1 Tort law: an introduction

This chapter discusses:

- What a tort is
- How torts compare to other legal wrongs
- The roles of policy and fault in tort law
- Alternative compensation methods for personal injury
- Proposed reforms of the tort system.

The law of tort covers a wide range of situations, including such diverse claims as those of a passenger injured in a road accident, a patient injured by a negligent doctor, a pop star libelled by a newspaper, a citizen wrongfully arrested by the police, and a landowner whose land has been trespassed on. As a result, it is difficult to pin down a definition of a tort; but, in broad terms, a tort occurs where there is breach of a general duty fixed by civil law.

When a tort is committed, the law allows the victim to claim money, known as damages, to compensate for the commission of the tort. This is paid by the person who committed the tort (known as the tortfeasor). Other remedies may be available as well. In some cases, the victims will only be able to claim damages if they can prove that the tort caused some harm, but in others, which are described as actionable *per se*, they only need to prove that the relevant tort has been committed. For example, landowners can claim damages in tort from someone trespassing on their land, even though no harm has been done by the trespasser.

Comparing tort with other legal wrongs

Torts and crimes

A crime is a wrong which is punished by the state; in most cases, the parties in the case are the wrongdoer and the state (called the Crown for these purposes), and the primary aim is to punish the wrongdoer. By contrast, a tort action is between the wrongdoer and the victim, and the aim is to compensate the victim for the harm done. It is therefore incorrect to say that someone has been prosecuted for negligence, or found guilty of libel, as these terms relate to the criminal law. Journalists frequently make this kind of mistake, but law students should not!

There are, however, some areas in which the distinctions are blurred. In some tort cases, damages may be set at a high rate in order to punish the wrongdoer, while in criminal cases, the range of punishments now includes provision for the wrongdoer to compensate the victim financially (though this is still not the primary aim of criminal proceedings, and the awards are usually a great deal lower than would be ordered in a tort action).

There are cases in which the same incident may give rise to both criminal and tortious proceedings. An example would be a car accident, in which the driver might be prosecuted by the state for dangerous driving, and sued by the victim for the injuries caused.

Torts and breaches of contract

A tort involves breach of a duty which is fixed by the law, while breach of contract is a breach of a duty which the party has voluntarily agreed to assume. For example, we are all under a duty not to trespass on other people's land, whether we like it or not, and breach of that duty is a tort. But if I refuse to dig your garden, I can only be in breach of a legal duty if I had already agreed to do so by means of a contract.

In contract, duties are usually only owed to the other contracting party, whereas in tort, they are usually owed to people in general. While the main aim of tort proceedings is to compensate for harm suffered, contract aims primarily to enforce promises.

Again, there are areas where these distinctions blur. In some cases liability in tort is clarified by the presence of agreement – for example, the duty owed by an occupier of land to someone who visits the land is greater if the occupier has agreed to the visitor's presence, than if the 'visitor' is actually a trespasser. Equally, many contractual duties are fixed by law, and not by agreement; the parties must have agreed to make a contract, but once that has been done, certain terms will be imposed on them by law.

A defendant can be liable in both contract and tort. For example, if a householder is injured by building work done on their home, it may be possible to sue in tort for negligence and for breach of a contractual term to take reasonable care.

The role of policy

Like any other area of law, tort has its own set of principles on which cases should be decided, but clearly it is an area where policy can be seen to be behind many decisions. For example, in many tort cases the parties will, in practice, be two insurance companies – cases involving car accidents are an obvious example but this is also true of many cases of employers' liability and occupiers' liability. The results of such cases may have implications for the cost and availability of insurance to others; if certain activities are seen as a bad risk, the price of insurance for those activities will go up, and in some cases insurance may even be refused. This fact is often taken into account when tort cases are decided.

