THE FAILURE OF UNIVERSAL THEORIES OF TORT LAW

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Many torts scholars are in the business of offering universal theories of tort law. Such theories purport to explain tort law irrespective of jurisdictional boundaries, apparently on the assumption that there are no relevant differences in the law of torts between jurisdictions. We believe that this approach to theorising in relation to tort law is seriously flawed considering the fundamental differences that exist in the law of torts between countries that embrace the common law tradition. In our view, scholars who offer globally-applicable theories of tort law have failed to appreciate that there is no such thing as a universal law of torts.

In our proposed paper, we will identify significant differences in the law of torts between jurisdictions that leading global theories of tort law cannot explain. For example, corrective justice theories of tort law cannot account for differences in (1) the approaches taken to the defence of illegality, (2) the significance of the utility of the defendant’s conduct for the purposes of determining whether the defendant acted negligently, (3) the availability of punitive damages, or (4) the availability of apportionment of damages for contributory negligence. Rights-based theories of tort law cannot accommodate the jurisdictional discrepancies that exist in relation to (1) liability for negligently inflicted pure economic loss, (2) the liability of public authorities for omissions, or (3) the responses to evidential gaps for the purposes of causation.

Our main goal in the proposed paper is to demonstrate the failure of universal theories of tort law. However, we will also identify the key reasons why there is no universal law of torts and unlikely to ever be a universal law of torts. Central considerations include (1) the replacement of the Privy Council as the ultimate appellate court in several jurisdictions, (2) ideological differences between states, (3) major variations in the constitutional arrangements of states, (4) powerful local influences, such as ‘insurance crises’, (5) the impact of human rights instruments, and (6) the highly insular tradition of some judiciaries.

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