

Part I
The Issues in Perspective

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Introduction: Surveying the Field

1.1 Compensation for Accidents

This book is principally about how the law compensates for certain kinds of misfortune, particularly death and physical and mental impairment, resulting from accidents. Although the term ‘accident’ is convenient, its meaning is not straightforward, and some explanation of how 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 strikes 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 were unpreventable. Thirdly, we do not generally count impairment or death resulting from natural causes as ‘accidental’. Fourthly, the word ‘accident’ will normally be used to refer to personal injury¹ or death caused by a sudden, non-repetitive, traumatic occurrence. 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.

Just as the word ‘accident’ has various senses, so does the term ‘compensation’. They will be considered in detail later (17.1). However, at this stage it suffices to say that lawyers generally think of compensation as a method of making good a ‘loss’ and replacing something of which a person has been deprived. They 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 death, and physical and

¹ ‘Personal 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 legislation was unsuccessfully challenged for inconsistency with the European Convention on Human Rights, and irrationality: *AXA General Insurance Ltd v. HM Advocate* [2012] 1 AC 868. Conversely, symptomless sensitisation to platinum salts does amount to damage: *Dryden v. Johnson Matthey Plc* [2018] UKSC 18.

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

mental impairment, compensation has two major functions. First, it makes good measurable financial losses such as medical and nursing expenses, as well as 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.

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 (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. To what extent are these distinctions justified? 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? Other important issues include how compensation systems are administered and how the law seeks to reduce the amount of impairment and death inflicted. Relatedly, are we, as a society, making the most sensible use of the resources devoted to compensation for impairment and death? Even ignoring the controversial issue of whether a larger share of society's resources should be devoted to such compensation, we will also ask whether the resources already distributed to those who suffer death, and physical and mental impairment, are being sensibly allocated. Do we over-compensate some and under-compensate others?

In answering such questions, we will need to look at various areas of law. One of these – tort law – is of central importance; but it is necessary to take account of certain 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. 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 and by the defendant's insurance company acting usually without reference to the defendant, 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') raises some profound 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

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

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 social care. What, then, is the place of the tort system in all this?

In addition to the questions that arise from the practical operation of the tort system, complex problems are presented by 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 and, if so, in which circumstances? Should one compensation fund be entitled, having paid out compensation, to recoupment from another fund? These are questions that will be addressed in due course.

This book is primarily concerned with compensation, but compensation is nearly always second best: prevention is better than cure. 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, usually the criminal law and regulation are 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 and should be 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 distinguishes 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 (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 (13.5) may be available to the ill and injured regardless of the cause of their illness or injury. Industrial injuries benefits (13.4) are available only 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 show that they can be so traced.

The distinction between natural and human causes should not be confused with that 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 can be directly traced to a human cause, but by no means all: 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 past 200 years has been the discovery that very many diseases have human causes,⁴ the most we can say is that a greater proportion of traumatic injuries, than of illnesses and diseases, is 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.

The distinction between human and natural causes can produce some striking results. For example, a child born disabled,⁵ 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 whereas 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 only be entitled 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. Furthermore, 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

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

⁵ '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). 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.

will see that tort compensation for impairment and death resulting from human conduct is typically paid not by those who are 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 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?

1.2.2 Society's 'Responsibility' for Human Causes

One argument in favour of affording persons who are injured by human causes preferential treatment is that society 'accepts responsibility' for impairment and death that is attributable to human conduct in a way that it does not for impairment and death caused naturally. The suggestion here is that the former are attributable to social conditions in a way that the latter are not. One difficulty with this line of reasoning is that we may also say that society accepts responsibility for those who are disabled by natural causes in the sense that it accepts an obligation to maintain them at a reasonable standard of living. It would involve circular reasoning to say that different treatment of different classes of disabled people is justified 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 that 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. However, 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 that 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 that 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 come 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, of course, be good arguments why society should compensate people disabled by human conduct based on the fact that the disabled need help. However, such arguments would not justify giving different amounts of compensation to those disabled by human actions and those disabled by natural causes whose needs are 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, particularly the expectation of regular future income (17.1.2.3). It may be 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, giving the victim more time to adjust his or her affairs and lifestyle to cope with the disability. However, this explanation is weak. It is true that being seriously injured or killed in a road accident, for example, is a sudden misfortune. However, 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 many do not. Furthermore, even if the disease has perceptible symptoms (which it may not), a person afflicted with a gradual disease is not necessarily better able, because the disease is gradual, to take steps to deal with the problems that follow 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 caused in various ways deserve compensation is the relative frequency of disability from those various causes. Serious long-term disability (such as is apt seriously to disappoint expectations) directly caused by human activities is *relatively* rare in our society. Consequently, we feel that those who are unfortunate enough to suffer from it ought to be compensated because they have probably planned their lives and made commitments on the reasonable assumption that they will not be seriously disabled in this way. Due 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 suggests that any argument that compensation is justified 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 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 common and widespread misfortunes, are notions of social equality: that everyone should have equal opportunities to enjoy life and to be fulfilled. We might think 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 or by someone else's fault. 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, we think, are just facts of life that all must bear as best they 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 responsibility require people to cope personally with certain types of differences between human beings