In terms of simple justice, it may seem desirable that everybody who has suffered harm, however small, should find it easy to make a claim. In practical terms, however, the tort process is expensive and it is difficult to justify its use for very minor sums. The courts therefore have to strike a balance between allowing parties who have suffered harm to get redress, and establishing precedents that make it too easy to get redress so that people make claims for very minor harms. The English courts have often been resistant to upholding claims that would 'open the floodgates' for a large number of similar cases to pour into the courts, which again brings policy into the decision.

There are other practical concerns too: it has been suggested, for example, that in the USA, where ordinary individuals are much more likely to sue than here, medical professionals are inclined to avoid new techniques, or to cover themselves by ordering costly and often unnecessary tests, because of the danger of legal action. While it is clearly a good thing that dangerous techniques should not be used, medical science has always had to take certain risks in order to make new discoveries, and it may be that fear of litigation can stunt this process.

These are difficult issues to weigh up, and traditionally English judges avoided the problem by behaving as though such considerations played no part in their decisions, referring only to established principles. However, in recent years they have been more willing to make clear the policy implications behind their decisions: certainly the 'floodgates'

argument mentioned above has been overtly referred to in the case law on both nervous shock and the recovery of economic loss in negligence.

The Compensation Act 2006 now gives judges specific permission to address one particular aspect of policy when deciding cases involving negligence or breach of statutory duty. Section 1 of the Act states that when considering whether a defendant should have taken particular steps to meet a standard of care, a court

> may . . . have regard to whether a requirement to take such steps might –
> (a) prevent a desirable activity from being undertaken at all, to a particular extent, or in a particular way, or
> (b) discourage persons from undertaking functions in connection with a desirable activity.

The clause was a response to claims that Britain has developed a 'compensation culture' in which people are too ready to sue over trival events.

LAW IN THE NEWS

Over the past decade, both the media and politicians have frequently argued that Britain has a 'compensation culture', in which people have become too ready to sue over trivial events, and in which it has become common to try to blame someone for events which would once have been seen as nothing more than accidents. The media in particular give the impression that the number of cases is constantly rising, and the courts are flooded with trivial claims; it is, for example, widely believed that the British courts allowed a claim against McDonald's by a woman who was scalded because their coffee was too hot. In fact, when the government set up a taskforce to investigate the issue, its report, *Better Routes to Redress* (see Reading on the Internet, p. 00), found that the number of people suing for personal injury has gone down in recent years, and there was no statistical evidence that the compensation culture actually exists. As you will discover when you read the next chapter, it is not legally possible in England to claim in negligence for trivial accidents that are nobody's fault, and while it is true that McDonald's were sued for selling too-hot coffee in the USA, an attempt to bring a similar claim in the English courts (quite rightly) failed.

Tort and the requirement of fault

In addition to proving that the defendant has committed the relevant act or omission (and, where necessary, that damage has been caused as a result), it is sometimes necessary to prove a particular state of mind on the part of the defendant. This is described as a tort requiring an element of fault, and depending on the tort in question, the required state of mind may be intention, negligence or malice. Most torts require some element of fault; the few that do not are described as torts of strict liability.

Intention

'Intention' has various meanings depending on the context, but it essentially involves deliberate, knowing behaviour. So for example, if I throw a ball at a window deliberately, knowing the glass will probably break, I can be said to intend to break the window. If on the other hand, I threw the ball at a wall, unaware that there was a window in the wall,

then I would not be said to intend to break the window. Trespass is an example of a tort in which the required state of mind is intention.

Negligence

As a state of mind, negligence essentially means carelessness – doing something without intending to cause damage, for example, but not taking care to ensure that it does not. In the example above, when I threw the ball at the wall, then I may have been negligent. The term 'negligence' also describes a particular tort.

