simply accept social inequality—it protects and promotes it.

Admittedly, modern legal developments significantly alter this regime. A major theme of twentieth century legal development has been the curtailment of market freedom through legislative initiatives such as labour legislation, human rights legislation, and consumer protection legislation, which are aimed at promoting a greater degree of equality. Interestingly, however, these reforms have come primarily as legislative abrogations of common law which has not itself changed so radically. Indeed, the existence of such legislation has, on occasion, been taken as reason to leave the common law undisturbed.²⁹

25. *Tort Theory*, *supra* note 3 at 101.

26. *Tort Theory*, *supra* note 3 at 104–125.

27. *Tort Theory*, *supra* note 3 at 108.

28. Some would argue that tort law is an exception—that contract law sets the rules of the marketplace and tort law limits market freedom. This misses the point that tort law provides the base-lines or outer boundaries required to create the market (especially the protection of property and physical security, and basic market norms such as the prohibition against fraud) and does not significantly limit market activity.

29. In *Bhadauria v. Seneca College* (1981), 124 D.L.R. (3d) 193 (S.C.C.) the Supreme Court of Canada refused to recognize a cause of action for discrimination, partly because human rights codes had occupied the field.

The view that common law is a poor instrument for the promotion of equality is further bolstered by established legal and political theory which sees society divided into the public sphere of governmental action and the private sphere of individual relations. Because common law governs the relations between individuals in the 'private sphere,' law and governmental action is not *obviously* implicated in the resulting outcomes. In the private sphere, we tend to tolerate a greater amount of inequality than we do in the 'public sphere.' This is thought to be justifiable in order to preserve individual liberty. This legal-political view is reflected, for example, in the principle that the *Canadian Charter of Rights and Freedoms* does not apply to private litigation.³⁰ The result of the public/private bifurcation is that there is no consensus about when inequality is traceable to *the law*, as opposed to being simply a natural background social feature; or when inequality is a product of social structures for which we are responsible, rather than simply the product of individual actions or chance circumstances which we can only regret. While a radical view would treat virtually all social inequality as a product of the law and social structures (for example private law protects property, property is power, power is the basis of hierarchy), the more established view, of course, is that general social inequality is to some extent a natural background feature of society and that the law is not so centrally implicated.³¹

Moreover, insofar as tort law governs the relations between individuals, it leaves little room for the recognition or remediation of the types of systemic inequality that is the focus of so much modern equality jurisprudence. The law typically concerns itself only with the relationship between the immediate parties to the dispute and ignores the wider social context in which their encounter takes place. As well, the law accepts the prior status quo as the appropriate measure and goal of justice. Thus, there is little room for the application of norms of distributive justice—norms

30. *Retail, Wholesale and Department Store Union v. Dolphin Delivery* (1986), 33 D.L.R. (4th) 174 (S.C.C.).

31. Taken to its own extreme, of course, this view denies any connection between private law and inequality. So long as the law treats individuals in a formally equal fashion, actual inequality is not a legal concern. Nineteenth century private law, as it is often caricatured, adhered rather strictly to this model of formal equality. The critique of formal equality, of course, is that it not only accepts, but preserves and promotes substantive inequality by leaving undisturbed, and licensing the exploitation of, the background differences in power between individuals. Thus the ironic description by Anatole France, of the "majestueuse egalite des lois," "qui interdit au rich comme au pauvre de coucher sous les ponts, de mendier dans les rues et de voler du pain" *Le Lys Rouge* (1894) (Paris: Calmann-Lévy, 1916).

that might focus on wider social inequalities that are reflected in the relationship between the parties even before a wrong is committed.³²

