

Cambridge University Press
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Part I
The issues in perspective

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Introduction: surveying the field

1.1 Compensation for accidents

This book is about how the law compensates for certain kinds of misfortune, particularly physical and mental impairment and death resulting 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 include intentionally inflicted impairment and death (as when, for example, one person deliberately assaults another), even though neither the inflicter nor the victim may consider the outcome to be 'accidental'. Secondly, the term will not be confined to its technical legal sense – in this sense, an event would be accidental only if it was either unforeseeable or foreseeable but unpreventable.

Thirdly, we are sometimes reluctant to refer to impairment or death resulting from natural causes as 'accidental'. For instance, 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 personal injury¹ or death 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 injuries and non-traumatic diseases is of considerable practical and theoretical importance in the law,² and it will be mentioned at various points. The term 'impairment' covers both and refers to lack of function (or 'disability'), whether temporary or permanent, resulting from injury, illness and disease.

¹ 'Personal injury' (or 'injury') includes harm to the body (including the brain) and mental harm (such as depression). But not all undesirable changes to the body constitute personal injury and qualify for legal compensation. For instance, pleural plaques caused by exposure to asbestos have been held not to constitute 'actionable damage': *Rothwell v. Chemical & Insulating Co. Ltd* [2008] 1 AC 281. In Scotland, this decision has been reversed by legislation, which was unsuccessfully challenged for inconsistency with the European Convention on Human Rights and irrationality: *AXA General Insurance Ltd v. HM Advocate* [2011] 3 WLR 871.

² J. Stapleton, 'Compensating Victims of Disease' (1985) 5 *Oxford Journal of Legal Studies* 248; J. Stapleton, *Disease and the Compensation Debate* (Oxford, 1986).

Despite its title, the scope of this book is not limited to any of these narrower senses of the word 'accident'. However, the word 'accident' will normally be used to refer to a sudden, non-repetitive, traumatic occurrence.

As we will see, the law distinguishes in many ways, not only between impairment and death resulting from natural causes on the one hand, and human activity on the other (see 1.2); but also between impairment and death resulting from human activity according to whether the person responsible for it was in some sense at fault. We will consider to what extent these distinctions are justified. The main questions to be addressed are: in what circumstances ought the law to provide compensation for impairment and death? 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 impairment and death inflicted.

This book is principally concerned with compensation for physical and mental impairment and death. However, there will be some discussion of damage to property (which often accompanies impairment and death) because this allows some illuminating contrasts to be drawn between different possible ways in which compensation systems can operate. The comparison, for instance, between the way in which the law compensates for impairment and death 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. Its various meanings 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' and replacing something of which a person has been deprived. Lawyers use the word 'loss' in an odd way to include many things that are not losses in a literal sense, such as pain. In the context of physical and mental impairment and death, compensation has two major functions. First, it makes good measurable financial losses such as medical and nursing expenses, and income that has been 'lost' in the sense that it can no longer be earned. Secondly, it makes amends for the fact of having suffered impairment, for loss of faculty, for pain and suffering, and for 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 impairment and death. Even ignoring the controversial question of whether a larger share of society's resources should be devoted to such compensation, we must also ask whether the resources already distributed to those who suffer physical and mental impairment and death 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 (as often happens)?

In answering these questions we will need to look at various areas of law. One of these – tort law – is of central importance, and a significant part of this book is concerned with tort law. But in order to provide an adequate account of the way our society deals with the problem of compensating for impairment and death, it is necessary to take account of other areas of law as well. For instance, the social security system and the criminal injuries compensation system both provide compensation for impairment and death. Personal insurance also plays a part – although it is much more important in relation to property damage than physical and mental impairment and death.

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. For instance, the development of widespread liability insurance in the late nineteenth and early twentieth centuries altered the administration and financing of the tort system³ 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 for understanding the practical administration of the tort system as is the behaviour of lawyers and courts. Moreover, the fact that most tort compensation is paid by insurers (or the government) and not by people who commit torts ('tortfeasors') and are legally responsible for impairment and death, raises some very important issues. For example, should compensation be assessed differently depending on who will pay it? 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 compensation, and that most compensation for physical and mental impairment and death is paid either by the government or by insurance companies, may lead us to conclude that compensation is effectively paid for by society as a whole. In turn, this conclusion raises questions, for instance, about the relationship between the Welfare State and the tort system. Some might think that society's obligation to the injured is 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, complex problems arise from the interrelation of the various systems of compensation. Should a person be compensated through one system or another? Should a person be allowed to collect compensation from more than one source? Should one compensation fund be entitled, having paid out compensation, to recoupment from another fund? Such issues have been dealt with to some extent by the courts in relation to the tort system. But they also

³ The phrase 'the tort system' refers to the relevant rules of tort law and the machinery for using those rules to obtain compensation.

arise in relation to compensation systems that 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.

This book is primarily concerned with compensation, but the question of prevention must not be overlooked. Compensation is nearly always second best; prevention should be the first aim. Law can play a part – albeit only a limited part – in preventing impairment and death. When law is deliberately employed to prevent (or reduce) the incidence of impairment and death, it is usually the criminal law that is used. However, it is often claimed that compensation systems can also help in reducing and preventing impairment and death. Indeed, some people argue that this is the prime function of tort law. This subject is dealt with in Chapter 17.