Malice

In tort, to act maliciously means acting with a bad motive. Normally, malice – and motive in general – is irrelevant in tort law. If what you do is lawful, it remains lawful whatever your reason for doing it. Similarly, if your act is unlawful, doing it with a good motive will not usually make it lawful. This was the approach taken by the House of Lords in the leading case of **Bradford Corporation** *v* **Pickles** (1895). The Bradford Corporation owned a reservoir on property adjoining Pickles's land. Water naturally flowed under Pickles's land and into the reservoir. Pickles wanted to force the corporation to buy his land at a high price. With this aim in mind, he dug up some of his land, in order to stop the natural flow into the reservoir. It was already settled law that it was not a tort for a landowner to interfere with the flow of underground water, but the corporation argued that although Pickles's action would normally have been lawful, his malice made it unlawful. The House of Lords rejected this argument.

However, there are a few torts for which malice is relevant. In defamation, certain defences will be unavailable if the defendant has acted maliciously, and in nuisance, malice can render what would have been a reasonable act an unreasonable one. For example, in **Hollywood Silver Fox Farm Ltd** *v* **Emmett** (1936) the defendant and claimant owned farms near each other. After a dispute between them, the defendant arranged for guns to be fired on a part of his own land which was near the claimant's land, with the intention of interfering with the breeding of the claimant's foxes. The firing did have this effect, and so the claimant sued for nuisance. The action was successful, because of the malicious motive with which the defendant acted.

Malice may also be relevant to the calculation of damages, making them higher than they would be if the same act was committed without malice.

Strict liability

A strict liability tort is committed simply by performing the relevant act or omission, without having to prove any additional state of mind at the time. The tort under **Rylands** *v* **Fletcher** (see p. 000) is an example of a tort of strict liability. Where the duty breached is a statutory one, proof of a state of mind such as negligence is not normally required, so if an Act simply states that something should be done, not doing it will in itself establish liability. The Consumer Protection Act 1987 has brought another area within the fold of strict liability, namely damage caused by defective products. It should be noted that

while liability may be strict, it is not necessarily absolute as in many cases defences will be available.

Reasons for a requirement of fault

In practice the majority of torts do require some proof of fault, and there are several reasons why this has traditionally been thought desirable, including the following.

Control of tort actions

The fact that a claimant must usually prove fault limits the number of tort actions brought, and helps prevent the courts from being overloaded.

Laissez faire policy

The modern tort system arose in the nineteenth century, when the doctrine of *laissez faire* was prominent. This argued that individuals should be responsible for their own actions, with as little intervention from the state as possible. People were not required actively to look after each other, only to avoid doing each other harm, and they would only be expected to make amends for such harm as they could reasonably have avoided doing – in other words, not for harm caused when they were not at fault. The state would provide a framework of rules so that people could plan their affairs, but would intervene in those affairs as little as possible.

Deterrence

The requirement of fault is said to promote careful behaviour, on the basis that people can take steps to avoid liability, whereas under strict liability it would be beyond their control, leaving little incentive to take care.

Wider liability would merely shift the burden

Compensation is designed to shift the burden of harm from the person who originally suffered the harm to the person who pays the compensation. It moves, rather than cancels out, the loss. As a result, it can be argued that it is better to let the loss lie where it falls unless some other purpose can be served by providing compensation. A fault requirement adds an additional purpose, that of punishing the wrongdoer.

Accountability

The requirement of fault is a way of making people pay for what they have done wrong, which appears to be a deep-seated social need – even though in many cases it is actually an insurance company which pays, and not the person responsible.

Strict liability merely reverse the burden of proving fault

Almost all strict liability torts allow the defendant to plead the contributory fault of the claimant as a defence, or a factor which should reduce damages. In practice therefore, strict liability often amounts to nothing more than a reversal of the burden of proof.

