The Case for Abolishing Trespass to the Person

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Is it appropriate to describe trespass to the person as part of the ‘common’ law of obligations when there is currently little consensus throughout the common law world as to the nature of the liability imposed in respect of such torts (strict or fault), the conditions in which such liability is imposed (is directness sufficient, or intention required?) or the form which the different torts might take (does the tort of negligence trespass exist?)?

This paper suggests that differences in trespass to the person which exist throughout the common law world do not reflect local influences, but rather reveal flaws in the current understanding of trespass to the person.

On this basis, the paper re-examines the liability currently imposed by common law courts (specifically in Australia, Canada, England and New Zealand) in tort for physical interferences with the person. It will be shown that although different terms are used to describe such liability, common law courts generally do not impose liability in tort for physical interferences with the person without balancing competing interests. This differs from the approach taken to imposing liability in tort for physical interferences with land, where the courts will impose liability in certain circumstances without balancing competing interests. It will be argued that the different approaches taken by courts to imposing liability in tort with respect to physical interferences with the person and with respect to physical interferences with land do not exist because land is more important than people, but because the fixed nature of land means that it can be protected differently.

The current failure to appreciate the different approaches taken by the courts to imposing liability in tort with respect to physical interferences with the person and with respect to physical interferences with land has resulted in considerable inconsistency and uncertainty in the law. The paper will suggest that one way to overcome such inconsistency and uncertainty is to recognise that there is no longer a distinct form of liability which is imposed by the courts under the label ‘trespass to the person’. It follows that it is now possible to make a case for abolishing trespass to the person.