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Peter Cane

Excerpt

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Part 1

The issues in perspective

1

Introduction: surveying the field

1.1 Compensation for accidents

This book deals with certain kinds of misfortune, and in particular with injury and damage arising from accidents. Although the term 'accident' is a convenient one, its meaning is not straightforward, and some further explanation of the way it is used in this book is necessary. First, the word 'accident' will be used to cover injury and damage inflicted intentionally (as when, for example, one person deliberately assaults another), even though neither the inflicter nor the victim may consider the injury to be 'accidental' in the normal sense. Secondly, the term will not be confined to the technical legal sense – in this sense, injury or damage would be accidental only if it was not a foreseeable consequence of a deliberate or negligent act.

Thirdly, we are sometimes reluctant to refer to injury or damage resulting from natural causes as accidental: we might hesitate to say that a house, the roof of which was blown off by a hurricane, was damaged 'by accident' (although we might say that a person hit by the debris suffered an accident); or we might hesitate to say of a person who died of leukaemia that they died accidentally (although if a person, while on holiday, contracts a rare viral disease and dies soon after, we might call the death an accident). Fourthly, the term 'accident' is often used to refer to injury and damage which is caused by a sudden, non-repetitive, traumatic occurrence; and in this sense it is contrasted with illness or disease, which often develops gradually and has no easily identifiable starting point. The distinction between 'traumatic' accidents and 'non-traumatic' diseases is of considerable practical and theoretical importance in the law,¹ and it will be mentioned at various points.

The scope of this book is not limited to any of these narrower senses of the word 'accident', although its primary focus is on injury and damage for which the law provides some compensation. As we will see, the law distinguishes in many ways, not only between injury and damage resulting from natural causes on the one hand, and human activity on the other (see 1.2); but also between injury and damage of

1 J. Stapleton, 'Compensating Victims of Disease' (1985) 5 *Oxford J. Legal Studies* 248; *Disease and the Compensation Debate* (Oxford, 1986). It has been held that suffering deep vein thrombosis as a result of long distance air travel is not an accident within the terms of the provision of the Warsaw Convention 1929 dealing with compensation: *Re Deep Vein Thrombosis and Air Travel Group Litigation* [2005] 3 WLR 1320.

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Excerpt

[More information](#)4 Chapter 1

the latter type according to whether the person responsible for it was in some sense at fault. We will be considering to what extent these distinctions are justified. The main questions to be addressed are: for what injuries and damage ought the law to provide compensation? what form should that compensation take? how should it be assessed? and who should pay for it? Important related issues include how compensation systems are administered and how the law seeks to reduce the amount of injury and damage inflicted.

This book is principally concerned with personal injuries and death, and only marginally with damage to property. The main reason for including some discussion of property damage is that it allows some illuminating contrasts to be drawn between different possible ways in which a compensation system can operate. The comparison, for instance, between the way in which tort law works in relation to personal injuries and the way fire insurance works in relation to damage to houses is so significant that it would be wrong to exclude all reference to property damage.

Just as the word 'accident' has a number of senses, the meaning of the term 'compensation' is also far from straightforward. Meanings of the word and the purposes of giving compensation will be considered in detail later (17.1). Here it is sufficient to note that lawyers generally think of compensation as a method of making good a 'loss', of replacing something of which a person has been deprived. Lawyers use the word 'loss' in a rather strange way to include many things that are not losses in a literal sense, such as pain. In the context of personal injury, death and accidental damage to property, compensation has two major purposes. First, it is designed to make good measurable financial losses such as out-of-pocket expenses, income that has been 'lost' in the sense that it can no longer be earned, and the cost of repairing or replacing property which has been physically damaged or destroyed. Secondly, it is designed to make amends for disabilities or loss of faculty, pain and suffering, or death of a close relative. Here also the lawyer thinks mainly of compensating in financial terms: even though the 'loss' has no measurable financial value, compensation in money can be, and is, given.

Another question closely related to those posed earlier is whether, as a society, we are making the most sensible use of the resources devoted to compensation for injury and damage. Even ignoring the controversial question of whether a larger share of national resources should be devoted to such compensation, we cannot fail to ask whether the resources already distributed to the injured and disabled are being sensibly allocated. Do we over-compensate some and under-compensate others? Is there any justification for compensating some people twice over and others not at all for basically similar misfortunes?