Arguments against a requirement of fault

Unjust distinctions

The result of the fault principle is that two people who have suffered exactly the same injuries may receive very different levels of compensation. For example, John and Jim both lose the use of their legs in separate car accidents; in Jim's case the driver is proved to be at fault, in John's, the driver is not. They both suffer the same degree of pain, they both end up with the same disability, and the same problems. Yet Jim may win thousands of pounds in damages to help him cope with those problems, while the most John can hope to receive are benefits provided by the social security system. As we shall see further on, some countries have partially replaced tort law with no-fault compensation schemes aimed at dealing with this problem. A no-fault scheme could compensate not only accidents, but also hereditary and other disabilities and illnesses, on the basis that the problems are the same, regardless of cause.

Illogical distinctions

Even if it is admitted that the potentially huge number of tort actions has to be limited in some way, proof of fault is not the only grounds by which this could be done, nor a particularly logical choice. It appears to be the result of a policy decision that it is sometimes just to reward defendants who have been careful, by protecting them from liability for the consequences of their actions. Quite apart from the fact that fault is difficult to prove, and failure to prove fault does not mean that fault did not occur, it is difficult to see the logic of this approach when the wrongdoer is insured, and would not personally lose anything by paying damages.

Lack of deterrence

The practical deterrent effect of fault liability is debatable. First, the generalised duty to take care is too vague to influence behaviour much. Secondly, in many cases the tortfeasor will be well aware that damages will be paid by their insurance company. Motorists are obliged by law to take out insurance against accidents, as are most employers, and many professional organisations run negligence insurance schemes for their members. It can be argued that defendants also know that a claim may result in higher premiums, but it is debatable whether this is actually much of a deterrent, especially in business situations where the cost can simply be passed on to consumers in higher prices.

Of course, cost may not be the only deterrent; bad publicity can be equally powerful, if not more so. However, large corporations with good lawyers can largely avoid such publicity by negotiating an out-of-court settlement. In such a case, claimants' chances of

recovery seem to depend not on fault, but on the amount of pre-trial publicity they can drum up.

Tort should compensate and not punish

It can be argued that it is not the job of tort to punish wrongdoers; that function properly belongs to the criminal law.

Damages can be disproportionate to fault

As we will see when we look at negligence, there are cases in which a very minor level of fault can result in very serious consequences. There can be a huge disproportion between defendants' negligence (which may only be a momentary lapse in concentration) and the high damages that they subsequently have to pay.

Expense

The need to prove fault increases the length, and so the cost, of tort cases. This increases the proportion of money that is spent on operating the tort system rather than compensating claimants.

Unpredictability

The fault principle adds to the unpredictability of tort cases, and increases anxiety and pressure on both sides. The practical result is that claimants may feel pressurised into accepting settlements worth much less than they could have won if they had gone to court.

Problems with the objective standard

Fault is judged by reference to an objective standard of behaviour, which ignores the knowledge or capacity of the individual; this can mean that someone is legally at fault, when we would not consider that they were at fault morally, or at least not to the degree suggested by the law. For example, the law requires an objective standard of care from drivers, and it expects this equally after 20 years of driving, or 20 minutes.

Alternative methods of compensation for personal injury

A hundred years ago, the law of tort, with all its flaws, was almost the only way of gaining compensation for accidental injury, but its role has declined with the development of insurance and social security. For these the issue of fault is usually irrelevant.

The social security system

The vast majority of accident victims who need financial support get it not from the tort system, but through social security benefits. This is because most accident victims do not sue anybody, either because the accident was not (or cannot be proved to be) someone

else's fault, or because they do not realise they could sue, or because for some reason (often cost) they decide not to. They may be unable to work for a long period or even permanently, and unless they have insurance, state benefits will be their only means of financial support. Benefits vary depending on the person's needs, and how much they have paid into the system while working, but are unlikely to provide for more than the bare essentials of life – unlike tort compensation, which is designed as far as possible to give an accident victim back the standard of living he or she enjoyed before the accident.

The social security system tends to provide support for injury victims more quickly, and with less uncertainty than the tort system, but its drawbacks are the very low levels of support, and the continuing stigma attached to accepting state benefits – tabloid newspapers, for example, routinely refer to benefits as 'handouts', when the recipients may in fact have been paying into the social security system for years through tax and national insurance.

