

Whose Interests Prevail in Tort Law: The Individual's or the Public's?

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Introduction

Tort law is a branch of private law, and it is often said that private law's first principle involves the correction and reparation of a committed wrong.¹ Viewed exclusively from this bilateralist perspective, it may appear that tort law is only concerned with individuals, and more specifically, the parties before the court. This article however, seeks to demonstrate that whilst it may very well be true that tort law prioritises individual entitlements, it does not inappropriately do so at the expense of the public interest. In *Part I*, we explore the primacy of individual considerations in the law of tort and its apparent neglect of wider community welfare concerns. In *Parts II* and *III*, two lines of argument are offered to refute this claim. The first approach relies on a careful analysis of the case law in showing that judges do, when deciding tort cases, accord due weight to relevant public-interest factors. The second argument given in *Part III* is that the concept of tort liability is inherently contributory to the public interest.

I. The priority of individual entitlements²

As mentioned, tort law's primary concern has to do with righting a civil wrong, and as Jules Coleman put it, "tort law is best explained by corrective justice."³ Tort liability is imposed when

¹ H Sheinman, 'Tort Law and Distributive Justice' in J Oberdiek, *Philosophical Foundations of the Law of Torts* (Oxford University Press 2014), 371. See also E Weinrib, *The Idea of Private Law* (Harvard University Press 1995); E Weinrib, *Corrective Justice* (Oxford University Press 2012).

² For the purposes of this article, 'entitlement' shall be interpreted to mean *legal* entitlement, as opposed to moral entitlement.

³ J Coleman, *The Practice of Principle: In Defense of a Pragmatist Approach to Legal Theory* (Oxford University Press 2001), 9.

the defendant violates a claimant's right to which he had a correlative obligation; and therefore the defendant is imposed on a duty to compensate for causing that damage. From this perspective alone, it is hard not to view tort disputes as a matter purely related to individual interests. Indeed, it would be both untrue and unhelpful to say that tort law does *not* prioritise individual entitlements. Such prioritisation can also be found manifested in the case law: under the former two-stage approach in *Annes v Merton LBC*, interparty factors, such as the proximity between parties or the remoteness of harm, enjoy a priority in the process of determining a duty of care.⁴

A different, and more difficult, question is whether tort law prioritises these individual factors *to the neglect of the wider public interest*. The appearance of such dereliction may be attributed to two reasons. Firstly, under the *Annes* approach, and the similarly pluralist approach suggested by Andrew Robertson,⁵ community welfare considerations are relevant only if the courts deem that interpersonal justice supports the finding of liability. This can lead to the impression that cases are decided on the basis *solely* on interpersonal factors, especially in cases where interpersonal factors are sufficient in themselves to deny liability, such as where the harm is too remote. The second reason has to do with judges' interests in promoting their authority and independence. Understandably, judges have a stake in creating the appearance that their decisions are shaped entirely by the application of legal principles onto individual facts. If the influence of policy seems apparent, they may risk giving right purists, an opening to criticise the judiciary for being unauthorised lawmakers.⁶ Today, judges in many recent Supreme Court decisions have openly downplayed the relevance of policy considerations in their decision-making processes. In *Robinson v Chief Constable of West Yorkshire Police*, Lord Reed emphasised that the courts should apply established

⁴ [1977] UKHL 4. Overruled by *Murphy v Brentwood District Council* [1991] UKHL 2.

⁵ A Robertson, 'Rights, Pluralism and the Duty of Care' in D Nolan and A Robertson, *Rights and Private Law* (Hart Publishing 2011).

⁶ See, for instance, A Beever, *Rediscovering the Law of Negligence* (Hart Publishing 2013).

principles of law, rather than basing their decisions on their assessment of public policy.⁷

However, forceful these comments may be, the concerns of Lord Mance in his dissenting speech in *Robinson* are self-evident. His Lordship was sceptical that “the courts are not influenced by policy considerations,” and thought that it would be “unrealistic to suggest that.”⁸ Indeed, Lord Reed’s comments seem inconsistent with past developments where the courts have duly given weight to relevant policy considerations. To demonstrate this, the next Part shall outline four common thematic public-interest considerations that have dictated, or at least heavily influence, the outcomes of tort cases.

II. The precedent argument: public-interest concerns form part of the judicial reasoning in tort cases

a. Avoiding conflict with other legal or moral obligations

Firstly, courts will avoid imposing liability where it will result in a conflict of legal or moral duties on the part of the defendant.⁹ This is most obvious in the law of defamation, where an aptly named defence of ‘publication on the matter of interest’ is recognised under section 4 of the Defamation Act 2013.¹⁰ Formerly known at common law as the *Reynolds* privilege, named after *Reynolds v Times Newspapers Ltd*,¹¹ this grants publishers immunity from liability if the statement complained of was on a matter of public

⁷ [2018] UKSC 4. This was summarised in *Poole Borough Council v GN* [2019] UKSC 25, [64] (Lord Reed).

