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Challenging Views of Tort (Part 1)¹

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Abstract

This two-part article examines images of how the law of tort is supposed to operate and then it contrasts the reality of personal injury practice. In doing so it challenges accepted views not only about the scope of tort law and what it achieves, but also about the “compensation culture”.

RL/AM

This article challenges many accepted views about how the tort system of personal injury litigation operates. It is written in two parts. In the first part, we consider images of tort deriving from traditional portrayals of justice. We set out seven commonly held views about the system and then we contrast what actually happens in practice. We note the rhetoric and the social attitudes derived from long-held views of how the law is supposed to operate and we then compare the reality. We start by reflecting upon the basic scope of tort principles. Next we consider who brings and defends personal injury cases and what role is played by courts and judges in their resolution. We then consider how the key principle of fault is interpreted in practice and how the operation of insurance affects traditional perceptions of how justice is delivered. Finally, we look at the reasons why damages are awarded and what amounts are paid. Overall, we set out the seven commonly held views of tort and then, by examining the actual practice of personal injury, we undermine and challenge them.

In the second part of this article we look at another set of images which contrast with those set out in the first part. These images portray the tort system in a very critical way, depicting it as a burden that undermines rather than underpins society. It is widely perceived that tort has encouraged a damaging compensation culture. Our propensity to claim is said to have increased to such an extent that we can no longer accept personal responsibility for our misfortunes. The system is thought to be awash with unmeritorious claims which have been prompted by an ambulance-chasing entourage offering to work on a “no-win no-fee” basis. Exaggeration and fraud are to the fore and non-existent or trivial injuries are compensated. As in the first part of the article, although with less force, we then show how these images have become distorted from reality. In particular, the majority of injured people still do not go on to claim compensation despite being encouraged to do so through widespread “no-win no-fee” advertising. The exception arises in the context of road traffic accidents where there is a strong culture of claiming. The significant increase in the number of personal injury claims over the last forty years is largely attributable to such accidents. We examine the reasons for this. Whilst the extent of fraudulent claiming has generally been exaggerated, again the complaints have more foundation in the road traffic context. In conclusion, having revealed how traditional and modern portrayals of tort differ from the reality, we show how tort in practice is heavily influenced by institutional arrangements.

¹ This is a substantially revised version of an article first published as “Tort Law Culture in the United Kingdom: Image and Reality in Personal Injury Compensation” (2012) 3 (2) *Journal of European Tort Law* 1–35 ISSN (Print) 1868-9612, DOI: 10.1515/jetl-2012-0230, September 2012, and ISSN (Online) 1868-9620 pp.230–264. It appears here with the permission of the JETL editor, Professor Ken Oliphant, and its publisher Walter de Gruyter GmbH Berlin/Boston. The original article was commissioned by the European Centre of Tort Law and Insurance and the Institute for European Tort Law and was presented in Vienna in April 2012 at a plenary session of the 11th Annual Conference on European Tort Law. For further information about those organisations see www.ectil.org [Accessed May 2, 2013] and www.etl.oeaw.ac.at [Accessed May 2, 2013].

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Tort and the traditional portrayal of justice

Tort law is universal and applies to all accidents and injuries

A powerful image of the traditional portrayal of justice is that of the universal application of the law to all citizens. All are equally subject to the law and all can equally benefit or be penalised by it. To law students, this is reinforced early in their study of tort by the analysis given of the negligence formula. They are told that one of the reasons for the success of that cause of action is that it can potentially apply to all sorts of accidents and injuries. In addition, the formula itself is a relatively simple one. As a result, instructions to juries based upon finding liability using the “reasonable man” formula were easy to give and understand no matter how complex the situation. Similarly, the “neighbour” test used by judges to determine whether a duty of care was owed has a superficial simplicity and appears capable of being used in very diverse circumstances.

In reality the actual scope of actions in tort for personal injury is severely limited. Only certain types of injury are likely to attract compensation. This is because the claims brought are much affected by the incidence of compulsory insurance so that the accidents that are compensated closely match the areas where liability insurance is to be found. Road and work accidents predominate largely because those are the two major areas where insurance is compulsory.² In 2011–12 they constituted 88 per cent³ of all the claims that were brought for personal injury, with motor accidents comprising 80 per cent of the total and employer liability 8 per cent.⁴ They dominate the practice of tort even though they constitute, at best, only about a half of all accidents,⁵ and some surveys suggest that they are much less important than this.⁶ More common accidents are those in the home, or suffered in the course of leisure activities or in playing sport, and yet very few of these result in any damages award.⁷ It was estimated that there were 7.8 million accidents in the home in 1999 but in only 0.5 per cent of these was there the potential for a successful tort claim.⁸ This is not only because fault is less readily apparent but also because, in the absence of insurance, we are less inclined to think of seeking a remedy in tort. Overall, although work and transport injuries dominate the tort system, they are not representative of accidents in general.

All this means that the place where you are injured is crucial. Accidents in areas not covered by liability insurance are extremely unlikely to be compensated. According to one study conducted over 30 years ago whereas one in four road accident victims and 1 in 10 work accident victims were compensated in tort, only one in 67 injured elsewhere did so.⁹ Overall, only one accident victim in 16 who was incapacitated for three days or more was compensated by the tort system. However, if we concern ourselves only with serious injuries, tort was much more important: where an accident caused incapacity for work for six months or more, almost a third of victims received tort damages. However, this increased significance of tort was then severely undermined: the importance of the tort system is reduced tenfold if account is taken of those suffering disablement not from accidents alone, but from all causes, including congenital illness

² The lack of coherent policy behind compulsory insurance was traced in R. Lewis, “The Duty to Insure” (2004) 154 N.L.J. 1474 and C. Parsons, “Employers Liability Insurance—How Secure is the System?” (1999) 28 I.L.J. 109.

³ Department for Work and Pensions, *Compensation Recovery Unit—Performance Statistics* at <http://www.dwp.gov.uk/other-specialists/compensation-recovery-unit/performance-and-statistics/performance-statistics> [Accessed May 2, 2013].