Insurance

A whole range of policies provide insurance cover in many potentially dangerous situations. Two of the most important sources of accidents are road traffic and industry, and statute makes it a criminal offence for either vehicle users or employers to be without adequate insurance (under the Road Traffic Act 1988 and the Employers' Liability (Compulsory Insurance) Act 1969 respectively). In addition, the Motor Insurers' Bureau, an organisation set up by the insurance industry, gives money to traffic victims where the driver is either uninsured, or unidentified (as in the case of a 'hit and run' accident).

Many people take out household insurance, which usually covers occupier's liability. Three main types of policy provide compensation where accidental death or injury occurs: life assurance, personal accident insurance and permanent health insurance.

In many cases, employers provide a variety of benefits which may also be of use to accident victims. There may be lump sums payable under occupational pension schemes where death or injury lead to premature retirement. Some employers offer sick pay at higher rates and for longer periods than the statutory scheme, though this rarely exceeds six months on full pay.

Compensation for victims of crime

There are additional sources of financial help for those who are injured as a result of crime. The Criminal Injuries Compensation Scheme compensates victims of violent crime, and those injured while trying to prevent crime, for pain and suffering and loss of amenity (meaning loss of the ability to lead a full life through injury).

The sums paid are based on a tariff, with around £1,000 awarded for relatively minor injuries such as fractured bones, and at the upper end, £250,000 for serious brain damage. The tariff amounts were increased in 2001 after media criticism of the awards made in several high-profile cases. Most of the tariff awards are roughly comparable to the sums that would be awarded by a court for the same kinds of injury, but the amounts awarded to victims of crimes that have caused very serious injury can be considerably higher than those that are likely to be awarded by a court. The scheme also compensates victims of crime for loss of earnings and expenses, but no compensation is paid for

the first 28 weeks' loss of earnings, and the total amount of compensation for loss of earnings is limited to one-and-a-half times the average gross industrial wage (currently around £29,000 a year). In practice the scheme provides a remedy where a person's rights in tort are useless because the assailant has not been identified, or would be unable to pay substantial damages if sued.

A second source of compensation for crime victims is the compensation order, which courts can make against those convicted of crimes, in order to pay for any damage they have done in committing the crime. The orders can cover compensation for personal injury, or loss of or damage to property; in practice most are for theft, handling stolen goods and criminal damage.

The NHS complaints system

Since the mid-1990s, claims against the NHS for medical negligence have been increasing, and currently cost the NHS over £500 million the NHS over £500 million a year in compensation and legal fees. As a result, in 2001, the National Audit Office looked into the issue of negligence claims against the NHS, and concluded that money could be saved, and complaints dealt with more efficiently, if a new system specifically for NHS complaints was created.

The Commission pointed out that research showed that in many cases, financial compensation was not the patient's main aim. Often, they were more interested in getting a genuine explanation of what had gone wrong, an apology, and some kind of reassurance that action would be taken to prevent other people being injured by the same sort of mistake. It was when the NHS failed to meet these needs that attitudes tended to harden, leading people to sue for compensation. The Commission concluded that if measures were put in place to address these issues, fewer legal cases might be brought.

A further report was produced in 2003 by the Chief Medical Officer, Liam Donaldson. In *Making Amends*, he too recommended the creation of a new scheme for NHS complaints, which would make it easier to get not just compensation, but also acknowledgement of mistakes, and care and rehabilition to deal with the results of the medical negligence. The emphasis in the report was on creating a system in which, instead of the patient having to prove fault, and the NHS attempting to fight claims, NHS staff would be encouraged to admit mistakes, and the organisation would take responsibility for improving practice by learning from such mistakes.

