

Torts in Law

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Abstract

Lawsuits in “tort” allow victims of other people’s wrongful and sometimes merely harmful behavior to claim monetary damages for their injuries. Defenders of tort law extol it as a vehicle for achieving justice, promoting safety, internalizing accident costs, compensating victims and more. Critics doubt tort law’s effectiveness on all these criteria and would prefer legal jurisdictions to follow the lead of New Zealand, which has replaced tort law for personal injuries with a comprehensive accident compensation scheme.

Keywords

cost internalizing, deterrence, fault liability, justice, lawsuit, liability, personal injury, strict liability, tort, victim compensation

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A *tort* is a “civil” or personal wrong to a private individual or enterprise, and the legal remedy for a tort victim lies in the injured party bringing a private lawsuit against the injurer.

This is to be contrasted with a “crime” which is wrong against society and which can lead to the prosecution of the wrong-doing criminal by public authorities. The conventional social remedy against those who commit crimes is incarceration and/or a financial punishment (a fine) that is paid to the government. By contrast, when tort victims make successful claims against their injurers they usually recover money damages from their injurer (or the injurer’s insurer).

Torts are like crimes in the sense that liability is often based upon the violation of standards of conduct set by the society. Yet, not all torts are crimes, and violations of many criminal statutes do not injure private actors in ways that would give rise to tort claims.

Tort claims should be distinguished from claims based on breach of promises, claims arising from contract law. Speaking generally, in the latter the victim seeks to hold the injurer to the promise that was privately made, rather than to a socially-created standard (although contemporary contract law often reads implied promises into contracts in part to satisfy public goals as well as consumer expectations).

The money damages that tort victims seek are understood to fall under two headings (Luntz 2006). The first concerns what are typically called pecuniary (or perhaps economic) losses. These include things like lost income and profits both past (from the time of the tort until the time of the trial or settlement) and future (projected out for so long as those losses are expected to occur). The other major sort of pecuniary loss for which victims sue is the recovery of expenses that have already been incurred and are likely in the future to be incurred because of the tort. The best examples of these losses are medical and related expenses.

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The second heading of damages is typically termed non-pecuniary or non-economic. These are damages for what tort law in the U.S. calls pain and suffering, although that label is generally meant to also capture loss of pleasure, loss of amenities of life, loss of dignity, the upset one feels as a result of an impairment or a disfigurement, and the like. Other legal systems frequently label these non-pecuniary awards using different terminology, such as moral damages.

These sorts of non-pecuniary damages are primarily awarded to those who suffer personal physical injuries, and physical harm to the person will be the focus here. Quite obviously, at the time of a trial or settlement of a case someone who has suffered a grave disability as a result of another's tortious conduct might still be suffering and be expected to suffer until the end of life. Hence in this respect pain and suffering damages, like pecuniary damages, may be awarded for both past and projected future losses.

Nations differ enormously, however, in the actual amount of non-pecuniary losses that are awarded for similar serious injuries (Sugarman 2006). Even within Europe, victims with similarly grave injuries might win ten times as much in non-pecuniary damages in some nations as compared with others. And some victims in the U.S. might well be awarded ten times as much as would be awarded in the most generous European country. Some of these differences undoubtedly are a product of national wealth and the level of average citizen material well-being which influence judgments about appropriate sums to award. But attitudes towards the disabled and existing social services arrangements for dealing with the disabled in general surely also come into play, as probably do national cultural attitudes towards money in general – since tort law can hardly put victims back into their former state of health but can only offer money as a kind of solace.

Other sorts of indignities – like invasions of privacy, defamation, false imprisonment and so on – where recognized as giving rise to tort claims, can also result in the award of non-pecuniary damages, although those sorts of claims will be put aside here. Moreover, although tort claims

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frequently arise on behalf of those seeking compensation for financial losses, damage to real or tangible personal property, injuries to reputation, and so on, as noted already the focus here will be on personal injury and death. This focus is in accord with U.S. practice; most American lawyers who bring tort claims are typically called “personal injury lawyers” since bodily injury claims form the core of their legal practice. Things are quite different in New Zealand, however, where tort claims for personal injury have been almost entirely eliminated and replaced by a government-created compensation scheme to deal with all accident victims (Palmer 1979). There, tort lawyers tend to focus on financial and property injuries.