The answers to these questions cannot be found by looking at any one segment of the law. It is true that one large chapter of private law – tort law – appears to be central to the questions posed, and a significant part of this book is concerned with tort law. But to concentrate on this segment of private law to the exclusion of other relevant areas of the law would give a very distorted view of the way in which the problem of compensation for misfortunes is dealt with in our society. There are

many other methods of compensation, such as the social security system and the criminal injuries compensation system, which deal with disability and bodily injuries. Personal accident insurance is also important – although it operates principally, but by no means exclusively, in the field of damage to property.

Besides being only a part of the picture, in practice tort law operates very differently from the way suggested by a simple statement of the relevant legal rules. The development of liability insurance altered the administration and financing of the tort system² out of all recognition. Because the vast majority of tort claims are settled out of court by the defendant's insurance company, the behaviour of insurance companies is at least as important to an understanding of the way the tort system is administered in practice as is the behaviour of lawyers and courts. In practice, most tort compensation is paid by insurers and not by the people who commit torts.

Yet there are very important issues at stake here. If the person responsible for injury or damage to another is not to pay the compensation, then who should pay it? Furthermore, once it is conceded that tortfeasors (i.e. people who commit torts) do not generally pay for the injury and damage they cause, other questions arise. For example, should compensation be assessed differently depending on who will pay it? Again, if the legally responsible party does not pay the compensation, why should people be entitled to compensation only if there is someone legally responsible for the injury or damage suffered? Recognition that most tortfeasors do not personally pay damages, and that most tort damages are paid either by the government or by insurance companies, points to the conclusion that damages are effectively paid for by society as a whole. But this recognition carries many other puzzles in its wake. In particular, it raises the question of the relationship between the welfare state and the tort system. Society's obligation to the injured and the disabled is, it might be thought, discharged by the provision of social security benefits, the national health service and personal health and welfare services. What, then, is the place of the tort system in all this?

In addition to questions of this kind, which arise from the practical operation of the tort system, many complex problems arise from the interrelation of the various systems of compensation operating simultaneously today. Should an injured person be compensated through one system or another? Should an injured person be allowed to collect compensation from more than one source? Should one compensation fund be entitled, having paid out compensation to an injured person, to recoupment from another fund? These questions have been dealt with to some extent by the courts in relation to the tort system. But they also arise in relation to compensation systems, which are rarely the subject of court proceedings. In order to see these issues in perspective and to discuss them rationally, it is necessary to look beyond the rules of tort law.

2 The phrase 'the tort system' refers to the relevant rules of tort law and the machinery for using those rules to obtain compensation.

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Excerpt

[More information](#)

6 Chapter 1

This book is primarily concerned with compensation for injury and damage, but it is impossible to overlook completely the question of accident prevention. Compensation is nearly always second best; prevention should be the first aim. Law can play only a limited part in preventing injury and damage: the skills of mechanics, engineers, psychologists, managers and so on are probably much more relevant. Even when the law is invoked to prevent (or reduce) accidents, it is usually the criminal law which is used; and in our legal system the criminal law does not have a great deal to do with compensating people (although some would like to see this changed). This book does not profess to deal at length with the role of the criminal law in injury prevention, but the claim is often made that compensation systems also perform the incidental role of reducing or preventing accidents, and this subject is dealt with at length in chapter 17.

1.2 Natural and human causes

1.2.1 The issue

We noted earlier that the law draws a distinction between injuries and diseases according to whether or not they are caused by the actions (or inaction) of some human person. In the tort system this distinction marks the line between liability and no-liability because compensation for injury or illness will be recoverable in a tort action only if one of its immediate or proximate causes was the conduct of some human person other than the claimant. This is so even if the defendant to the tort action is a corporation. Normally there will be liability only if the person who caused the injury is identifiable.³ The Criminal Injuries Compensation Scheme (see ch. 12) is also limited to injuries caused by someone other than the victim. By contrast, the social security system is not so limited in its coverage: it draws no distinction between disabilities with a human cause and disabilities resulting from 'natural causes'. Sickness and incapacity benefits (12.5) are available to all disabled people regardless of the cause of their disabilities. Industrial injuries benefits (12.4.3) are only available in respect of 'injuries arising out of and in the course of employment'; but while it is probably true that most such injuries can be traced to a proximate human cause, the claimant does not have to do this in order to qualify for benefits.

