

UNLSA Law and Religion Panel
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‘Religion and Private Law’
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Most of you will know I have a keen interest in private law- especially the law of Torts! You will also probably know I have a keen interest in religion. What I want to do tonight, briefly, is to comment on some ways that the majority Western religious world view, Christianity, has had an impact on the shaping of private law in our legal system. You’ve already heard how we are not an explicitly Christian country. But of course we have a deeply Christian cultural heritage in the West, and that has had a significant impact on the doctrines of the common law (and even, as we will see, something of an impact on our statutes.)

I will be drawing on my own observations, but also on a recent paper called “Christianity and Torts” by Michael P. Moreland.²

One of the points that Moreland makes is one I must confess I hadn’t realised until I read his paper. This is that there is an obvious link between tort law and an older translation of the Bible in the word “trespass”. As you will all know, the word “trespass” is used in the name of a number of intentional torts- trespass to the person, trespass to land, trespass to goods. But it is also used in the older English Bibles in the prayer given to his disciples by Jesus, where as part of that prayer we pray, “forgive us our trespasses, as we forgive those who trespass against us”.

Moreland notes:

Even the English word used for centuries to denote the category we now call torts—“trespass”—is used in its general sense of a “wrong” in the Lord’s Prayer (not in its now narrower sense of an unauthorized entry upon land). We might even say that we pray to be forgiven of our torts, just as we forgive those who commit torts against us.

So the law of torts could be called the law of trespasses! This connection leads onto another link between torts and the Christian world view- the idea of “rights” and the concept of “wrongs”. There are some older theories as to why we have the law of torts, which links the notion simply to an economic analysis (who is the “cheaper loss-avoider”), or simply to a utilitarian analysis. But in more recent years scholars of the law of torts have come back to see that the role of the law of torts is the protection of rights.³ We can analyse tort actions in terms of the particular rights that the law recognises- rights to bodily integrity (protection by torts such as assault and battery), rights to freedom of movement (the tort of false imprisonment), rights to reputation (the tort of defamation.)

But then we have to ask, where do these rights come from? Many scholars today are content to say that we have rights, but cannot clearly say why we do. But when we look into the Christian world-view, we see some important themes that help to explain why the legal system protects these rights. The most important theme is probably the notion that human beings are not just a random collection of chemicals, but are actually made by a good God, and made in the “image of God”. Because this is the case, the Christian perspective is that every human being’s life is infinitely important and should be protected- and one way we do this is by the high value given by the law of torts to bodily integrity.

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² Forthcoming in John Witte, Jr. and Rafael Domingo, eds., *Oxford Handbook on Christianity and Law* (Oxford University Press, 2023). See also David F. Partlett “Tort law and its three Christian pillars”, ch 15 in *Christianity and Private Law*, ed Robert Cochran, Jr & Michael Moreland (London: Routledge, 2020).

³ See eg Robert Stevens, *Torts and Rights* (Oxford: OUP, 2007).

So the “laws” of the Bible, particularly in the Hebrew Bible, what Christians call the Old Testament, were meant to be rules for life that reflected the character of the God who gave them, and also were designed to be as it were “manufacturer’s instructions” as to how humans were meant to live and flourish in the world created by God.⁴

This concept of the high value humans have, is there side by side with a recognition of the reality that human beings do not always behave as they should! For C S Lewis fans, see Aslan to Caspian:

“You come of the Lord Adam and the Lady Eve,” said Aslan. “And that is both honour enough to erect the head of the poorest beggar, and shame enough to bow the shoulders of the greatest emperor in earth. Be content.”⁵

This idea of the image of God in creation can be seen in the first chapter of the Bible, *Genesis 1:26-27*

²⁶ Then God said, “Let us make man in our image, after our likeness. And let them have dominion over the fish of the sea and over the birds of the heavens and over the livestock and over all the earth and over every creeping thing that creeps on the earth.”

²⁷ So God created man in his own image,
in the image of God he created him;
male and female he created them.

There are many implications; but two that are later spelled out are:

- *Genesis 9:6*:

Whoever sheds the blood of man, by man shall his blood be shed, for God made man in his own **image**.

So, one sense murder is the worst kind of blasphemy against the Creator. It is the ultimate interference with bodily integrity.

In the New Testament, we this reflected in

- *James 3:8-9*

[N]o human being can tame the tongue. It is a restless evil, full of deadly poison. ⁹ With it we bless our Lord and Father, and with it we curse people who are made in the **likeness of God**.

So, the fact that people are made in God’s likeness is a reason for us not to curse and denigrate them. Hence even the law of defamation has a source in the Bible!

The value of human life becomes a later basis for human rights instruments asserting the “inalienable” rights of mankind. There is a fascinating study by non-Christian historian Tom Holland, in a book called *Dominion* (Little, Brown 2019), which he describes as “the story of how Christianity transformed the world” (in ch XXI).