Concentrating on personal injuries, tort claims arise from a wide range of human interactions. The most important categories of accidents that can lead to tort claims include: 1) transportation injuries (accidents involving occupants of autos, planes, trains, buses, and motorbikes, as well as pedestrians who are struck by such vehicles); 2) medical injuries (arising from the failed treatment by physicians and other health professionals, often termed “malpractice”); 3) product injuries (when a specific item is defective or when an entire line of products is defective with respect to its design or the adequacy of its warnings); 4) injuries that occur on the property of others (such as slips and falls, dangerous conditions that result in accidents, and dangerous activities that lead to harm); 5) recreational injuries (suffered by participants in organized or disorganized sporting and related activities); and 6) work injuries.

Most industrialized nations have separate work-injury compensation schemes (sometimes called workers’ compensation or industrial accident schemes) that pay money to those injured in the course of their employment. Nations often allow those suffering work injuries to sue in tort to recover losses not already covered by the industrial accident scheme (although the amount of compensable additional damages is often sufficiently minor that few victims elect to pursue their rights and sue their employers.). But elsewhere, such as in all of the U.S. states, for ordinary work injuries the victim’s exclusive remedy is through the workers’ compensation system; in return for funding this benefit employers are exempt from tort claims (Kramer and Briffault 1991).

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There are pragmatic reasons for focusing a discussion of tort law on personal injury and death cases. These injuries can give rise to devastating harms and very large losses (and sometimes to very large financial recoveries). Personal injury claims for *accidental* injuries tend to be the most numerous sorts of tort claims because all too often those who commit *intentional* torts (which are also frequently crimes, such as murder, rape, and armed robbery) have no financial means to draw on to provide financial compensation to their victims. That is to say, even if they are captured, they are typically judgment proof. Hence society tends to deal with these sorts of wrongdoers through the criminal justice system.

One reason that criminals are frequently judgment proof is that, even if they were to have liability insurance to stand behind them if they were to commit a tort, that sort of insurance does not cover intentional harms (Abraham 1986). Rather it only applies to accidental harm, even if tortuously imposed. Hence, you can buy insurance that would pay what you owe in tort if you carelessly drive your auto into someone or carelessly allow someone to slip and fall on your property and so on, but you cannot buy insurance that would cover your tort liability if you wrongfully punch someone in the face. However, sometimes a person or enterprise is sued in tort for carelessly failing to prevent the victim from being injured by someone else acting in a criminal way – e.g., a psychiatrist who fails to warn a victim that the therapist’s patient is coming to kill her, or a vehicle owner who gives his car keys to a drunk, or an apartment building owner who is aware of criminal attacks on tenants and fails to take reasonable precautions that would have prevented an attack (Franklin, Rabin and Green 2011). Liability insurance will cover the legal obligation of the non-criminal defendant in these sorts of cases.

It is also true for many countries that the most intellectually interesting and controversial tort cases arise out of accident settings and have resulted in the sorts of judicial rulings that have gained the most sustained scholarly attention (Rabin and Sugarman 2003).

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The tort law of Great Britain, the U.S., and many other former English colonies (like Canada and Australia) is said to be “common law” (Baudouin and Linden 2010, Dobbs 2000, Fleming 2011) and to be distinguished from the tort law of other places, like France, Germany, Japan and China, where tort law is said to be “civil law” or “code law” (Markesinis and Unberath 2002). Although there are important theoretical and practical differences between the two approaches, not too much should be made of the difference.