It is important not to confuse the distinction between natural and human causes with the distinction between traumatic injuries caused by accidents (in the sense of sudden, short-lived events), on the one hand, and illnesses and diseases, on the other. Many traumatic injuries (by which is meant injuries resulting from accidents as just defined) can be traced to a proximate human cause, but by no means all can: a person may be struck by lightning, or swept out to sea and drowned, or have a heart attack while driving and run into a roadside pole. Conversely, many illnesses and diseases cannot be traced to any proximate human cause; but one of the great advances in medical science in this century has been the discovery that very many diseases have

³ For an exception see 4.2.

human causes.⁴ The most we can say is that a greater proportion of traumatic injuries are probably attributable to human causes than of illnesses and diseases; and that illness and disease account for a much greater proportion of human disability than do traumatic injuries (1.4.2). It is also true, as a generalization, that responsible human causes are much harder to identify in the case of many diseases than in the case of traumatic accidents. The result is that, in practice, a much greater proportion of victims of traumatic injuries receive tort compensation (and industrial and criminal injuries benefits) than do victims of illnesses and diseases. If proper attention were to be paid to the compensation of those disabled by disease, the distinction between human and natural causes would have to be abandoned.⁵

The distinction between human and natural causes can produce some striking results. Why, for example, should a child born disabled as a result of negligence, on the part of the doctor who delivered the child, be entitled to substantial compensation from the tort system, while the child born with similar *congenital* disabilities receives no common law damages; or why should a person blinded in a criminal attack be entitled to compensation from the Criminal Injuries Compensation Scheme while a person blinded by a 'natural' disease or by their own actions is entitled only to social security benefits? It has been suggested that 'the view that brain-damaged babies deserve more generous treatment than the congenitally disabled is rooted in the desire for accountability, not compensation'.⁶ More generally, it might be argued that compensating victims of human causes at a higher level than victims of natural causes is a way of giving effect to notions of personal responsibility: a person should be required to pay compensation for injuries if, but only if, that person was in some sense responsible for the disabilities. But there are many ways of holding people accountable for their actions other than by making them pay compensation; and even if we accept that compensation for injuries caused by humans ought to be paid for by those who cause them, it does not follow that those injured and disabled by human causes should be treated more generously than those injured and disabled by natural causes.

Nevertheless, if compensation for disabilities was paid by individuals, the argument based on personal responsibility might have some force. However, we will see that most tort compensation is not paid by individuals but by insurers, corporations and the government, and in this light it is less clear why tort-type benefits should only be available to those injured by human action. On the whole, those disabled people who can recover tort damages or criminal injuries compensation are much better provided for financially than those disabled people who must rely on social security benefits alone. Can this be justified in the light of the fact that the tort system and the social security system are, in effect, both financed by the public at large: in the case of the tort system, by insurance premiums paid by potential tortfeasors, and in the case of the social security system, by all those who pay National Insurance contributions and taxes?

4 See Stapleton, *Disease and the Compensation Debate*.

5 Ibid.

6 P. Fenn, 'The No-fault Panacea' (1993) 100 *British J. of Obstetrics and Gynaecology* 103, 104.

Cambridge University Press

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Excerpt

[More information](#)8 Chapter 1

1.2.2 Society's 'responsibility' for human causes

One possible answer to this is to say that society is 'responsible' for injuries, diseases and disabilities attributable to human conduct in a way in which it is not 'responsible' for naturally caused conditions because the former are, while the latter are not, caused by people, or by the organization of society in certain ways. What does this mean? It cannot mean that society is responsible for making good the consequences of – or, in other words, is under an obligation to compensate for – injuries with a human cause, because this begs the very question at issue. Society may also regard itself as 'responsible' for those disabled by natural causes in the sense that it regards itself as obliged to maintain them at a reasonable standard of living; and it would involve circular reasoning to justify different treatment of different classes of disabled people by pointing out that society 'accepts responsibility' for them in varying degrees.