Weinrib is right that common law *is* built, by and large, on a model of formal equality. In articulating and remedying the rights of individuals, rarely does the law concern itself with social context or the actual relation of the parties. All are equal and vested with the same rights and duties. Investigation into social advantage and disadvantage rarely figures in the analysis. So long as the law treats everyone the same, then the demands of equality are met. It is for this reason that many are skeptical about the capacity of common law concepts to deal with the realities of social inequality. For example, in discussing the relationship between a woman and her doctor in *Norberg v. Wynrib*, McLachlin J. was of the view that the classical law of contract and tort are ill suited to take account of the problem of inequality. She stated "In negligence and contract the parties are taken to be independent and equal actors, concerned primarily with their own self-interest," and the preservation of their freedom to pursue that interest is still a primary legal objective.³³ There is, in her view, too little room in these bodies of law for an actual appreciation of the imbalance in power and, therefore, to use them to analyze relationships characterized by inequality is to adopt lenses "which distort more than they bring into focus."³⁴

III. *A Middle Way: Post-Instrumentalism?*

Both the instrumentalist and formalist appear to agree that tort law has little ability to achieve much in the way of social good. There is, however, a third group of theorists represented in *Tort Theory* who are seeking to define a more moderate position, either by reasserting some of tort's traditional goals, or searching for new ways in which the law can be made socially meaningful. The lead essay in this regard is Ken Cooper-Stephenson's "Corrective Justice, Substantive Equality and Tort Law."³⁵ In this essay Cooper-Stephenson offers a critique of Weinrib's formalism,

32. A clear example of this problem can be found in the law of personal injury damages. Damage awards discriminate against women and racial minorities because they reproduce inequities in society generally. The law is designed to restore the status quo, even though the status quo it seeks to restore is not one that any of us find acceptable. But, it is argued, the misfortune and disadvantage suffered by many of these victims cannot necessarily be traced exclusively to the accident. Responsibility for systemic injustice cannot be attributed to an individual tort defendant, and cannot be remedied in a personal injury action. See J. Cassels, "Damages for Lost Earning Capacity: Women and Children Last" (1992) 71 *Can. Bar Rev.* 445.

33. (1992), 92 D.L.R. (4th) (S.C.C.) 449 at 487.

34. *Ibid.* at 484.

35. *Tort Theory*, *supra* note 3 at 48–68.

arguing that formalism fails to describe law as it actually operates; that it fails to attend to social and political context, and that it fails to accommodate aspirations to distributional or substantive, rather than formal, equality. He argues that the law does, in fact, redistribute wealth and power in ways that show a sensitivity to the problems of substantive inequality. First, he argues, the way in which the law defines harm or loss is influenced by community recognition of group detriment or disadvantage. As an example, he cites the development of “wrongful birth” litigation spurred in part by the legal system’s growing awareness of the perspective of women. Similarly, Cooper-Stephenson argues that questions regarding the type of fault requirement (negligence, intent, maliciousness, strict liability) are influenced by distributive considerations, as are considerations of systemic disadvantage one of the primary driving forces for the extension of new remedies to particular groups in society. Cooper-Stephenson concludes:

... tort [law] at one time tended to focus particularly on protection of the advantaged—the privileged property owning classes—while denying its protection to the less powerful. In the current social setting, however, the interests and relationships that tort law increasingly addresses are those concerning the underprivileged and powerless.³⁶

In his other essay in the collection entitled “Economic Analysis, Substantive Equality and Tort Law”³⁷ Cooper-Stephenson continues his project of demonstrating that tort law does/should pursue egalitarian objectives and criticizes economic analysis on the ground that, like formalism, it ignores the problem of substantive inequality. His primary point is that by building the theory upon the existing distribution of wealth, economic analysis reproduces, and in fact aggravates, inequality. Its recommendation to “maximize wealth in society”³⁸ can thus have little normative force.