⁴ Department for Work and Pensions, *Compensation Recovery Unit—Performance Statistics*. The Pearson Commission 35 years ago similarly recorded that road and employment claims comprised 88% of all claims. *Report of the Royal Commission on Civil Liability and Compensation for Personal Injury* (1978, cmnd 7054, chairman Lord Pearson), Vol.2 table 11. Atiyah suspected that the relative proportion of claims had not changed 20 years later. P. S. Atiyah, *The Damages Lottery* (1997) 99. However, employment claims have since declined considerably falling from 45% of all claims in 1973 to 8% now. By contrast, road accidents have increased considerably, expanding from 41% to 80% of all claims.

⁵ Pearson Commission, *Report of the Royal Commission on Civil Liability and Compensation for Personal Injury* (1978, cmnd 7054, chairman Lord Pearson), Vol.2 table 57.

⁶ In Australia they are less than a fifth. H. Luntz and D. Hambly, *Torts: Cases and Commentary*, 5th edn (2002), 4.

⁷ D. Harris, *Compensation and Support for Illness and Injury* (1984), table 2.1.

⁸ Datamonitor, *UK Personal Injury Litigation* (2003), 79.

⁹ Pearson Commission, *Report of the Royal Commission on Civil Liability and Compensation for Personal Injury* (1978, cmnd.7054, chairman Lord Pearson), Vol.1 table 5 and D. R. Hensler, *Compensation for Accidental Injuries in the United States* (1991), 122.

and disease. For a variety of reasons this group is much less able to claim in tort than accident victims,¹⁰ and common law damages plays an even more limited role in their compensation.

The limited scope of tort compensation can be contrasted with the much wider ambit of the welfare state. Although only a small part of public expenditure upon welfare is paid to accident victims,¹¹ the amount greatly exceeds the total damages paid by the tort system. In reality tort is very much the “junior partner” of the social security system.¹² The Pearson Commission in 1978 found that seven times as many accident victims received social security payments as opposed to tort damages for their injuries, and the total benefit obtained by them was double the sum of all damages awarded.¹³

These figures must not be taken to imply that the tort and social security systems are mutually exclusive; in fact they are closely linked. The person who succeeds in his damages claim is more likely to be in receipt of a wider range of welfare benefits than the more typical accident victim who is unable to claim in tort.¹⁴ The existence of the welfare state has provided injured people with the basic sustenance needed to undergo the sometimes lengthy process of pursuing a claim for damages at common law. If accident victims had not been able to obtain this immediate support from the benefit system it is unlikely that the action for common law damages—with all its delays, costs and complexity—would have survived long into the 20th century. For that reason the tort system can be seen as parasitic upon the welfare state. As we shall see, it is similarly dependent upon liability insurance.¹⁵ This is far from the image of tort as an independent “natural” system of rules of universal application supposedly forming the foundation of a just society. Tort in practice is limited in its scope, partial in its application and very dependent upon existing systems of welfare and insurance administration.

Tort claims for personal injury are often brought and defended by individuals

This image seems largely self-evident insofar as corporations cannot suffer personal injury, only individuals can. Although many claimants will seek to attribute responsibility to their employer or the state or other complex body, the majority will name another individual as liable for their injury. Tort case names are replete with the surnames of individuals; organisations appear much less frequently. This individualism is said to be one of the most distinctive features of tort. When combined with a subjective approach in the assessment of loss and claimant need, this individualism is said to make tort distinct from the provision for injury made by the welfare state. However, this image of tort again needs to be qualified considerably when viewed from the perspective of practice.

Defendants

Let us first consider those who are the real defendants in the great majority of cases: the insurers. They are the paymasters of the tort system and are responsible for 94 per cent of tort compensation for personal

¹⁰ J. Stapleton, *Disease and the Compensation Debate* (1986).

¹¹ The Pearson Commission, *Report of the Royal Commission on Civil Liability and Compensation for Personal Injury* (1978, cmnd.7054, chairman Lord Pearson), Vol.1 para.87 roughly estimated that in 1978 only about 6% of public expenditure upon welfare was directed towards accident victims. This represented about 2% of total public expenditure at that time (welfare provision then being a third of the total).

¹² Pearson Commission, *Report of the Royal Commission on Civil Liability and Compensation for Personal Injury* (1978, cmnd.7054, chairman Lord Pearson), Vol.1 para.1732.

¹³ Pearson Commission, *Report of the Royal Commission on Civil Liability and Compensation for Personal Injury* (1978, cmnd.7054, chairman Lord Pearson), Vol.1 para.1732 and table 4 suggested that in 1977 there were about 215,000 recipients of damages totalling £200 million whereas the social security system paid out £420 million to 1½ million people. By 1988 although more people were receiving tort damages, the relative importance of the schemes remained about the same. Lord Chancellor's Department, *Report of the Review Body on Civil Justice* (cm.394, 1988), para.391.

¹⁴ In a survey 9 out of 10 recipients of damages of £20,000 or more also received, on average, three different social security benefits. Law Commission Report No.225 (1994) *Personal Injury Compensation: How Much Is Enough?* Table 901.

¹⁵ J. Steele, *Risks and Legal Theory* (2004), 36: “Insurance ‘technology’ underlies the whole practice of tort law.” Without insurance, it is probable that tort liability itself could not survive. J. G. Fleming, *The American Tort Process* (1988) 21, and R. Lewis, “How Important are Insurers in Compensating Claims for Personal Injury in the UK?” (2006) 31 *The Geneva Papers on Risk and Insurance* 323.

injury.¹⁶ Although not named in the law reports and therefore rarely mentioned in tort textbooks, they are the “elephant in the living room.”¹⁷ That is, they are almost always present and dominate proceedings, and yet judges and jurists rarely discuss this fact.¹⁸ Their reluctance helps create one of the great legal fictions of modern times: that claims are defended by individuals. Although it is true that in the majority of claims it is an individual that is nominally sued, almost all of these people are insured against their liability. Similarly, most employers, companies and organisations who are sued are also insured. Even where local authorities fund damages awards directly, they may still employ private insurance company personnel to handle the claims made against them.¹⁹ The result is that in 9 out of 10 cases the real defendants are insurance companies, with the remainder comprising large self-insured organisations or public bodies such as government departments and health authorities. It is extremely rare indeed for an uninsured individual to be the real defendant.