1.2 Natural and human causes

1.2.1 The issue

We noted earlier that the law draws a distinction between impairment and death according to whether or not they are caused by human activity (or inactivity). In the tort system this distinction marks the line between liability and no-liability because compensation for impairment and death will be recoverable in a tort action only if one of its immediate or direct causes was human conduct of some identifiable person other than the claimant. The Criminal Injuries Compensation Scheme (see Chapter 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 injuries and diseases that have a human cause and those resulting from 'natural causes'. Sickness and disability benefits (12.5) may be available to the ill and injured regardless of the cause of their illness or injury. Industrial injuries benefits (13.4) are only available in respect of 'injuries arising out of and in the course of employment'; but even if such injuries can be directly traced to a 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 directly traced to a 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 directly traced to any human cause. Although one of the great advances in medical science in the last century has been the discovery that very many diseases have human causes,⁴ the most

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

we can say is that a greater proportion of traumatic injuries than of illnesses and diseases are probably directly attributable to human causes; and that illness and disease account for a much greater proportion of human disability than do traumatic injuries (1.4.2). It is also generally true 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 for 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. For example, a child born disabled⁶ as a result of negligence on the part of the doctor who delivered the child may be entitled to substantial compensation from the tort system, while a child born with similar inherited disabilities is not entitled to such compensation. A person blinded in a criminal attack may be entitled to compensation from the Criminal Injuries Compensation Scheme while a person blinded by a 'natural' disease or by their own actions may be entitled only to less generous social security benefits. It might be argued that compensating victims of human causes more generously 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. However, 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 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 impairment and death resulting from human conduct were actually paid by those responsible for the conduct, the argument based on personal responsibility might have some force. However, we will see that tort compensation for impairment and death resulting from human conduct is typically paid not by those responsible for the disabilities but by insurers and the government. In this light, it is less clear why tort-type compensation should only be available for impairment and death caused by human action. On the whole, those who can recover tort compensation are much better provided for financially than those who must rely on social security benefits alone. Can this be justified in 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

⁵ *Ibid.*

⁶ 'Disabled' and 'disability' are used here, and typically in this book, in a loose sense to refer to the effects of impairment (i.e. lack of function) resulting from injury, illness or disease. The term also has a more precise meaning in the Equality Act 2010 (discussed in Chapter 14 below). There, it is limited to impairment that has a substantial and long-term effect on a person's ability to carry out normal day-to-day activities.

of the tort system, by insurance premiums paid by potential tortfeasors and by the government; and, in the case of the social security system, by all those who pay national insurance contributions and taxes?

1.2.2 Society's 'responsibility' for human causes

One possible answer to this is to say that society 'accepts responsibility' for impairment and death attributable to human conduct in a way in which it does not accept 'responsibility' for impairment and death caused naturally because the former are attributable to social conditions in a way that the latter are not. What does this mean? It cannot mean that society accepts an obligation to compensate for disability with a human cause, because this begs the very question at issue. We may also say that society accepts responsibility for those disabled by natural causes in the sense that it accepts an obligation 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 think that society is responsible for disabilities with a human cause because it is 'at fault' or 'to blame' in respect of them. But this is a difficult argument 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 courts, legislators, the media, highway authorities, and so on, pay insufficient attention to the road toll and because, as a society, we devote inadequate resources to road safety and to developing safer alternatives to road transport.⁷ There is an important difference between this type of judgment and the judgment involved in a finding that an individual is legally responsible. The latter normally implies that the responsible 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 disability 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

⁷ There is some evidence that 'corruption', 'governance quality' and general 'willingness to comply with the law' affect the incidence of fatalities in road accidents: L. T. Hua, R. B. Noland and A. W. Evans, 'The Direct and Indirect Effects of Corruption on Motor Vehicle Crash Deaths' (2010) 42 *Accident Prevention and Analysis* 1934; E. Gaygisiz, 'Cultural Values and Governance Quality as Correlates of Road Traffic Fatalities: A National Level Analysis' (2010) 42 *Accident Analysis and Prevention* 1894; L. Vereeck and K. Vrolix, 'The Social Willingness to Comply with the Law: The Effect of Social Attitudes on Traffic Fatalities' (2007) 27 *International Review of Law and Economics* 385.

in which it does not cause disabilities resulting from natural events. For instance, there are many illnesses and diseases for which human conduct may be responsible in this sense. Many are caused by environmental conditions, and many 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 and indirect type is very different from the responsibility that attaches in tort law to 'direct' human causes, and so it can hardly explain why the law treats victims of direct human causes (such as negligent driving) better than it treats victims of 'direct' natural causes (such as an earthquake). 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 much more remotely connected with the disabilities than conduct that 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 members of society whether directly or indirectly, 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 when their need for compensation is similar.

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.

A factor that may influence 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) directly 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.

This would suggest that any argument that 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 that affect the lives of all or a large proportion of people, are notions of social equality, that everyone should have equal opportunities to enjoy life and to be fulfilled. 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. The difficulty is to distinguish between those misfortunes we expect people to bear and those that are sufficiently unusual that their victims deserve our sympathy and financial help. We do not compensate people simply because 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