We might say that society is responsible for disabilities with a human cause because it is 'at fault' or 'to blame' in respect of them. But this too is a difficult argument to sustain because the concept of 'fault' being used here is very different from the concept of fault we apply to individuals. We might say, for instance, that society is to blame for most road accidents because judges, magistrates, legislators, jurors, the media, highway authorities, and so on, pay insufficient attention to the 'massacre on the roads' and because, as a society, we devote insufficient resources to road safety and to developing safer alternatives to road transport. There is an important difference between this type of judgment and the judgment involved in a finding of negligence. The latter normally implies that the negligent party has paid too much attention to his or her own interests, whereas our system of social decision-making allows those in power to make decisions which are thought to be in the interests of society as a whole, even if they inflict injury or harm on some people. We may all share some of the blame for every road accident, but this is blame in a quite different sense from that embodied in the law of tort.

Another possible meaning of the 'responsibility' of society for disabilities with human causes might be found in the concept of cause. We might say that even if society is not to blame for such disabilities, it nevertheless causes them in a way in which it does not cause disabilities resulting from natural events. There are many illnesses and diseases for which human conduct is in some sense responsible. For instance, much bronchitis is caused by air pollution resulting from human activity, much cancer is caused by smoking (both active and passive), and many diseases are spread by the fact that people are brought into contact with one another in public transport and workplaces, as a result of the way in which society organizes itself. However, responsibility of this diffuse type is very different from the responsibility which attaches in tort law to the proximate human cause of an individual's disabilities, and so it can hardly explain why victims of proximate human causes are better treated by the law than victims of proximate natural causes. Of course, to say that society causes disabilities is to say that people cause them by their actions or

inaction. But the human conduct being referred to is usually very much more remote, in a causal sense, from the disabilities than conduct which attracts tort liability. Sometimes it is said that society is responsible for the conduct of individual citizens as when, for example, it is alleged that social deprivation leads people into crime. Even assuming that such a connection could be demonstrated, it would not follow that society should bear the cost of compensating the victims of violence by individual criminals: the responsibility of the criminal is different from the responsibility of society.

There may be good arguments why society should compensate people disabled by human conduct, but these do not depend on the fact that such disabilities are caused by some members of society whether proximately or not, but on the fact that the disabled need help. Therefore such arguments cannot be used to justify different treatment for those disabled by human actions and those disabled by natural causes.

1.2.3 Protecting reasonable expectations

An important aim of a compensation system is to minimize the hardships that arise out of the disappointment of reasonable expectations, in particular, the expectation of regular future income (17.1.2.3). It might be thought that one of the reasons why the law distinguishes between human and natural causes is that human causes of disability tend to strike more suddenly and with little warning, whereas natural causes tend to operate more slowly, thus giving the victim more time to adjust his or her affairs and lifestyle to cope with the disability. However, on examination, this argument has very little force. It is true that being seriously injured or killed in a road accident, for example, is a sudden misfortune. But by no means all traumatic injuries are caused by human actions; even less are they all caused by anyone's fault, and yet the tort system compensates chiefly on the basis of fault. It is also true that some diseases have a gradually disabling effect, but others do not; and a person afflicted with a gradual disease is not necessarily better able, because the disease is gradual, to take steps to ameliorate the misfortune it brings in its wake. Besides, the nature of the disease as either sudden or gradual in effect is not related to whether it is caused by people or by nature.

Perhaps one factor which influences our attitude to whether disabilities from particular causes deserve compensation is the relative frequency of disability from that cause. Serious long-term disability (such as is apt seriously to disappoint expectations) caused by human activities is relatively rare in our society, and so we feel that those unfortunate enough to suffer from it ought to be compensated because they have probably planned their lives and entered commitments on the reasonable assumption that they will not be seriously disabled in this way. Thanks to advances in medical science, serious or prolonged disease and premature death resulting from natural causes are also relatively uncommon today, and people tend to plan their lives on the basis that these misfortunes will not befall them. This might encourage us to feel that compensation is as due here as in the case of disability from human causes.

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Peter Cane

Excerpt

[More information](#)

10 Chapter 1

This would suggest that any argument which justifies compensation on the basis of disappointment of expectations should focus not on the suddenness of the disability, but on its relative frequency and the extent to which people can reasonably be expected to guard against the risk of disability by personal insurance.