The important centres of personal injury practice are therefore insurers’ buildings, rather than courts of law, or even lawyers’ offices. In the last decade the number of such insurance centres has declined because of company mergers and greater specialisation. The work has been concentrated in particular localities. Consolidation in the general liability insurance market has resulted in it being dominated by only 8 major companies, although there are more than 50 other smaller firms issuing policies.²⁰ More than half of the larger general insurers are foreign owned.²¹ For motor insurance there were over 350 companies authorised to transact motor insurance, but only 65 companies and 11 Lloyd’s syndicates actively did so. The 10 largest motor insurers control three quarters of the market.²² Therefore, when just over a million people suffered personal injury last year and brought their tort claim, they came up against very few real defendants.

Policyholders in practice cede complete control over their case to their insurer and thereafter usually play little or no part in the litigation process. For example, Harry Street, the late Professor of Law at Manchester University and author of *Street on Torts*, revealed that he was once a defendant in a case but only discovered that it had been determined on appeal when he read about it in a newspaper.²³ He had played no part in the proceedings. Insurers in practice determine the litigation tactics that are used and how any defence is to be conducted. This means, for example, that they commonly make admissions without the consent of the insured,²⁴ and they can settle cases in spite of objection from the policyholder.²⁵ Further examples of the insurer’s control over a personal injury case are given below.

Claimants

When we consider claimants, it is axiomatic that the individual named in the lawsuit is the person who has suffered injury. However, bringing a tort action is also very much influenced by the insurance background to the claim. Here we concentrate upon claimants’ abilities to appoint their own legal representation in order to bring the claim. We know that most tort defendants are liability insurance policyholders and have no choice in the law firm appointed to defend them; if they wish to take advantage

¹⁶ Pearson Commission, *Report of the Royal Commission on Civil Liability and Compensation for Personal Injury* (1978, cmd.7054, chairman Lord Pearson), Vol.2 para.509.

¹⁷ R. Lewis, “Insurers and Personal Injury Litigation: Acknowledging ‘The Elephant in the Living Room’” [2005] J.P.I.L. 1.

¹⁸ R. Lewis, “Insurance and the Tort System” (2005) 25 *Legal Studies* 85.

¹⁹ S. Halliday, J. Ilan and C. Scott, “Street-Level Tort Law: The Bureaucratic Justice of Liability Decision-Making” (2012) 75 M.L.R. 347, 356.

²⁰ C. Parsons, *An Analysis of Current Problems in the UK Liability Insurance Market*, Office of Fair Trading Report (OFT659a, 2003), para.5.6.

²¹ IMAS Corporate Finance (on behalf of TheCityUK and UK Trade & Investment), *UK Financial Services: Ownership, Value and M&A Developments* (2012).

²² Ernst and Young, *Bringing Profitability back from the Brink of Extinction: A Report on the UK Retail Insurance Market* (2011) 17. The Association of British Insurers (“ABI”) found the percentage to be two thirds in *Response to the Greenaway Review of Compulsory Motor Insurance and Uninsured Driving* (2004), annex B.

²³ D. W. Elliott and H. Street, *Road Accidents* (1968), 209.

²⁴ T. Goriely, R. Moorhead and P. Abrams, *More Civil Justice? The Impact of the Woolf Reforms on Pre-Action Behaviour* (2002), 90.

²⁵ However, this very wide discretion given to insurers to conduct the litigation behind the insured’s back is subject to some limit as recognised in *Groom v Crocker* [1939] 1 K.B. 194.

of the indemnity provided by the policy they must accept the representation provided. It might be thought that claimants, in contrast, have complete freedom to choose their own lawyer. However, this is far from the case.

The reason for the limited choice lies in the rapid expansion in recent years of before-the-event (“BTE”) insurance.²⁶ This is the claimant’s own insurance against future legal costs that he took out before the accident which caused him injury. It is sometimes referred to as legal expenses insurance. Almost three in five adults now have some form of this insurance.²⁷ Over 18 million drivers hold it as part of their motor insurance, and 14 million householders as part of their buildings and contents insurance. In total these number about 22 million people.²⁸ In addition, for example, about 7 million workers are entitled to BTE benefits resulting from their trade union membership, although this is a declining number. This wide penetration of the market has been achieved largely because BTE has been sold as an additional benefit to be included in existing motor liability or household insurance. In effect, there has been a great deal of inertia selling. Few people opt to take out stand alone BTE policies, but they commonly accept legal expenses cover as part of a wider package.

BTE limits the freedom to choose one’s own lawyer because claimants are directed by the insurer to use firms which are on the insurer’s approved panel.²⁹ In return for limiting their costs and ensuring that the cases are dealt with efficiently, panel firms are guaranteed a constant flow of work by the insurer. Until recently, firms also paid the insurer a referral fee for each case received. Significant sums have thus been received by insurers, but the referral arrangement may not be of similar benefit to the claimants. The designated low-cost law firm may be located a considerable distance from the injured person’s home and resort must then be had to electronic and written communications. In practice, therefore, the firms are not only the choice of the insurer rather than the claimant but they also may not facilitate the personal help and contact that the claimant may need. In spite of this, injured people in practice are pressured into accepting a panel solicitor,³⁰ and the claim is thus brought through an insurance sponsored lawyer. Whatever the merits of this arrangement,³¹ we can see that it is far from the case that claims in tort are either brought or defended by individuals as the traditional view implies.