In a similar, though somewhat more cautious vein, Ted Decoste, through the lens of critical theory,³⁹ provides an account of the problems and possibilities of liberal tort law. Starting with an explanation of the liberal dilemma of reconciling individual freedom and social order, he suggests that rights discourse is the practice of mediating the relation-

36. *Tort Theory*, *supra* note 3 at 55. By way of illustration, Cooper-Stephenson refers to *Crocker v. Sundance* (1988), 44 C.C.L.T. 225 (S.C.C.) and *Just v. B.C.* (1990), 1 C.C.L.T. 1 (S.C.C.) as examples of cases where superior resources, skill, etc. lead to a higher standard of care (due to control power and recognition of superior wealth and loss-spreading capacity). He also refers to the use by courts of utilitarian social calculations where risks are weighed against benefits to third parties and society in judging liability and compensation.

37. *Tort Theory*, *supra* note 3 at 131–161.

38. *Tort Theory*, *supra* note 3 at 134.

39. “Taking Torts Progressively”, in *Tort Theory*, *supra* note 3 at 240–275.

ships between individuals and between individuals and the state. But this discourse presupposes formally equal sovereign transactional subjects, and ignores the realities of hierarchy and difference, especially in terms of race class and gender. As such, the relationships constructed by liberal rights will systematically reproduce and reinforce inequality. Similarly, argues Decoste, lawyers and judges are required to ignore the particularities of the disputants, and even of themselves, and to abandon personal values, commitments and aspirations.

Despite all this, Decoste cautiously affirms that law might be a site for progressive practice, especially through resistance against the abstraction and universalization of legal thought. He recommends that lawyers might assist in the struggle by the less powerful to assert their own 'biographies.' For Decoste legal discourse is a process of ongoing construction of the social order and, borrowing from Hart, suggests that the order is not fixed, and depends upon a normative consensus. Using the examples of *Thomas v. Norris*⁴⁰ (a civil assault action and false imprisonment action in respect of a Coast Salish spirit dance initiation) and the failure of tort law to respond to sexual harassment, Decoste shows the imperialism of white, male tort law in its view of legal subjects and its construction of social relations. He recommends in both cases that the route of progressive practice is resistance to the colonizing force of law through rejection of its 'universal' (white male) standards and the assertion of difference.

The other essays in this volume also take the position that tort law is flawed, though perhaps not fatally, and most build in a practical way upon the more abstract suggestions made by Cooper-Stephenson and Decoste. In "The Gendered Wage Dilemma in Personal Injury Damages,"⁴¹ Elaine Gibson provides a critique of inadequate tort compensation, and, in particular, the inadequacy of damages to female plaintiffs. Fewer women than men receive tort damages for their injuries and when they do, they receive less. While women may be treated with formal equality, because its 'universal' standards are male, tort law masks and reproduces substantive inequality. In particular, Gibson focuses on the use of actuarial and statistical data in the fashioning of awards to women, demonstrating how such data are built upon, and thus reflect and reproduce, socio-economic patterns of inequality and discrimination. She then argues that the use of gender-based actuarial data contravenes the spirit of human rights legislation and also the *Canadian Charter of Rights and Freedoms*. She recommends that damages be based not upon gender-based income

40. (1992) B.C.J. No. 210 (unreported).

41. *Tort Theory*, *supra* note 3 at 185–211.

predictions, but upon an assessment of capacities equivalent to men (perhaps simply based on ungendered averages). More radically, she proposes that the basis of compensation be reformulated, based upon need rather than income replacement.

In “Measuring Pain: Quantifying Damages in Civil Suits for Sexual Assault”,⁴² Kate Sutherland argues that the courts fail properly to compensate victims of sexual assault because they typically focus too much on the nature of the defendant’s conduct rather than the injury caused to the plaintiff. She suggests that courts could do a better job of quantifying damages in these cases if they were to develop a better empathic understanding of the harm suffered, and that the best way to do this would be through personal narrative. As suggested by Decoste, the point is to reassert the subjectivity of the plaintiff, and to “integrate into the mainstream the views of outsiders, those whose stories are most often excluded from the law. . .”⁴³ In a similar vein, in “The Culture of the Common Law in the 21st Century: Tort Law’s Response to the Needs of A Pluralist Society”,⁴⁴ Lucie Leger argues that tort law is unduly narrow in its concept of injury, and if the promotion of equality, respect and multiculturalism are valid goals, the law should recognize a tort of discrimination and recognize the emotional, psychological and social harms wrought by intentionally discriminatory conduct. Two further articles by Daniel Jutras and Lakshman Marasinghe explore the concept of strict liability as possible antidotes to the common law’s overly-narrow focus on fault.⁴⁵