Common law is law that is announced by judges in the course of giving their opinions in individual cases that come before them for resolution. In these opinions, judges explain not only what the law is but also state what they believe are the relevant facts in the matter before them and give the reasons why they reached the conclusion they did. This practice helps assure that the judges are at least formally providing reasoned elaborations in justification of their conclusions (although some believe that judges first decide how they feel the case should come out and then construct arguments designed to support that feeling). It also provides analysis for lawyers on both sides of new conflicts to argue about and draw on in trying to predict how judges are going to decide new disputes involving arguably importantly different facts. And these past written opinions provide a trail with which judges must contend when deciding new matters, either following along in what they see as the relevant track or distinguishing or overruling past opinions.

Although it was once imagined that judges would find the law of torts through logic, somehow analogously to the way that scientists find the laws of physics, this is not a realistic way of looking at things. To be sure, common law judges tend to give great deference to the decisions of other judges in prior similar cases, following the principle captured in the Latin phrase *stare decisis* (the doctrine of precedent).

Yet this too should not be over-emphasized. First, the obligation to follow precedent is said to apply only to “lower” or “inferior” courts with respect to prior decisions of higher courts. Second, in torts cases especially, the facts are always different if one digs deeply enough, and

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judges quickly became expert in distinguishing prior decisions they do not like by emphasizing different facts in the matters before them. Third, the top level courts in all common law jurisdictions reserve the right to change the law if they see fit, and they do so. Many reasons are employed to justify such changes, including the argument that social circumstances and/or expectations have changed, contemporary morals are different, new situations have developed to which it makes little sense to apply old principles adopted for other times, the prior decision was (alas) never persuasively reached in the first place, and so on.

Hence, on the ground, so long as the relevant legislative bodies keep out of the way, the common law of tort in each country is perhaps best seen as an organic system that evolves under the direction of judges in furtherance of the values and other factors they believe best suit the contemporary world. And, if the judges are seen to have gotten it wrong, then the relevant legislature can and sometimes does intervene and overrules what the judges have decided. So, for example, when the California Supreme Court decided, as a common law matter, that a social host has a legal duty of care to take reasonable steps to assure that his/her social guest who has drunk too much alcohol at the host's home does not leave and, as a drunk driver, carelessly run someone else down, the California legislature decided that this was inappropriate and by statute changed the law (Franklin, Rabin and Green 2011).

In the U.S., this debate usually occurs at the state level, because in the U.S. tort law is state law. In fact there is no national body of tort law in the U.S., but rather 50 different bodies of tort law in the 50 different states (and although on most issues the laws of all the states are similar, on many controversial matters they are not).

In Canada and Australia, unlike the U.S., there is a national common law declared by the highest court of each nation. But there too, like the U.S., provincial and state legislatures may and do sometimes act to change by statute the tort law in their jurisdiction. For example, not long ago in New South Wales, Australia, the government restricted the amount of a victim's lost income that tort law would replace to three times the

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average wage in the state (Fleming 2011). In England and Wales it is normally the national Parliament that would change the common law as it did decades ago, for example, when adopting the principle that the victim's contributory negligence would no longer be a complete defense but rather would serve only to reduce appropriately the damages a victim could receive from his/her careless injurer (Arvind and Steele 2012).

In civil law nations it is said that judges simply apply the law as laid down by the government, which in many places (unlike the U.S.) is, in effect, a combination of the executive and legislative branch since in parliamentary democracies (or even in monarchies or tyrannies) the political leadership commonly simultaneously controls both the legislative and executive functions. Yet, it is not our world-wide experience that governments in civil law nations are routinely altering their law of torts in substantial ways. To the contrary, they generally tend to have adopted a few basic statutory legal principles that form the core of their civil code. In many places these codes may be ultimately traced back to the Napoleonic Code or even earlier, say, to Roman law. To be sure, just as there are statutory changes made in the common law of torts, so too civil code countries update, alter, and make more complex their respective bodies of tort law. But in the end many of the key decisions of courts in civil law nations reflect the efforts of judges, as best they can, to apply long established simple principles of justice to new and changing events. In this respect, they are, as a practical matter, often functioning very much like common law judges. The tradition of writing opinions in civil code jurisdictions varies, however, so that it is not infrequently the role of academics to try to rationalize new decisional outcomes with the pattern of past interpretations of code provisions.