The government's response to *Making Amends* was the NHS Redress Act 2006. It allows the creation of an NHS Redress Scheme which, the explanatory notes to the Act state, will 'provide investigations when things go wrong, remedial treatment, rehabilitation and care where needed, explanations and apologies, and financial compensation in certain circumstances' without the need to go to court. Only cases worth less than £20,000 will be handled by the scheme, and patients who accept redress offered under the scheme will have to waive their right to take legal action.

The Act is what is known as an enabling Act, which sets out a broad framework for the scheme and then permits the detailed rules to be put in place by means of secondary legislation. It was passed in November 2006, and the government then began consulting with interested parties before deciding on the details of how the scheme will work.

At the time of writing, no more details had been issued, though it was expected that the scheme would be put in place during 2009.

Special funds

Highly publicised accidents involving large numbers of victims, such as the sinking of the *Herald of Free Enterprise* ferry off Zeebrugge and the Kings Cross underground fire, sometimes result in the setting up of special funds to compensate the victims.

No-fault systems

The social security and insurance arrangements run alongside the tort system in England. However, in some countries, tort liability in particular fields has been completely replaced by a general no-fault scheme of compensation. The main benefits of this are that similar levels of harm receive similar levels of compensation, regardless of whether fault can be proved, and that the money spent on administering the tort system, and providing legal aid in tort cases, can instead be spent in compensating those who have suffered harm. It should be pointed out here that tort is a notoriously uneconomical way of delivering benefits to those who need them: the 2001 survey of medical negligence claims by the National Audit Office found that in nearly half the cases studied, the costs of the case would be higher than the damages awarded to the claimant. In cases where the claim was for more than £500,000, 65 per cent cost more than the eventual damages.

The most notable no-fault scheme is that which was created in New Zealand in 1972. Their scheme covered personal injuries caused by accidents, which included occupational diseases, and was financed by a levy on employers, the self-employed, vehicle owners, health care providers and through general taxation. Tort actions for personal injury were abolished, and instead injured parties claimed through the Accident Compensation Commission.

Victims unable to work as a result of their accidents could claim weekly payments of up to 80 per cent of their pre-accident earnings, up to a statutory maximum. Those who were still able to work, but at a lower rate of pay than before, could claim 80 per cent of the difference between old earnings and new. Payments could be adjusted to reflect inflation and improvement or deterioration in the victim's medical condition. The system also allowed for lump-sum payments to compensate for pain and suffering (known as non-pecuniary loss, as it is difficult to put a price on it). However, during the late 1980s and early 1990s, the political climate in New Zealand turned against high spending on any kind of welfare and social benefits. As a result, the no-fault scheme has been dismantled and the tort system brought back into operation.

In the USA, approximately half of all the states have established no-fault schemes for victims of road accidents, though there is considerable variation between these schemes and their effect on any potential tort claim. In most of these states, motorists have to buy no-fault insurance cover up to the limit imposed by their state, and the driver and anyone else injured by the vehicle can make a claim. Non-pecuniary loss such as pain and suffering is still covered by the tort system and in some states, claims for non-pecuniary loss can only be brought if the case is particularly serious.

The US schemes seem to have led to a lowering in the cost of motor insurance, and the award of compensation to many victims who would have received no compensation under the old system.

In the Australian state of New South Wales, tort liability for transport accidents has been replaced by a scheme which only pays compensation if the accident was caused by the fault of someone, and for these purposes the victim's fault is not sufficient. The practical effect of this has simply been that cases which would in the past have been dealt with as tort cases in the civil courts are now being heard by administrative tribunals; and because statute imposes limits on the payments that can be made under the scheme, there has been a decrease in the amount of compensation for the serious cases.

Although most no-fault schemes have been created in the context of transport accidents, in Sweden there is a no-fault scheme for victims of medical accidents.

Alternative methods of making wrongdoers accountable

There are also alternatives to the tort system in terms of holding wrongdoers to account for what they have done. The criminal law is an obvious example, though it does not cover all activities which would lead to redress in tort. Highly publicised accidents, such as the thalidomide tragedy, the sinking of the *Herald of Free Enterprise* and the Kings Cross fire often result in public inquiries, which aim to investigate why they happened and provide recommendations to prevent similar accidents.