⁸ *Ibid*, [84].

⁹ See, for instance, the policy rationales proposed for the illegality defence in private law, one of which includes avoiding inconsistencies in the law which would jeopardise the integrity of the legal system: *Patel v Mirza* [2016] UKSC 42, [1] and [93].

¹⁰ Defamation Act 2013, s 4.

¹¹ [2001] 2 AC 127.

interest and the publisher reasonably believed that releasing the statement was in such public interest.¹² Lord Nicholls warned that “the court should be slow to conclude that a publication was not in the public interest and, therefore, the public had no right to know, especially when the information is in the field of political discussion.”¹³ Unlike the affairs of private citizens, of which publication rarely goes without liability, affairs of government and public servants are privileged because everyone in a community, in theory at least, is concerned with their conducts and activities. Accordingly, the public has a right to discuss them and receive reports of their behaviours through the media. This provides a striking example of an instance where matters of the community interest are prioritised over individualistic considerations (here, the defamee’s right to reputation). Simon Brown LJ in *Al-Fagih v HH Saudi Research* went so far as to say that the media’s right to freedom of expression, especially in the field of political discussion “is of a higher order... [than] the right of an individual to his good reputation.”¹⁴

Another instance where imposition of liability might be at odds with our other legal and moral duties are the defamation cases involving the report of crimes, as illustrated in *Byrne v Deane*.¹⁵ In that case, a poem was hung on the bulletin board of the defendant’s club proclaiming that the claimant had informed the police about the slot machines in the clubhouse. Slessor LJ, holding that no liability in defamation can arise, said, “to allege of a man... that he has reported certain acts, wrongful in law, to the police... cannot possibly be said to be defamatory of him in the minds of the general public.”¹⁶

b. Ensuring just compensation for victims and efficient allocation of loss

Secondly, courts have also demonstrated an inclination in placing the burden of liability on the party who is better positioned to

¹² Defamation Act 2013, s.4(1).

¹³ n 9, 205.

¹⁴ [2002] EMLR 13, [26].

¹⁵ [1937] KB 818.

¹⁶ *Ibid*, 832.

prevent the harm or is insured, to provide a practical remedy for those who have suffered injury.

This is apparent in the sector of law as regards liability for asbestos-induced illnesses. As a starting point, a claimant who sues for negligence must prove that her injury had the necessary causal connection with the defendant's tortious conduct. Although the orthodox 'but for' test serves claimants well in relatively standard cases,¹⁷ the crop of cases involving asbestos-induced illnesses have proven more difficult. The well-known facts of *Fairchild v Glenhaven Funeral Services* best illustrate this.¹⁸ The claimants contracted mesothelioma after being exposed to asbestos by multiple employers during the course of employment, however medical knowledge could not associate the disease with any one employer. Facing this "rock of uncertainty" as Lord Bingham put it, the House of Lords turned to *McGhee v National Coal Board* for hope, and concluded that the defendants could be made liable for merely increasing the *risk* of the claimants' injury.¹⁹

When formulating this principle, Lord Bingham was very much aware of the potential injustice it may cause to the defendants. His Lordship acknowledged that there was a possibility that "an employer may be held liable for damage he has not caused", and as was the case in *Fairchild*, "[t]he risk is the greater where all the employers potentially liable are not before the court."²⁰ Nonetheless, his Lordship held that,

"there is a strong policy argument in favour of compensating those who have suffered grave harm, at the expense of their employers who owed them a duty to protect them against that very harm and failed to do so, when the harm can only have been caused by breach of that duty and when science does not permit the victim accurately to attribute, as between

¹⁷ See *Barnett v Chelsea & Kensington Hospital Management Committee* [1969] QB 428.

¹⁸ [2003] AC 32.

¹⁹ [1973] WLR 1.

²⁰ n 18, [33].

*several employers, the precise responsibility for the harm he has suffered.*²¹

The important point in this case is that proof of causation was physically impossible on the basis of current medical knowledge.²² Under the orthodox rules of causation, the defendants in *McGhee*²³ and *Fairchild*²⁴ were *entitled* to have the benefit of doubt given to them, as it could not be proven on the balance of probabilities which of them actually caused the injury. The courts, however, felt compelled not to adhere strictly to such principles, as it would lead to an injured claimant bearing the loss of a risk she did not create.