Interestingly enough, until lately non-common law nations avoided use of the word "tort," with countries like France being traditionally said to have a private or civil law that covered both what the English would term tort law and contract law. This is now changing, and many now speak of EU tort law, German tort law, and French tort law, which is perhaps a welcome relief because the word "tort" itself has a

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French origin. When the common law of torts was first evolving, the elites of England, at least in the legal world, wrote in what is sometimes termed “law French” since the evolving English language was left more to the common man (not the common law).

The curious thing here is that even today the word “tort” in contemporary French is ambiguous in its meaning and brings us to a fundamental issue in the law of accidents. Many would say that “tort” means “wrong” but others would say that it also means, or perhaps even better means, “harm.” This distinction is critical. If tort law is about wrongs, then it rests on the principle that you may shift your losses from yourself to another through tort law when that other has wronged you -- that is, when the one you sue has misbehaved in a way that resulted in your injury. If all that is required is harm, however, then one who innocently injures you may also be held legally responsible for the consequences of his/her behavior.

In contemporary parlance, this raises the question of whether tort law does or should rest on the “fault” principle or whether people should be “strictly liable” (i.e. liability in the absence of fault) for harms they cause (Calebresi 1970). Of course, many defendants act in a faulty way and hence would be liable in tort whether the system rests on the fault principle or on a strict liability principle. The difficulty comes when you or your activities generate injuries for which one would say you are not to blame in this specific sense: the victim is not saying that you should have acted differently, in a manner that would have avoided his/her injury; rather, the victim is saying that it was not socially objectionable for you to have acted as you did, but nonetheless you should compensate me for my loss that your behavior caused.

As will be discussed below, there are good reasons that can be put forward in support of a system of strict liability – at the least in situations in which the injurers are enterprises and the victims are ordinary people. But in fact, at least on the books, the law of torts around the world is primarily a fault-based system. The victim must show that he/she was wronged, that he/she should not have been injured, that the defendant in

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the lawsuit acted, as they say in the U.S., “unreasonably.” More precisely this means the defendant failed to act in the way that a prudent person would have acted, taking into account the riskiness of the defendant’s act and the burden that would have been born by the defendant to have avoided the harm.

In many legal systems there are islands of strict liability in this sea of fault liability (Dobbs 2000, Fleming 2011). Some places, for example, have effectively made the law governing auto accidents one of strict liability (although in many places the law governing auto accidents is not really tort law anymore, but rather a separate statutory scheme for compensating victims of auto accidents on a no-fault basis). In many places, when a manufacturer provides a product that is defective in the sense that something is wrong with it (it is dangerous in ways that the product maker did not intend and the victim did not expect), there is strict liability in the sense that it is no excuse that the manufacturer employed the best available inspection system and no such system could have detected the defective item before it caused injury; proof of lack of due care, in short, is not required. And in some places like the U.S., if the actor is carrying on certain abnormally dangerous activities, like dynamite blasting, then he/she is liable for harm done even if the activity was carried out in an altogether reasonable manner and simply unavoidably went astray. While there are other examples, overall the instances in which liability is “strict” are but a few of the many ways in which people are accidentally injured, and for those many ways proof of fault is typically required.

In trying to untangle this fault v. harm conundrum, we should attend to the functions of tort law and appraise how well tort law in fact achieves the goals that many have set for it.

For some, tort law has an almost magical character (Geistfeld 2008, Porat and Stein 2001). Its threat, they believe, prompts most people and businesses to act properly. Hence, we achieve socially desirable levels of safety (accident prevention) without the cost and heavy hand of bureaucratic regulations. People who violate community standards and

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injure others are held accountable through a privately initiated system that delivers victim compensation and yet involves only minor public costs of administration. Holding wrongdoers accountable in this way achieves corrective justice in the sense that victims are “made whole” to the extent that money can do that, and injurers are punished for their sins. Moreover, the costs of injuries that should have been avoided are now internalized into the cost of the activities that caused the harm (and are thus either reflected in the price of those activities or in reduced profits for shareholders). Because the government makes available this form of redress, people who are wronged (and their families) are less likely to seek vengeance against wrongdoers through private violence.