It is interesting how modest are the claims made by those seeking to reassert the social utility of tort law. Most of the authors here are fully aware that tort has not yet lived up to its promises and that it continues to operate against a backdrop of inequality and social injustice. All have accepted the main lessons of the critics and have abandoned any grand instrumentalist claims. Most confine themselves to the much weaker (post modern) assertions that while law does not ‘determine’ anything, it does play a role in social construction. They also contend that while law may be primarily a reflection of the status quo that need not *necessarily* always be the case, and that while legal discourse is primarily dominated by the powerful, ways might be found to incorporate the voices of the less powerful.

42. *Tort Theory*, *supra* note 3 at 212–234.

43. *Tort Theory*, *supra* note 3 at 225–6.

44. *Tort Theory*, *supra* note 3 at 162–180.

45. D. Jutras, “Louis and the Mechanical Beast, or Josseland’s Contribution to Objective Liability in France” in *Tort Theory*, *supra* note 3 at 317–341 and L. Marasinghe, “Towards A Quasi-Tort in the Common Law?” in *Tort Theory*, *supra* note 3 at 342–355.

Conclusion and Assessment

Judged against the objectives set out by the editors, *Tort Theory* is a success. The volume is intended by its editors to house a wide range of perspectives, to encourage discussion and scholarship concerning the jurisprudential underpinnings of tort law, and to facilitate the development of seminars in advanced tort theory. The editors are motivated by a belief that theoretical inquiry will ultimately assist those who must rely on tort for redress for disability and social disadvantage, and to promote reform or even radical transformation.

By and large, the volume delivers what it promises. A collection of fifteen essays in one place, interspersed with the editors' brief but helpful introductions, the book does embrace a good range of theoretical perspectives, including those of analytical and moral philosophy (especially in those works dealing with tort law as a form of corrective justice), economic analysis, feminism and critical legal studies. The collection is thus relatively representative⁴⁶ of the work being done in Canada today (perhaps more accurately, in light of what I said above about the theoretical gap in tort scholarship, the collection *is* the work being done in Canada today). As such, *Tort Theory* should quickly become the principal resource for anyone interested in going beyond doctrinal exegesis in this field.

The book will also promote the editors' stated objective of facilitating the development of seminars and would serve admirably as the anchor text in an advanced tort seminar. One particular advantage in this regard is that, unlike many theory collections, *Tort Theory* has a real coherence. The book accurately reflects the ideological, practical and theoretical differences that characterize contemporary scholarship and reform initiatives in tort law, yet the authors, while coming from widely differing viewpoints, seem capable of engaging with one another while, at the same time, pursuing radically different objectives and ideas. The concepts, arguments, themes and discourse all display a certain connectedness or commensurability. Despite their very great differences and the different answers they give, most of the authors can be read as responding to the questions of the social significance of tort law, and whether it can be made relevant in modern Canadian society.

Finally, *Tort Theory* should also help to encourage and promote further discussion and scholarship in the area; and good theory is undoubtedly essential to understanding the phenomenon and practice of law, and to the development of sound proposals for reform.

46. Missing are (uncritical) accounts of economic analysis of tort, old-style instrumentalist (left, right or centre) accounts or any account inspired by critical race theory.