Tort claims are determined in court by judges aided by lawyers and juries

An enduring image of tort law contained in popular views of justice is that of bewigged judge, aided by similarly adorned barristers carefully sifting the evidence to come to a just decision. The judge and barristers are invariably male with the latter distinguished by the finery of their robes. They sit in the formal surroundings of a courtroom, often wood-panelled, which affects in many ways the justice that is delivered.³² Behind the barristers sit a phalanx of sober suited solicitors. Some people may also conjure up a box of 12 people good and true to form a jury by which their peers are to be judged. The formality is at once respected and feared. Although helping to ensure impartial adjudication untainted by emotional response, the atmosphere is so alien to many claimants that they will do almost anything to avoid it. Fear of having to appear in court and face cross-examination is a major reason for claimants being too ready to accept the very first offer of settlement that is put to them.³³ This also explains why some claims are not even

²⁶ R. Lewis, “Litigation Costs and Before-The-Event Insurance: The Key to Access to Justice?” (2011) 74 M.L.R. 272.

²⁷ FWD Group, *The Market for “BTE” Legal Expenses Insurance* (2007), para.3.3.

²⁸ Mintel International Group, *Legal Expenses Insurance* (2008).

²⁹ H. Blundell, “Free to Choose? BTE Legal Expenses Insurance and Freedom of Choice” [2004] J.P.I.L. 93. The freedom is supported by Directive 87/334 on Legal Expenses [1987] OJ L185/77, the Insurance Companies (Legal Expenses Insurance) Regulations 1990 (SI 1990/1159) and *Brown-Quinn v Equity Syndicate Management Ltd* [2011] EWHC 2661.

³⁰ P. Abram, *In Sure Hands?* (2002).

³¹ For a robust defence see M. Harvey, “Before the Event Legal Expenses Insurance—Why do so Many Seek to Close This Access to Justice Gate?” [2010] J.P.I.L. 93, and P. Smith, “Panel Solicitors: the Legal Expense Insurer’s Perspective” (2004) 14 (3) A.P.I.L. P.I. Focus 15.

³² L. Mulcahy, *Legal Architecture: Justice, Due Process and the Place of Law* (2011).

³³ See below.

pursued at all. However, it is a fear with little foundation because cases today are never decided by a judge and jury in court. The involvement of these symbols of justice is very limited when we consider how tort cases are actually determined.

We have already seen that the great majority of cases are really defended by insurance companies. The high cost of litigation, when combined with the small size of claims, ensures that it is simply not economic to utilise the legal profession and its accoutrements in the way that the popular imagination conceives. In practice, it is insurers who decide whether a case merits the very exceptional treatment of being taken to a court hearing. A key statistic of the tort system reveals how unusual it is for a court to become involved: 98 per cent of cases are settled before they are even set down for trial, and of the few that do receive a trial date, most are concluded before that formal hearing takes place.³⁴ In one survey only 5 out of the 762 “ordinary” cases went to trial.³⁵ In effect, insurers allow trial judges to determine only one per cent of all the claims made. In these rare cases the judge receives no assistance from that other major symbol of popular justice, the jury. Although juries remain an important feature of personal injury litigation in the USA, they were abolished in the UK in all but very exceptional cases in 1933 having fallen into disuse many years before. A *Runaway Jury* simply cannot happen in a personal injury case in the UK.³⁶

If a case does reach court and is determined by a judge, the decision is unlikely to be challenged further. Few cases are appealed to a higher court. The result is that when the senior judiciary are called upon they are left to adjudicate upon a small fraction of what are, by then, very untypical cases indeed. Whether an appeal court is to be given an opportunity to examine a point of tort law may depend upon the insurer because, if it serves the insurer’s purpose for doubt to remain, the claimant can be paid in full and threatened with a costs award if the action is continued.³⁷ By their control of settlement tactics and which cases are taken to appeal, insurers have shaped tort principles and what happens in practice. This is far from the popular image of how tort law has been created and what effect it has.

If we turn our attention to cases that are settled out of court, as opposed to formally adjudicated, we find that it is still insurers that determine the extent that lawyers and formal procedures become involved. Increasingly they are seeking to settle cases at an early stage without resorting to the issue of court documents. In one survey of major insurers it was estimated that, because of earlier settlement, the number of cases disposed of only after the issue of formal proceedings had declined by a third.³⁸ Of course, it has always been the case that the great majority of claims are settled informally: over 30 years ago 8 per cent of cases were being settled without formal proceedings, then in the form of a writ, being issued.³⁹ Now even more cases are being settled at an early stage.

Insurers are avoiding not only judges, courts, and court procedures but also lawyers. Defence lawyers are being bypassed. The handling of claims against local authorities for failures in road maintenance is made “largely in isolation from the input of lawyers.”⁴⁰ More work is being done in-house by insurers. In addition, in an effort to increase specialisation and cut costs insurers have tried to ensure that fewer law firms act for them. For example, in 2004 AXA insurance company announced that it had reduced by half

³⁴ Pearson Commission, *Report of the Royal Commission on Civil Liability and Compensation for Personal Injury* (1978, cmnd.7054, chairman Lord Pearson), Vol.2 table 12, Lord Chancellor’s Department, *Report of the Review Body on Civil Justice* (cm.394, 1988).

³⁵ P. Pleasence, *Personal Injury Litigation in Practice* (1998) 12. Earlier D. Harris, *Compensation and Support for Illness and Injury* (1984) suggested that as many as 3% of cases might go to trial. See also P. Cornes, *Coping with Catastrophic Injury* (1993), 20.

³⁶ John Grisham, *The Runaway Jury* (1996). The residual power to order trial by jury in personal injury cases after the Administration of Justice (Miscellaneous Provisions) Act 1933 was very rarely exercised. After *Ward v James* (No.2) [1966] 1 Q.B. 273 juries were even more confined.