1.2.4 Egalitarianism and the problem of drawing the line

Underlying the idea that people ought to be compensated for rare and uncommon misfortunes but not for the common and widespread misfortunes which affect the lives of all or of a large proportion of us, are notions of social equality, that we should all have equal opportunities to enjoy life and to fulfil ourselves. Such notions may lead to the idea that people who suffer unusual losses ought to be helped by being compensated, and that the cost of that compensation should be spread or distributed amongst those members of society who have been fortunate enough not to suffer such losses. These ideas are vividly illustrated by the adoption of the principle of State compensation for war property damage during the Second World War. Sir Winston Churchill explained the genesis of the war damage scheme in his history of the War in the following terms: ⁷

Another time I visited Ramsgate. An air raid came upon us, and I was conducted into their big tunnel, where quite large numbers of people lived permanently. When we came out after a quarter of an hour, we looked at the still-smoking damage. A small hotel had been hit. Nobody had been hurt, but the place had been reduced to a litter of crockery, utensils and splintered furniture. The proprietor, his wife and the cooks and waitresses were in tears. Where was their home? Where was their livelihood? Here is a privilege of power. I formed an immediate resolve. On the way back in my train I dictated a letter to the Chancellor of the Exchequer laying down the principle that all damage from the fire of the enemy must be a charge upon the State and compensation be paid in full and at once. Thus the burden would not fall alone on those whose homes or business premises were hit, but would be borne evenly on the shoulders of the nation.

Here the justice of treating war damage as a charge on the State is clearly rested on the notion of equality. Few would disagree with these sentiments. The question is how far this principle can be extended. In his speech in the House of Commons introducing the War Damage Bill, Churchill pointed out that the principle of State compensation must be limited to direct loss from enemy action and not extend to indirect loss such as loss arising from business failure. But was there any sound reason for this limitation except that a scheme without it would be very expensive?

The difficulty is, of course, to distinguish between those misfortunes we expect people to bear and those which seem sufficiently unusual that their victims deserve our sympathy and financial help. We do not compensate people simply because

⁷ *The Second World War*, vol. II (London, 1949), 308. Churchill was one of the pioneers of social insurance: *Liberalism and the Social Problem* (London, 1909), 309, 315–16.

their natural abilities do not allow them to earn as much as some others, but we do compensate people whose earning power is reduced by a work accident (under the industrial injuries scheme) or by someone else's fault (by imposing tort liability). The social security system compensates earners for income loss resulting from illness or accident, but it does not compensate people who have never been able to work for their inability to do so. Again, people who suffer facial disfigurement in a work accident or as the result of a tort are compensated for their disability as such, but people born with serious facial disfigurement are not. Even if we entirely abandoned the distinction between human and natural causes as a criterion for compensating the disabled, it would not follow that we would compensate everyone whose abilities or endowments were less than normal or average. Some disabilities are just facts of life which we must all bear as best we can. At the end of the day, it might not be possible to draw and justify distinctions between the disabled on any more precise basis than that the notions of human individuality and personal responsibility require people to cope themselves with (or to compensate themselves for) certain types of differences between human beings which disadvantage some people compared with others. Few, if any, advocates of egalitarianism see this notion as justifying or requiring the elimination of all differences between individuals. Such distinctions are bound, however, to appear to some extent ad hoc and arbitrary.

1.3 Mixed systems in a mixed society

We live in a society based on a mixture of political and economic principles. Many aspects of people's lives are regulated by the State, and a significant proportion of people's money is spent by the State. On the other hand, people are entitled, within fairly broad margins, to spend the rest of their money on what they like and to arrange their affairs as they wish. British society runs according to a basic principle that the prices of goods and services should be fixed by supply and demand, so that prices reflect consumer preference; but at the same time, taxes and subsidies may deflect consumer preferences from the directions they would take entirely unaffected by the State's interference. Britain is a society in which there are great inequalities of income and wealth, and in which a substantial degree of inequality appears to be acceptable to many people; but at the same time some of the most extreme and glaring forms of inequality of income are reduced by the taxation and social security systems.

It is not surprising, therefore, that we have a variety of regimes for dealing with the problem of compensation for misfortune. Some misfortunes are so trivial that they are simply accepted as routine ups and downs of life; others are less trivial but are still regarded as something that individuals should protect themselves against, if they wish, by private insurance; still others are seen as sufficiently important to justify the State instituting a coercive system to ensure that compensation is paid to the victim by some other person; and yet others are so important that the State takes