Notice how the social goals that tort law is said to serve by these lines of argument might be separated into social welfare (or utilitarian) goals and fairness (or moral) goals – perhaps counting compensation of victims, cost internalization, pre-empting violent revenge, and accident reduction as utilitarian and then counting justly putting victims back in the position they were in before the injury, as well as punishing wrongdoers and giving satisfaction to victims on the fairness side. Note also that this package of social goals said to be served by tort law rests on the assumption that tort law is fault-based.

Others, sometimes termed “legal realists,” are rather doubtful about the actual achievements of tort law in action with respect to these goals (Sugarman 1989). They may scoff, for example, at the actual “deterrence” impact of tort law on unsafe conduct. After all, private morality, market pressures, self-protection instincts, and existing governmental regulation already promote safer conduct. For that reason, it is not clear just how much more tort can achieve, especially once it is appreciated that many individuals from time to time are just not up to behaving with appropriate caution, that executives can only have so much success in training staff to take due care when those employees simultaneously are being pressed to maximize firm profits, and especially when the costs of precaution are born now and the costs of failing to do so might not be incurred until later, when the existing executive leadership is long gone. Furthermore, as a practical matter both individuals and firms that carelessly cause injuries are generally insured against their tort

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liability, so the actual monetary price they pay is only secondarily reflected, if at all, in higher insurance premiums after the fact.

Empirical studies of tort law's role in promoting greater safety (Deweese, Duff and Trebilcock 1996) are mixed, although some have found tort to have a positive, if perhaps modest, impact in the right direction. Others researchers have found that tort law can have negative impacts in terms of over-deterrence (e.g., excessive investment in safety through, for example, doctors wasting health resources on too many medical tests) or the withdrawal from the society of socially desirable activities (e.g., removing equipment for children to climb from school playgrounds).

Skeptics also question the sensibility of viewing tort as a way to appropriately compensate victims. First, the administrative costs of the system are enormous as compared with typical private insurance or public social insurance schemes. In the U.S., for example, costs of administration (especially legal fees on both sides) account for about half of the cost of the system, so that benefits to victims are only about half of what is spent. Besides that, a significant share of the benefits that are provided by tort law duplicate benefits already provided by other sources such as health insurance, social security and the like, leading either to double recovery or yet more administrative expense as the double payment sum is re-couped by the collateral source. Second, as compared with social insurance that generally limits the lost wages it replaces, tort law is very generous to the rich, providing full compensation for lost income (in most jurisdictions) that makes the system rather "regressive" in its impact (and explains why New South Wales, as noted above, decided to cap the level of income replacement). Third, not all accident victims are compensated via tort law. This is both because some injurers are financially unable to pay what they owe and because some victims are injured through no one's fault or perhaps theirs alone (and when both parties are at fault, then in most systems compensation is reduced or perhaps even eliminated). The existence of liability insurance also blunts the punishment function of tort law, and even more so when victims are injured by employees of enterprises, since it is the firm that pays-- not the actual worker who committed the tort.

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While tort liability does internalize some accident costs into activities that cause them, it does not fully do so unless strict liability is employed, but that is rarely the case at present. A much more sweeping embrace of “enterprise” liability (i.e. strict liability for business defendants especially in claims brought by individuals) would more fully internalize accident costs into the relevant enterprise activity. It would as well provide compensation to many more victims. Yet, on the other hand, if tort law were to become mostly a matter of strict liability, then its current functions of identifying wrongdoers and punishing them would be undermined. This reality shows the deep tension that exists when trying to use tort law to simultaneously serve multiple functions.