³⁷ *Davis v Johnson* [1979] A.C. 264 at 278 and *Fairchild v Glenhaven Funeral Services Ltd (t/a GH Dovener & Son)* [2002] UKHL 22; [2003] 1 A.C. 32. But see the failed attempt to prevent the House of Lords considering important causation issues in relation to asbestos liability in *Fairchild v Glenhaven Funeral Services Ltd* discussed by K. Oliphant in H. Koziol and B. C. Steininger (eds), *European Tort Law 2002* (2003), 148.

³⁸ T. Goriely, R. Moorhead and P. Abrams, *More Civil Justice? The Impact of the Woolf Reforms on Pre-Action Behaviour* (2002), 159.

³⁹ Pearson Commission, *Report of the Royal Commission on Civil Liability and Compensation for Personal Injury* (1978, cmnd 7054, chairman Lord Pearson), Vol.2 table 12. However, in 2013 in a study conducted by the Association of Personal Injury Lawyers (“APIL”) out of 322 cases involving whiplash only 76% settled before issue. Response to the Ministry of Justice Consultation, *Reducing the Number and Costs of Whiplash Claims* (2013), appendix B.

⁴⁰ S. Halliday, J. Ilan and C. Scott, “Street-Level Tort Law: The Bureaucratic Justice of Liability Decision-Making” (2012) 75 M.L.R. 347, 365.

the number of law firms defending its cases. Similarly over a period of four years the Zurich insurance company decimated the number of firms representing its policyholders in catastrophic cases: only four firms now defend such cases for this large insurer. Much of the work being done in personal injury law firms is now being carried out by unqualified or partly qualified paralegal personnel. It is feared that, as a result of recent reforms, non-lawyers at claims management firms could be left in charge of even complex personal injury claims.⁴¹ The image of tort law as being regularly administered by highly trained lawyers in a formal environment is thus very far from the reality.

Tort liability is largely dependent upon proof of fault and findings of law

The extent that popular culture requires fault to be established in order for liability to be found is uncertain. It is clear that wrongdoing has been the fundamental force which has justified the continued expansion of the law of tort. However, the notion of responsibility goes far beyond that of fault and this is reflected in the strict liability regimes found in the law of tort. These areas of non-fault liability are usually limited in their practical effect but have widespread popular support especially in the area involving injuries at work. For example, it has been shown that people commonly think that employers should pay for injuries caused to their workforce even in the absence of any fault on their part.⁴² However, overall the fault principle plays a major role in determining the popular response as to whether compensation should be paid. In the absence of fault, for example, property owners are rarely found liable. The fault principle has a great effect upon students of the law of tort because of the disproportionate emphasis it receives in tort textbooks. Common law negligence is the core element of tort teaching; strict liability, especially if deriving from statute, is a neglected area of study. As a result, the standard response to the inquiry “is compensation payable?” very often is “it depends whether fault can be proven.”

However, the hold that fault maintains over the popular and student response to compensation in tort is not reflected in the actual practice of law. Via liability insurance, tort in practice provides a structure for processing mass payments of small amounts of compensation. In processing these routine claims insurers decide which elements of damage they will accept or contest. The key fact here is that it is unusual for them to contest liability: one study revealed that insurers’ files “contained remarkably little discussion of liability,” finding it initially denied in only 20 per cent of cases.⁴³ Most claims are of low value and not worth contesting and, as a result, insurers make at least some payment in the great majority of them.⁴⁴ Only very rarely do they insist upon staging a gladiatorial contest to determine whether a particular defendant was in the wrong. Contrary to the impression gained from tort textbooks, duty of care, causation of damage, and even breach of duty are generally not in dispute in cases processed by the system.

Another element in establishing liability, at least in law student consciousness, is the importance of findings of law. Appeal cases are read one after another in order to distil the essence of what may be required to advise a client correctly and succeed in a claim. However, in practice, reference to the refined discussions of law which take place in the appellate courts rarely features in the everyday work of the personal injury practitioner. In road accident cases it has been shown that driving skills and common sense exercised within the scope of the “rules of the road” are of much more importance than any legal principle. To emphasise this further, we can say that it is the facts rather than the law that are much more likely to determine the case. One barrister surveyed memorably exaggerated the point: he commented that an excuse for not reading the papers for the case in detail in advance of a hearing was that the facts revealed in court would inevitably change:

⁴¹ “Case Conundrum?” (2011) 161 N.L.J. 1569.

⁴² S. Lloyd-Bostock, “Commonsense Morality and Accident Compensation” in D. P. Farrington (eds), *Psychology, Law and Legal Processes* (1979).

⁴³ T. Goriely, R. Moorhead and P. Abrams, *More Civil Justice? The Impact of the Woolf Reforms on Pre-Action Behaviour* (2002), 103.

⁴⁴ Citizens Advice Bureau, *No Win, No Fee, No Chance* (2004), para.4.31.

“You can only say how it looks on the evidence you have got at the initial stage, which is very rarely the picture that will emerge at the trial. There used to be a chap in these chambers whose motto was, ‘Never mind about the law, it will all be decided on the facts, and never mind the facts because that will all have changed by the time your client comes out of the witness box anyway.’”⁴⁵

Tort cases reflect the justice requirements of due process and fairness

As we have already seen the popular image of the delicately balanced scales of justice held by the goddess of justice needs close examination when what happens in the typical tort case is considered. The right to representation and to control the way in which a claim is litigated have already been discussed. Here we consider further the factors that are influential in disposing of a claim and contrast them with the traditional portrayal of justice.

We have seen above that it is the facts found rather than the law in the books that are more important in determining the result of a claim. But how are those facts found? The traditional image is of a rigorous, impartial, and detailed investigation into what happened. In a road accident we might imagine there will be a careful forensic examination of the scene by experts in determining the cause of injury. The effects of speed, weather, the road surface and layout, vehicle design and so on will be carefully weighed. Witness statements from many potential parties will be taken and police reports will be scrutinised. Thereafter this evidence will be subject to cross examination in court to assess its probative value, this being done according to the strict rules of evidence. At each juncture the parties will be able to question and test the views put forward and submit their alternative views within the limits of the rules of civil procedure which aims at providing a fair hearing for all.