Yet the book's ability to meet the editors' objectives is limited by several qualifications. First of all, as is often (though unnecessarily) the case, several of the essays are presented at such a level of abstraction, and with such a degree of jargon, that they are not nearly so accessible as they ought to be. As one of the authors in the collection herself complains, "while I concede the intellectual honesty and good faith of these approaches, they often seem unrelated to the realities of everyday life; they are in general devoid of human context and unhelpfully obscure."⁴⁷ This is a shame. This book could have been a vehicle for translation and popularization of some of the less accessible theoretical work in tort. In some cases it succeeds admirably in this regard, but in others the authors lost the opportunity to share their ideas with a wider audience.

A related criticism is that some of the essays lack sufficient grounding in the phenomenon which they seek to elucidate. Indeed, some are presented with so little illustration or concretization that they practically lack any reference whatsoever. Weinrib, for example, states that tort theorists start with the "familiar normative practice known as tort law" and that the point of tort theory "is not to imagine a utopia but to elucidate this practice."⁴⁸ Yet his contribution consists entirely in assertions about the structure and significance of tort "principles," "norms," and "concepts," without a single example, illustration or even description of the way in which those assertions might relate to any practice.⁴⁹ In light of this, the essay reads precisely like a story about an imagined utopia.

Most of the other authors go further, usually providing case examples which illustrate or instantiate their points, yet even then, there is a lack of grounding in the reality of legal processes, or at least a confusion between illustration and demonstration of a point. Thus, other authors may also be accused of imagining utopias. In arguing against Weinrib, for example, Cooper-Stephenson does give examples to support his claim that tort law attends to equality concerns. So the reader at least knows what he is talking about. But the few examples provided hardly serve to support ambitious claims such as the statement that tort law "frequently serves to redistribute collective wealth for the benefit of the underprivileged and disadvantaged at the expense of the privileged and advantaged."⁵⁰

47. L. Leger, "The Culture of the Common Law in the 21st Century: Tort Law's Response to the Needs of a Pluralist Society" in *Tort Theory*, *supra* note 3 at 162–163.

48. *Tort Theory*, *supra* note 3 at 6.

49. With the possible exception of his assertion that negligence law instantiates corrective justice in *Tort Theory*, *supra* note 3 at 14. I think I know what negligence law is, though I am not sure I know what Weinrib thinks it is, or how it instantiates corrective justice.

50. *Tort Theory*, *supra* note 3 at 53. The issue may be one of emphasis or overstatement. Elsewhere in the essay Cooper-Stephenson does show that he is fully aware of the limitations of the law of tort as an instrument of social justice.

In short, with the exception of one or two of the essays which draw upon empirical work (usually being done elsewhere—in England for example), the picture of law painted in most of the essays in *Tort Theory* is drawn primarily from the law's self-description (or, in some cases, from the author's imagination), relying upon the relatively abstract statements of principle found in a very few selected appellate cases or, indeed, simply upon general principles drawn from political or moral theory. As such, the essays can only be extremely partial, and likely distorted, accounts of law and legal practice. Especially in those essays which claim to detect a moral order in the law of tort, or a strongly progressive potential, one must ask exactly what 'law' is being referred to here, how many individuals will be able to access that law, and whether what judges say is really relevant to the concrete details of social order. In short, do the pictures accurately portray anyone's reality? Without more solid grounding not only in legal doctrine, but in the actual processes and practices of everyday dispute processing, and without a better account of the relation between law and social order, theory risks being little more than a story or myth about how things would work in a better world.

Some might object that the criticism here misunderstands what it is to do theory; that it is demanding that theorists do empirical or sociological work, or something different from 'theory.' The debate about what constitutes good theory must await another day, but it seems to me that the practice of doing theory on the back of legal doctrine alone is a little too much like trying to describe the taste, texture and aroma of a cake after having only read the recipe.

Despite these criticisms, I want to reiterate that *Tort Theory* is a splendid contribution to Canadian legal scholarship. It fills a much needed gap in the existing legal bibliography, and provides an eclectic, interesting and coherent resource. My criticisms may be read simply as the impatient demands of one reader who is anxious for more and even better.