Reform of the tort system

In the 1970s, the then government put in place a Royal Commission to study the various systems for compensating personal injury. The Royal Commission on Civil Liability and Compensation for Personal Injury, known as the Pearson Commission, reported in 1978, and remains the last large-scale examination of personal injury compensation. It considered several alternative recommendations for reform, including a no-fault scheme, and the abolition of fault-based tort liability, to be replaced by a system which would place responsibility on the party best placed to insure against the risk. Where, for example, a pedestrian is knocked down by a car, it is obviously much more practical for the motorist to insure against such an accident than for the pedestrian to do so. Equally, it is easier for an employer to take out one insurance policy covering the whole workforce than for each employee to buy their own accident insurance. However, there would be cases where it might be reasonable to expect the victim to insure themselves against the risk, and in this case an uninsured victim would have to bear the loss.

The Commission concluded that given the social security system in England, it was unnecessary to establish a full no-fault compensation system. It recommended that the tort system should still provide accident compensation, alongside the benefits provided by the social security system, but that there should be a shift in the balance between the two, towards increased social security benefits. In particular, the report advocated that there should be improved benefits for the victims of industrial injuries, and that a

dedicated scheme should be set up for injuries caused by motor vehicles, as these were by far the largest category of accidental injury studied by the Commission and were also likely to be serious. The scheme would be financed by a levy on petrol.

The Commission considered the idea of no-fault schemes for other particular types of accident, but given the possible difficulties in defining the scope of such schemes, and in financing them, felt there were too many practical problems to make these a sound proposition.

The idea of a general compulsory insurance was also rejected, on the grounds that it would be difficult to enforce, that some might find it unaffordable, and that it was not desirable to expect people to insure themselves against harm caused by others. Such a system would retain the high operational costs of the tort system, yet lose the advantage of making wrongdoers pay for the harm they cause.

The Commission recommended that the tort system should be kept because of its deterrent effect and because '[t]here is an elementary justice in the principle of the tort action that he who has by his fault injured his neighbour should make reparation' (Pearson Report of the Royal Commission on Civil Liability and Compensation for Personal Injury, Cmnd 7054, 1978, paras 245–63). It envisaged, however, that many small tort cases would no longer be brought if its recommendations on social security benefits were put into action.

The Commission also suggested that two measures be taken to reduce tort damages. Non-pecuniary damages would be available only in the most serious cases, and the value of any social security benefits obtained as a result of injury should be offset against the damages awarded. This, it was suggested, was justified by the fact that both social security benefits and tort damages were ultimately derived from society at large, and should not be paid twice.

The Pearson Commission was not a success, and its proposals were heavily criticised. The suggestion for a road accident compensation scheme, for example, was criticised as creating yet another *ad hoc* category in an already complex and fragmented system, when in fact road accident victims appeared to be one of the categories best served by the tort system. Shortly after the Pearson Commission reported, a Conservative government was elected, and rather than increase social security benefits as the Commission had suggested, it set about cutting them, so there was no real opportunity for the social security system to play a larger role in accident compensation as the Commission had envisaged. By the late 1980s, it was generally assumed in the majority of Western industrialised countries that social security spending should be curtailed, and despite a change of government in the UK, controlling expenditure on welfare benefits is still seen as a priority; against this background, the Commission's overall approach is obviously not going to be adopted. Only one significant move has been made in their direction, with the advent of legislation to allow the value of social security benefits received by accident victims to be claimed back by the state from tortfeasors (see p. 000).

In 2008, the government announced that it was putting forward new legislation to reform the law on damages. The Civil Law Reform Bill was due to be published during the 2008–2009 Parliamentary session, so few details were known at the time of writing, but one aim of the Bill is said to be that damages, especially bereavement damages, should better reflect public expectations.