The reality is very far from this idealised image. Classic empirical studies reveal that, in practice, it is insurance bureaucracy that largely dictates what facts are accepted, how the litigation proceeds, and whether, when, and for how much, claims are settled.⁴⁶ Ross, in particular, found that the rules of tort were transformed when they came to be used in the system in three ways: first, they were simplified; secondly, they were made more liberal; and thirdly, they were made more inequitable. Let us explain each of these features in turn, and reflect upon how the facts in most cases are actually found.

In practice, the rule that fault must be proven is too uncertain to apply to the individual circumstances of particular accidents. The rule has to be *simplified* and the facts found easily in order to process the claim. For reasons of cost and administrative efficiency, insurers have been forced to substitute other criteria for the theoretical tort analysis. Mechanical rules of thumb replace any detailed investigation into blame. For example, in practice the driver of the car that runs into the back of another is invariably found to be the one who is negligent. Similarly, the driver of the car emerging from the junction is the one presumed to be at fault for the ensuing collision. There is neither the time nor resources to instruct experts to analyse the scene of each road accident and precisely calculate the series of events leading to the accident: what really happened, what the parties did and might have done, receives little examination. Ross concludes:

“The price paid is reduction of any meaningful consideration of fault and the substitution of mechanical presumption for scientifically based investigation.”⁴⁷

⁴⁵ H. Genn, *Hard Bargaining* (1987), 74.

⁴⁶ See H. Genn, *Hard Bargaining* (1987), 74, D. Harris, *Compensation and Support for Illness and Injury* (1984) and, in the US context, H. L. Ross, *Settled Out of Court* (1980). The major findings are supported by more recent empirical studies and, in particular, by T. Goriely, R. Moorhead and P. Abrams, *More Civil Justice? The Impact of the Woolf Reforms on Pre-Action Behaviour* (2002). But see the critique of Genn’s work in R. Dingwall, “Firm Handling: The Litigation Strategies of Defence Lawyers in Personal Injury Cases” (2000) 20 *Legal Studies* 1.

⁴⁷ H. L. Ross, *Settled Out of Court* (1980), 100 discussed in T. Baker, “Liability Insurance as Tort Regulation: Six Ways that Liability Insurance Shapes Tort Law in Action” in G. Wagner, *Tort Law and Liability Insurance* (2005). See also the influence of bureaucratic as opposed to legal rules in S. Halliday, J. Ilan and C. Scott, “Street-Level Tort Law: The Bureaucratic Justice of Liability Decision-Making” (2012) 75 *M.L.R.* 347.

Economic pressures mean that cases are disposed of on the basis of very limited paperwork alone, and this may bear only a limited relationship to what actually occurred. Even if a case gets to court it has been argued that the findings of fact are likely to be so uncertain that you might as well toss a coin to determine the result.⁴⁸ Although these generalisations about how the facts are found and how litigation is conducted do not apply to all insurers for every type of case,⁴⁹ they reveal that the basis upon which claims are decided is very different from the image of justice which emphasises due process considerations in determining what really happened.

One effect of these pressures upon insurers to dispose of cases efficiently is that the system is very much more *liberal* than it may appear. Ross revealed that many more claims succeeded than the strict rules of tort—emphasising the need to prove fault—would allow. Often insurers pay something for claims which, if they were to be fully investigated, would be without legal foundation. As a result:

“... wherever there is insurance there is ... a closer approximation to the objectives of social insurance in fact than the doctrines of tort law would lead one to suppose.”⁵⁰

However, Ross also found that this liberality is but part of a system which overall is weighted in favour of insurers and results in much *inequality*. Indeed the case often used to illustrate the general inequalities in the legal system involves a “one-shotter” accident victim suing a “repeat player” insurer.⁵¹ Delay, uncertainty, financial need and other pressures cause claimants to accept sums much lower than a judge would award. The eagerness of claimants and their solicitors to get something from the system is reflected in the fact that, in the past, in two out of three cases they accepted the very first formal offer made to them by the “risk neutral” insurer.⁵² Those claimants who can withstand the pressures of litigation do better than those who cannot, with the result that those from a higher social class or wealthier background are more likely to succeed.⁵³ Those who suffer most are the severely injured. Although in the greatest need, they will find their high value claim scrutinised in detail and processed very differently from the average case which typically involves but a minor upset and little, if any, financial loss. Those seriously injured are much less likely to receive “full” compensation than those suffering minor injury. By contrast, the great majority of claimants quickly recover from their minor injury and, for a variety of reasons, are likely to emerge over-compensated for their pecuniary loss.⁵⁴

The overall result of the settlement system is that rough and ready justice is dispensed, much influenced by insurance company personnel and procedures, and driven by the needs of the insurance industry and the cost of the legal process. The system produces arbitrary results that bear only a limited relationship to the portrayal of justice contained in the traditional tort textbook.

Tort focuses upon compensating financial loss and serious injuries

One image of tort is of a caring system that compensates those who are especially needy when they are suddenly struck down by misfortune. Following a serious injury, the claimant may become very short of

⁴⁸ D. W. Elliott and H. Street, *Road Accidents* (1968), 243.

⁴⁹ R. Dingwall, “Firm Handling: The Litigation Strategies of Defence Lawyers in Personal Injury Cases” (2000) 20 *Legal Studies* 1.

⁵⁰ F. V. Harper and F. G. James, *The Law of Torts* (1956), s.13.7.

⁵¹ The seminal article is M. Galanter, “Why the “Haves” Come out Ahead” (1974) 9 *Law and Society Rev* 95. However, R. Dingwall, “Firm Handling: The Litigation Strategies of Defence Lawyers in Personal Injury Cases” (2000) 20 *Legal Studies* 1 emphasises that not all defendants in personal injury cases are “repeat players” and they should not be treated as a homogenous group. Other limits of the article were examined in an anniversary special issue in (1999) 33 *Law and Society Rev* 795.