that 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 that subscribes to 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 collected in taxes and spent by the State. At the same time, 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. However, 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. Simultaneously, some of the most extreme and glaring forms of inequality of income are reduced by the taxation and social security systems. In short, we live in a society that maintains a complex balance between individual freedom and State action.

In Britain today, we can distinguish broadly between three different types of compensation system according to the level of State involvement. First, individuals can obtain protection against certain misfortunes by purchasing 'first-party' (or personal) insurance from an insurer (Chapter 11). Such insurance is by far the main source of compensation for damage to property such as houses and motor vehicles. First-party insurance can also be bought in order to provide protection against the risk of physical and mental impairment, although this is relatively uncommon. The State does not (exceptions aside) require people to buy personal insurance against risks of injury, disease and death, irrespective of how prudent it would be to do so. However, it does provide the legal framework within which people can make insurance contracts and enforce them in the courts, and the activities of insurance companies are regulated in certain respects.

A second type of compensation system is that based on tort liability and 'third-party' liability insurance. This system is concerned primarily (although by no means exclusively) with providing compensation for physical and mental impairment and consequent expenses, loss of income, loss of 'amenities' and pain and suffering; for the death of an earner, causing loss of support to dependants; and for the death of a spouse or a child who did not support anyone but whose death causes grief and anguish. Here, once again, the State provides the legal framework of rights and obligations and the system of courts to enforce these rights and obligations. In addition, the State requires certain

groups of potential tortfeasors to take out insurance against the risk of being held liable. Users of motor vehicles must insure against liability for personal injury (and property damage) caused to others by their cars, and employers must insure against liability to their employees for injuries suffered at work. The main function of compulsory liability insurance is not to protect the insured against the cost of liability but rather to ensure that the victim receives adequate compensation.

A third compensation system consists of 'social' schemes funded and operated by the State. The national insurance system primarily protects workers against income loss and provides for various needs resulting from illness and unemployment; the industrial injuries scheme (13.4) deals with injuries suffered and diseases contracted at work; and the Criminal Injuries Compensation Scheme (Chapter 12) compensates the victims of criminal violence to the person. Income support benefits (13.6.3) provide basic assistance to persons in financial need who do not qualify for other benefits. In addition to cash benefits, the State provides a wide range of personal social services useful to those who suffer personal injury (the National Health Service, rehabilitation and employment services, residential accommodation and day centres, home helps and so on). Some groups of the disabled, especially blind people, enjoy special tax concessions (Chapter 14).

The relationships between these systems raise many difficult issues. For instance, should a person be able to claim both tort compensation and social security benefits for the same injuries? Should an injured person who receives free NHS medical treatment be allowed to recover in a tort claim what it would have cost to have private treatment? Should a person who pays for private medical treatment be able to recover its cost in a tort claim even though equivalent treatment would have been available free from the NHS? Should the cost of private treatment paid for by private insurance be recoverable in a tort claim? Such issues arise because the various systems operate relatively independently of one another and are very different from each other in structure, philosophy and operation. For instance, tort compensates in money alone whereas social programmes provide various non-monetary benefits as well. Tort typically pays lump-sum compensation while social security payments are nearly all made periodically. Tort compensation is provided in practice by liability insurance whereas social security benefits are financed partly by personal (but compulsory) insurance and partly by taxation. Private insurance companies handle most tort claims whereas social security is administered by the State. The tort system is much more expensive to operate than the social security system. Tort claims are mostly confined to cases in which fault can be proved against someone covered by liability insurance whereas in the social security system fault is generally irrelevant.

Some of the most significant differences between the tort and social security systems relate to the amount of compensation available. Notably, tort law provides what is called 'full compensation' whereas social security benefits typically