We can even see this type of approach reflected in comments in our own High Court, where in *Harriton v Stephens* [2006] HCA 15; (2006) 226 CLR 52 Crennan J said:

⁴ For an excellent overview of the laws of the Bible, and how they interact with modern law, see Burnside, Jonathan P *God, justice, and society: aspects of law and legality in the Bible* (New York : Oxford University Press, 2010).

⁵ C S Lewis, *Prince Caspian*

[258]...it is odious and repugnant to devalue the life of a disabled person by suggesting that such a person would have been better off not to have been born into a life with disabilities.

[259] In the eyes of the common law of Australia all human beings are valuable in, and to, our community, irrespective of any disability or perceived imperfection.

The importance of human dignity above the interests of property, for example, can be seen in that interesting case we discuss when dealing with intention in the tort of battery, *Bird v Holbrook* (1828) 4 Bing 628, 130 ER 911. You may recall that Mr Bird was chasing a stray hen when he went into Holbrook's garden, where he had set up a "spring gun" which fired when Bird tripped the wire. Some earlier cases had stressed the right of property owners to defend their property, but in this case the court found that there was an intention to harm whoever tripped the wire, and hence there was an actionable battery.

In ruling in this way Best CJ stressed that where no notice of this type of machine had been given, allowing it to be used this way was contrary to what he called "humanity", the common rules that should govern human society.

I am, therefore, clearly of opinion that he who sets spring guns, without giving notice, is guilty of an inhuman act, and that, if injurious consequences ensue, he is liable to yield redress to the sufferer...⁶

it is inhuman to catch a man by means which may maim him or endanger his life, and, as far as human means can go, it is the object of English law to uphold humanity, and the sanctions of religion.⁷

In fact, in this case Best CJ affirms that what he means by "humanity" can also be described as the doctrines of Christianity. We know from later authority that Christianity as such is not an internal part of the common law. But the influence of Christian values can be seen in the development of the law.

We can see the same theme in later cases dealing with the defence of "necessity", where the need to protect human life can excuse some torts, but the law is less willing to allow this excuse where it is only property that is being defended. This principle is even reflected in the rules of the *Civil Liability Act* (NSW), s 52, where a defence of "self-defence" to a tort claim is allowed, including defence of property, but qualified in this way:

- (3) This section does not apply if the person uses force that involves the intentional or reckless infliction of death only--
- (a) to protect property, or
 - (b) to prevent criminal trespass or to remove a person committing criminal trespass.

In a chapter called "Tort law and its three Christian pillars", Partlett outlines what he calls three essential foundations of tort law which have been inherited from the Christian world view- the idea of community (that we belong together in different communities, and we have a duty to get on peacefully); the idea of human dignity (valuing all human life, as we have just been seeing in the "image of God" concept); and the idea of protecting the vulnerable. He points out how the idea that we should protect those who can't protect themselves, can be seen in a range of legal concepts, and he traces it in particular in Lord Atkin's judgment in *Donoghue v Stevenson*.

Those who have done the law of negligence with me will hopefully remember that I pointed out there that you can't really understand Lord Atkin's incredibly influential decision in that case, unless you know the parable of the Good Samaritan which Jesus told. I won't go

⁶ *Bird v Holbrook* (1828) 4 Bing 628, 130 ER 911 at Bing 640.

⁷ *Ibid*, at Bing 643.

over it again this evening, but remember that what Lord Atkin does is try to bring together a number of previous decisions about when we owe a duty to others, by looking for a general moral principle. He finds the principle of morality in Jesus' story about costly love for someone who was not only vulnerable, but a member of a hated group. And what he does is to say that the law cannot completely adopt Jesus' moral principle, but does identify some rules for working out who our neighbour is, for whom we must legally exercise due care.

The influence of Jesus' story can also be seen in the *Civil Liability Act 2002* (NSW), where the part of the Act, Part 8, providing immunity for those who voluntarily come to the assistance of others, is headed "Good Samaritans"! Section 56 tells us that:

"good samaritan" is a person who, in good faith and without expectation of payment or other reward, comes to the assistance of a person who is apparently injured or at risk of being injured.

The idea of caring for the vulnerable is one that also comes up in what may seem to be the very technical question of when there is a duty of care to avoid causing economic loss. Again, hopefully those who have done Torts with me will remember that McHugh J in *Perre v Apand* (1999) 198 CLR 180 refers to various "salient features", and one of the most important is whether the plaintiff was "vulnerable" to the careless decisions of the defendant.⁸ This is an idea which goes back into the Christian world-view. See eg James 1:27

²⁷ Religion that God our Father accepts as pure and faultless is this: to look after orphans and widows in their distress and to keep oneself from being polluted by the world.

Well, there is lots more that could be said- but I really just wanted to introduce the topic and invite you to think about it, and read more about it. The papers I have mentioned will give you a good start to explore this fascinating area.

⁸ *Perre v Apand* (1999) 198 CLR 180 at [104].