⁵² D. Harris, *Compensation and Support for Illness and Injury* (1984), table 3.3. Although a more recent study discloses more bargaining, almost a third of cases still settled after only one offer, and two thirds settled after two. T. Goriely, R. Moorhead and P. Abrams, *More Civil Justice? The Impact of the Woolf Reforms on Pre-Action Behaviour* (2002), 154. C. Leech reports that her firm accepted only a quarter of the first offers made in 540 settled cases. “Better in than out” [2005] *Law Society Gazette* 10 (January 6).

⁵³ H. L. Ross, *Settled Out of Court* (1980).

⁵⁴ D. Dewees, D. Duff and M. Trebilcock, *Exploring the Domain of Accident Law: Taking the Facts Seriously* (1996) 19. P. A. Bell and J. O’Connell, *Accidental Justice: The Dilemmas of Tort Law* (1997), 63.

money. He may be unable to work. Sooner or later, depending upon his work status, any support from his employer will be withdrawn and he may lose his job. Savings, if any, will run out and reliance only upon the meagre resources provided by the welfare state could prove difficult. He may be unable to support his family, the mortgage may not be paid and the home may then come under threat. The claimant's loved ones indirectly may then be among the sufferers. In addition, the claimant's injury may need continuing care. Certain medical equipment and rehabilitation treatment may not easily be obtained from the National Health Service. The cost of providing it privately can be very high. Without financial assistance, nursing support may be reduced to a minimum, recovery may be delayed, and pain increased. To relieve these concerns about money there is the tort system. One image of tort is that it is a system which provides direct financial support which is much needed by recipients of compensation who are seriously injured. Who could possibly question this basic humanitarian function of tort law and deny its efficacy?

Unfortunately the truth of the matter is again far removed from the picture that has just been painted. First, it is not the case that damages in tort are predominately awarded to those who have been seriously injured. The great majority of claimants suffer only very minor injury, although it is true that those seriously injured receive a substantial portion of the total damages awarded. Secondly, financial loss comprises but a small part of the overall damages bill. Instead it is non-pecuniary loss that accounts for a disproportionate amount of damages. Pain and suffering and loss of amenity comprised two thirds of the total awarded 30 years ago,⁵⁵ and it has remained at about that level.⁵⁶

The extraordinary importance given to pain and suffering, as opposed to financial loss, reflects the fact that most awards are for minor injury and involve relatively small sums. The average payment is less than £5,000⁵⁷ which is approximately two month's average salary. In these minor cases claimants suffer very little, if any, loss of earnings and rarely incur medical costs. Future financial loss occurs in only 7 per cent of cases and amounts to less than 9 per cent of the total damages bill.⁵⁸ Over half of all claims are made by those who have suffered a whiplash injury in a road accident.⁵⁹ Although the effects of whiplash in some cases can be very disabling, for the majority the pain and discomfort is temporary. Claimants are often left with symptoms which are difficult to disprove.⁶⁰

In practice, therefore, the claimants in tort who suffer catastrophic effects as a result of their accident are very unusual. Instead nearly all suffer very minor injuries and soon make a full recovery. They are not left with any continuing ill effects. In most cases, the accident does not even result in a claim for social security benefit.⁶¹ It is these minor injury cases which account for the extraordinarily high costs of the system compared to the damages it pays out.⁶² But the essential point to note here is that the image of the

⁵⁵ Pearson Commission, *Report of the Royal Commission on Civil Liability and Compensation for Personal Injury* (1978, cmnd 7054, chairman Lord Pearson), Vol.2 table 107.

⁵⁶ e.g. the Health and Safety Executive estimated that the cost of including pain and suffering would increase payroll costs from 1% to 2.5% in an integrated compensation scheme for work injury. Greenstreet Berman, *Changing Business Behaviour—Would Bearing the True Cost of Poor Health and Safety Performance Make a Difference?* (2002). In the US, pain and suffering has been found to constitute 84% of damages for non-fatal injury resulting from medical malpractice. J. Hersch, J. O'Connell, and W. Kip Viscusi, "An Empirical Assessment of Early Offer Reform for Medical Malpractice" (2007) 36 J. Legal Studies S231, S239–44.

⁵⁷ The median figure was £2,500 in the survey of 81,000 cases receiving legal aid and closed in 1996–97 in P. Pleasence, *Personal Injury Litigation in Practice* (1998), fig 3.17. P. Fenn and N. Rickman, *Costs of Low Value Liability Claims 1997–2002* record average damages of only £3,000 for employers' liability accident claims. In a survey of conditional fee claimants in 2011 half of them received less than £5,000. Insight Delivery Consultancy, *No Win No Fee Usage in the UK* appendix 5 of the Access to Justice Action Group, *Comments on Reforming Civil Litigation Funding* at <http://www.accessjusticeactiongroup.co.uk/home/wp-content/uploads/2011/05/NWNF-research.pdf> [Accessed May 2, 2013].

⁵⁸ Pearson Commission, *Report of the Royal Commission on Civil Liability and Compensation for Personal Injury* (1978, cmnd 7054, chairman Lord Pearson), Vol.2 para.44 and table 107. However, 10 years ago the ABI estimated that 46% of the value of claims between £100,000 and £250,000 comprised future loss. Lord Chancellor's Department, *Courts Bill: Regulatory Impact Assessment* (2002), table 8.

⁵⁹ For 2011–2012 the Compensation Recovery Unit recorded 540,000 such claims out of a total which just exceeded a million. Paragraph 1.10 of the Impact Assessment of Consultation Paper CP 3/2013 *The Damages Act 1996: The Discount Rate*. Whiplash injury accounts for 70% of all road traffic claims. Ministry of Justice, Consultation Paper CP17/2012 *Reducing the Number and Costs of Whiplash Claims* para.18.

⁶⁰ Ministry of Justice, *Consultation Paper CP17/2012* para.6.

⁶¹ The Compensation Recovery Unit issues a nil certificate in 70% of cases. R. Lewis, *Deducting Benefits from Damages for Personal Injury* (1999) para.14.05.