Answering questions

1 Compensation for personal injury arising from negligence relies on the claimant being able to prove fault. How satisfactory is a system that relies on proof of fault and are there better alternatives?

To answer this question, you will need to have studied negligence, as well as the issues raised in this chapter. A good way to start this essay would to be to look at what we mean when we say that compensation for personal injuries caused by negligence depends on fault. Explain the ways in which the law of negligence judges fault: relevant issues here would be the **Caparo** test, the standard of reasonableness; and the rules on causation and remoteness of damage, all of which are designed to ensure that a defendant will only be liable for damage which can be said to be their fault.

In order to decide whether dependence on fault creates a satisfactory system, you should work through the reasons why fault might be thought desirable, as explained in this chapter, and explain how those factors contribute to the system we have. You could then work through the disadvantages of the fault principle, as explained on p. 000, again relating them to their practical impact on the tort system. Other useful material can be found on p. 000, specifically relating to the strengths and weaknesses of the law on negligence. Remember though that you are only being asked about personal injury claims, so the material on economic loss is not relevant here.

You should then look at the alternatives to a fault-based system, which are covered in this chapter, and give an assessment of their strengths and weaknesses. Finally, you should offer a conclusion which, based on the arguments you have put forward, states whether you think a fault-based system is the best option, or whether it should be replaced by an alternative, either completely or in certain types of case.

Summary of Chapter 1

Tort law covers breaches of a duty owed under civil law, and usually allows the victim to claim financial compensation.

Tort and other legal wrongs

- Tort and crime: crimes are punished by the state; torts are a dispute between the person committing the tort, and the victim.
- Tort and breach of contract: torts involve breach of a duty fixed by law; breach of contract involves breaching a duty agreed between the parties.

The role of policy

Policy can be seen to be behind many tort law decisions, because the rules made can have important effects on social issues such as the availability of insurance, or the willingness of doctors to try new techniques.

The requirement of fault

There are three forms of fault in tort:

- Intention
- Negligence
- Malice.

A small number of torts impose strict liability.

Reasons for a fault requirement:

- control of tort actions;
- laissez faire policy;
- deterrence;
- wider liability merely shifts costs;
- accountability;
- strict liability only reverses the burden of proof.

Arguments against a fault requirement:

- unjust distinctions;
- illogical distinctions;
- lack of deterrence;
- tort should compensate, not punish;
- damages disproportionate to fault;
- expense;
- unpredictability;
- problems with an objective standard.

Alternative methods of personal injury compensation

Other systems include:

- social security;
- compensation for crime victims;
- the NHS complaints system;
- insurance;
- special funds;
- no-fault systems in other countries.

Reform of the tort system

The Pearson Commission recommended a shift towards better compensation through social security for accident victims, but was not followed.

Reading list

Gooderham, P (2007) 'Special treatment?' *New Law Journal* 694

Jacobs, J (2006) 'Reforming personal injury compensation' *Solicitors Journal* 586

Parker, A (2006) 'Changing the claims culture' *New Law Journal* 702

Slapper, G (2005) 'Compensation culture' 46 *Student Law Review* 28

Towler, A (2005) 'Time to redress' *Solicitors Journal* 652

Reading on the Internet

The NHS Redress Act, and its explanatory notes, can be read at:
http://www.opsi.gov.uk/acts/en2006/2006en44.htm

The report, *Better Routes to Redress*, into the alleged compensation culture, can be read at:
http://www.brc.gov.uk/downloads/pdf/betterroutes.pdf

The government's response to *Better Routes to Redress* can be read at:
http://www.dca.gov.uk/majrep/bettertaskforce/better-task-force.pdf

The Chief Medical Officer's report *Making Amends* can be read at:
http://www.dh.gov.uk/Consultations/ClosedConsultations/ClosedConsultationsArticle/fs/en?CONTENT_ID=4072363&chk=qXY2KS

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