Effective victim compensation can also be seen as the underlying motivation behind Lord Rodger's dissent in *Barker v Corus*, the next episode of the asbestos saga. His Lordship opined that if the majority's position, that liability under *Fairchild* should be several, was taken, "claimants will often end up with only a small proportion of the damages which would normally be payable for their loss."²⁵ Instead, his Lordship advocated for joint and several liability, even though this might lead to, in his words, "a form of rough justice" on the part of the defendants.²⁶ Indeed, when section 3 of the Compensation Act 2006 eventually gave effect to Lord Rodger's position,²⁷ the "draconian consequences" that subsequently followed did not prevent the Supreme Court in *Sienkiewicz v Grief* from allowing the claimants' claim for redress.²⁸

c. Avoiding the overburdening of defendants

Thirdly, and quite opposite to the previous consideration, the courts are wary of 'opening up the floodgates of liability', potentially resulting in a situation where numerous individual

²¹ Ibid.

²² Ibid, [153].

²³ n 19.

²⁴ n 18.

²⁵ [2006] 2 AC 572, [89].

²⁶ Ibid, [90].

²⁷ Compensation Act 2016, s 3.

²⁸ [2011] 2 AC 229, [58] (Lord Phillips).

claims are brought against a large number of defendants, or where the burden of liability would be disproportionate.

The latter was the prevailing consideration in *Barker*.²⁹ Four of the five Law Lords thought that if liability under the *Fairchild* principle mimicked the joint and several nature of liability under the usual causation rules, the result would have been out of proportion to the defendants' contribution to the chance of the disease. One of the key motivators in the majority's conclusion is the fact that at the time of the appeal, many asbestos-using employers have become insolvent, uninsured or untraceable. This was explicitly recognised by Lord Walker, who said that “[i]n such cases a single solvent employer... might be faced, in the absence of proportionately limited liability, with a very heavy liability for a relatively short period of tortious exposure during employment with that employer.”³⁰

The concern about exposing a disproportionate amount of liability to an indeterminate class of defendants is also one of the traditional policy arguments given to justify the law's reluctance to impose a duty of care in omissions cases. In *Stovin v Wise*, this took the form of Lord Hoffmann's “why pick on me?” argument.³¹ A duty to prevent harm to others, his Lordship said, “may apply to a large indeterminate class of people who happen to be able to do something. Why should one be held liable rather than another?”³² And in the specific context of failures to act by the police force, Lord Templeman in *Hill v Chief Constable of West Yorkshire*³³ was critical of the fact that if such a duty existed, “every citizen will be able to require the court to investigate the performance of every policeman.”³⁴

d. Preventing the manifestation of adverse behavioural effects

²⁹ n 25.

³⁰ n 20, [108].

³¹ [1996] AC 923.

³² *Ibid*, 944. Cf S Tofaris and S Steel, ‘Negligence Liability For Omissions And The Police’ (2016) 75(1) CLJ 128.

³³ [1989] AC 53.

³⁴ *Ibid*, 65.

Finally, the courts also consider whether recognising liability may encourage negative practices and/or discourage beneficial ones. Where imposing liability for failure to act might motivate defensive practices or the diversion of resources from otherwise beneficial activities, for example, courts have in some instances refused to recognise a duty of care.³⁵ In *Hill*, Lord Keith refused to exclude the possibility that a recognition of liability may lead to policing activities being carried out in a “detrimentally defensive frame of mind.”³⁶ Similarly, when considering whether a landlord owed a duty of care to warn a tenant of potential danger, Lord Hope in *Mitchell v Chief Constable of South Wales Police*³⁷ expressed worries that an affirmative duty would “deter social landlords from intervening to reduce the incidence of anti-social behaviour” and that if a claim was allowed, such legal proceedings “would involve them in a great deal of time, trouble and expense which would be more usefully devoted to their primary functions.”³⁸ In these instances, the court’s concern is evidently not with the implications that a finding of liability may have on the correlative rights and duties of the claimant and the defendant in a given case, rather it looks beyond that to consider the effects of tortious liability on the wider population.

Admittedly, however, this consideration is considered to be relatively weak and is often readily dismissed by the courts mostly for its speculative basis. This was recognised by Lord Toulson in *Michael v Chief Constable of South Wales Police*,³⁹ who said that “the court has no way of judging the likely operational consequences of changing the law of negligence in the way that is proposed.”⁴⁰ His Lordship draws attention to the fact that former disciplinary proceedings are already present in cases of police negligence and “it is speculative whether the addition of potential liability at common law would make a practical difference.”⁴¹ The courts’ relative reluctance to invoke adverse behavioural reasons

³⁵ See n 4, 442.

³⁶ n 31, 63.

³⁷ [2009] UKHL 11.

³⁸ *Ibid*, [28].