⁶² Pearson Commission, *Report of the Royal Commission on Civil Liability and Compensation for Personal Injury* (1978, cmnd 7054, chairman Lord Pearson), Vol.1 para.256 estimated that the cost of operating the tort system amounted to 85% of the value of tort payments distributed to claimants.

tort system as caring for the immediate financial needs of mostly severely injured people in society is far from the reality.

Tort awards full compensation for losses suffered

Although most injuries compensated by tort are minor, a few are much more serious and account for a substantial amount of the damages paid. In 2002, insurers estimated that only 1 per cent of all cases in the tort system resulted in a payment of £100,000 or more. However, these few cases were responsible for 32 per cent of the total damages paid out by the system.⁶³ It is these serious injuries that are more likely to come to public attention, partly because they are more likely to go to court and be reported in newspapers. These accounts in the press are often written so as to suggest that the damages award is akin to a very large pools win. They may even give rise to feelings of envy because of the amount of the “windfall.” Perhaps this response is understandable in the case of a reader who has suffered a disability and is unable to claim in tort. However, it is less easy to excuse inducing jealousy in other people. What is rarely explored by the press is the suffering and loss of the victim and how his day-to-day life has dramatically changed. The newspapers only rarely couple the compensation paid with details of the problems faced by those who have suffered, for example, spinal injury or brain damage. Instead the impression that is often left is that these tragic victims are exceptionally well cared for by society and that many of them are among the growing number of new millionaires.

It is certainly true that the recipients of tort damages are much better treated than the majority of accident victims for the latter are left to rely upon their own resources as supplemented by the safety net of the welfare state.⁶⁴ However, it is misleading to suggest that victims of serious injury will have all their needs met by the tort system. Compensation has traditionally been awarded in the form of a lump sum and the experience of past decades has proven that, for those who need long term care and support, it will prove insufficient. There are many reasons for this.

One major factor causing erosion of the lump sum is that, in effect, too much allowance is made for the return on investment of the damages. A discount rate is used to allow for the fact that the claimant will receive compensation earlier than he would have had done so, for example, if he had been required to work for the wages now lost. The discount recognises that investment income can be obtained from this accelerated receipt of money. However, the discount used to calculate the damages has consistently been wrongly set; the rate has never reflected the true rate of return that the claimant can actually achieve.⁶⁵ At present a claimant is expected to achieve a real rate of return above inflation and after taxation of 2.5 per cent. With inflation at 3 per cent and taxation costs at a further 1 per cent, the claimant must obtain a return of 6.5 per cent at a time when the best secure savings rate is far below that figure. It is inevitable that any lump sum awarded will be eroded much more quickly than the court presumed.

Nor have courts made enough allowance for the substantial increase in life expectancy that we can now expect. In contrast, too much allowance has been given for the prospective potential earning capacity of the disabled person.⁶⁶ All this is likely to result in the money proving insufficient in the long term. A final

The Lord Chancellor's *Civil Justice Review* (cm .94, 1988), para.432 estimated that the cost of the tort system consumed 125% to 175% of damages awarded in the County Court. Jackson L.J. also found evidence of disproportionately high costs in his *Review of Civil Litigation Costs: Final Report* (January 2010). Data collected for one survey showed that for 280 cases which had come before the District Court the claimant costs alone amounted to £1.80p for every £1 of damages paid. On average, costs exceeded damages for cases settled up to £15,000 in the “fast track” procedure.

⁶³ Lord Chancellor's Department, *Courts Bill: Regulatory Impact Assessment* (November, 2002), table 1.

⁶⁴ Even where an accident causes incapacity for work for 6 months or more only a third of victims receive tort damages. Pearson Commission, *Report of the Royal Commission on Civil Liability and Compensation for Personal Injury* (1978, cmnd.7054, chairman Lord Pearson), Vol.1 table 5.

⁶⁵ The introduction to the Government Actuary's Department, *Actuarial Tables For Use In Personal Injury And Fatal Accident Cases*, 5th edn (2004), para.15 notes that the set discount rate has never been within 0.5% of the correct rate of return. The resulting substantial under-compensation is illustrated in the introduction to R de Wilde, *Facts and Figures*, 13th edn (2008–2009) and A. Lewis, “Discount Rates” [2012] J.P.I.L. 40. The Ministry of Justice is presently investigating reform. See its Consultation Papers CP12/2012 and CP3/2013.

⁶⁶ R. Lewis, R. McNabb and V. Wass, “Court Awards of Damages for Loss of Future Earnings: An Empirical Study and an Alternative Method of Calculation” (2002) 29 J. Law & Society 406.

reason for under-compensation is that the lump sum is likely to be agreed out of court and, because of the uncertainties of litigation, will reflect a substantial discount from what a judge would award. A sum less than the actual loss suffered is thus what is normally paid. It is true that there has been a sharp increase in the cost of damages awards in the last decade.⁶⁷ However, overall it remains the case that for a variety of reasons, claimants obtaining lump sum damages are still very unlikely to receive “full” compensation and in practice are not returned to the position they were in before the accident.⁶⁸ Most serious injuries are very much under-compensated.

⁶⁷ R. Lewis, A. Morris and K. Oliphant, “Tort Personal Injury Statistics: Is There a Compensation Culture in the UK?” (2006) 14 *Torts Law Journal* 158 and [2006] J.P.I.L. 87. The reasons include the rise in the real value of earnings; a reduction in the discount rate from the extraordinary 4.5% level which was used for 30 years until 1998; and the increase in awards for non-pecuniary loss as discussed in R. Lewis, “Increasing the Price of Pain” (2001) 64 M.L.R. 100.

⁶⁸ Those receiving periodical payments are much better treated. R. Lewis, “The Indexation of Periodical Payments in Tort: The Future Assured?” (2010) 30 *Legal Studies* 391, and R. Lewis, “The Politics and Economics of Tort: Judicially Imposed Periodical Payments of Damages” (2006) 69 M.L.R. 418.