Turning to yet more tort law goals, one can also be skeptical about how well tort law actually satisfies victims’ sense of justice. In practice many tort victims do not sue. Some are unable to find a solvent defendant who would be liable for their injury. Others are unable to prove that they were victims of someone’s fault even though that was the case, and in some situations that is because injurers have hidden or even destroyed incriminating evidence. A number of victims – say in medical injury cases – don’t even realize they were victims of negligence. And some who have theoretically valid claims can’t find lawyers to represent them because the costs of litigation will outweigh the small amount of damages they could recover (a problem especially severe in medical injury cases in the U.S. where each side bears its own legal fees). When victims do sue, their cases normally settle without trial, and settlement agreements typically include a “no liability” disclaimer. This can be highly frustrating for victims who want to formally hold their injurer accountable. Worse, many find the litigation and settlement process highly unpleasant. Their own lawyer often ignores them, the other side subjects them to harsh treatment, cases seem to go on endlessly for no discernible reason and so on. These realities often undermine the idea that tort law brings moral satisfaction to victims.

Finally, today’s organized and reasonably effective police forces, social norms and fears of criminal prosecution are likely to be more

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effective than the promise of tort recovery in discouraging violent vengeance especially against those who have merely accidentally, even if negligently, committed torts.

Tort law is far more robust in the 21st century than it was in the past (Sugarman 2000). Take lawsuits against physicians, for example. While these have long been theoretically available to patients who have been injured by medical malpractice, in the past the idea of suing one's family doctor was sharply counter to social norms especially when the doctor often provided helpful service over the years. Moreover, it was traditionally very difficult to find a doctor who would testify against another doctor, and yet winning a malpractice case almost always requires relying on an expert witness. Nowadays, at least in some places, medicine is seen as more of a business, medical specialization means that a doctor who injures you may well be someone you have never encountered before, the public is far more aware that doctors sometimes make careless mistakes that lead to catastrophic consequences, and getting a third party doctor to stand up for the victim is no longer quite so difficult (certainly in U.S. jurisdictions that now permit testimony from any qualified expert instead of requiring a local expert).

So, too, product liability litigation is far more promising for victims than in the past. At one time manufacturers of defective products could only be sued by their direct buyers, a rule that effectively immunized them from liability once sales of products began to be carried out through retailers. Later, manufacturers could be sued when their negligence caused a product defect that injured someone. Nowadays in many nations, product makers are strictly liable for defective products they produce, and a subset of expert lawyers specializes in these sorts of cases, leveling the playing field in litigation against large scale enterprises.

One aspect of tort law that remains peculiarly American is the widespread use of lay juries to decide liability in most tort cases (Fleming 1988). Elsewhere juries are either never or rarely used in civil cases. While there is a strong ideological commitment to juries in America, it is probably fair to say that their use introduces uncertainty and variability

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into legal disputes over accidents. In turn, although “tort reform” is a mantra of certain defense interests in other nations as well, it is in the U.S. that business interests and some conservative political players have most actively sought to “rein in” tort law. Since conservatives are committed to the idea of personal responsibility and certainly are not eager to replace tort with more government regulation of safety, it is perhaps not surprising that most “tort reform” has been in the form of either reducing the amount of money that tort law may award victims or changing tort procedures, rather than moving away from fault liability. These changes, where enacted (and this mostly means in the U.S. on a state-by-state basis), have somewhat lowered the stakes of tort litigation. Still, personal injury law remains a frequently wielded tool in the U.S. whenever plausible connections between solvent injurers and victims can be made (Shapo 2012).

Indeed, many today defend tort law precisely as a mechanism for uncovering and then disclosing misconduct by those in charge of large institutions that all too often seems overlooked by government officials. In short, the “ombudsman” or “private attorney general” function of personal injury lawyers is one of their strongest claims for promoting the public interest (Linden 2003, Lytton 2008).

Cross references: legal realism, social insurance, courts, classification of legal systems, common law, civil law, criminal law & crime policy, insurance & the law, litigation, remedies and damages

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