³⁹ [2015] UKSC 2.

⁴⁰ *Ibid*, [121].

⁴¹ *Ibid*.

can further be seen in the expansive developments on vicarious liability. In *Armes v Nottinghamshire County Council*,⁴² Lord Reed was unconvinced by counsel's argument that a finding of vicarious liability would discourage local authorities from using the foster care system, and instead resort to apparently less effective residential care. In response, his Lordship thought that such a result would only occur if, and only if, the local authorities were satisfied that the incidence of child abuse were lower in the latter than the former, and "[n]o evidence has been produced as to whether that is the position."⁴³ Similarly in *Cox v Ministry of Justice*,⁴⁴ counsel for the defendant prison service sought to argue that the imposition of vicarious liability in this case would lead to prisons adopting an unduly cautious approach when allocating other types of rehabilitation activities. Lord Reed, again, dismissed this proposition for being "entirely speculative."⁴⁵

e. Final remarks

The last observation illustrates an important point, that public-interest considerations when raised, do not always guarantee a policy-favourable outcome. Nevertheless, even though such policy considerations are sometimes dismissed, it does not follow that tort law is operated at the expense of the public interest. Sometimes, policy factors are displaced by other countervailing policy factors, as already illustrated by the conflict between compensating victims of asbestos exposure and preventing a disproportionate burden of liability on employers.

III. The conceptual argument: tort liability itself is in the public interest

Let us imagine *arguendo* a body of tort law that is shaped entirely by interpersonal considerations, without appeal to the public

⁴² [2017] UKSC 60.

⁴³ *Ibid*, [68].

⁴⁴ [2016] UKSC 10.

⁴⁵ *Ibid*, [44].

interest. Image also, if one may, that in this system of tort law, judicial decisions are purely based on interparty factors, and policy-based reasoning is never resorted to. (Such a system of law may well exist in theory, but as demonstrated in *Part II*, it is not the law of tort as have been developed in this jurisdiction. In our tort law, community welfare considerations have played a prominent role in driving doctrinal developments.) It is submitted that even in such a fictional system of tort, the mere recognition of liability is aligned with the wider public interest, irrespective of whether the decision to impose such liability are made with explicit resort to policy considerations.

The first reason is that individual rights and entitlements, at least those protected by the law of tort, can be traced back to some wider public-interest justification. The claim that tort law gives effect to individual entitlements in lieu of the public interest assumes that, somehow, it is possible to draw a distinction between those two factors. However, the possibility of that distinction has been thrown into question. Peter Cane, for example, wrote that “all rules and principles that state individuals’ legal rights and obligations are underpinned by policy arguments.”⁴⁶ James Plunkett gives the example of an assault:

“So the interpersonal right not to be assaulted by another person, for example, whilst justifiable on the ground of principle (I would not wish to be assaulted by you therefore I have no right to assault you) could be seen as actually justified on the policy-based grounds that permitting assault would, amongst other things, lead to higher taxes to recover the associated costs of medical treatment, could indirectly lead to more serious crimes being committed, and may make people less likely to interact with others, thereby making the world a worse place to live – in other words, on the basis that it would be bad for the community.”⁴⁷

⁴⁶ P Cane, ‘Another Failed Sterilisation’ (2004) 120 LQR 83, 92.

⁴⁷ J Plunkett, ‘Principle and Policy in Private Law Reasoning’ (2016) 75(2) CLJ 366, 376.

As this quote shows, absent a meaningful way to distinguish individual versus public matters, the forcefulness of the argument that tort law neglects issues of community welfare is diminished.

Secondly, in addition to its primary aim of compensation, tort law is also instrumental to other public interest aims. The imposition of tort liability in itself has non-compensatory effects; most notably, it can serve as a deterrent to wrongful conduct.⁴⁸ When tortious conduct is penalised, it serves to increase the cost of the activity, thereby discouraging wasteful behaviour in society. So, whilst the decision to impose liability may be made with reference to individual entitlements, it may nonetheless have an external effect that benefits other members of society. Although the compatibility between tort (and generally, private) law and punishment has long been a bone of academic contention, the modern prevailing view seems to be that a function of punishment is at least accommodable within the structure of tort (private) law.⁴⁹ One of the traditional arguments against the adoption of a penal paradigm in tort law is the assertion that tort (private) law, with its roots in corrective justice, is concerned with the dual interaction between claimant and defendant.⁵⁰ Punishment, on the other hand, is a one-sided consideration which focuses only on the defendant, and therefore is incapable of explaining tort (private) law. However, as the editors of *Punishment and Private Law* reveal, this involves a *non sequitur*: “the fact that a particular model may explain the law or a good portion of it as it presently stands does not mean that the law should be changed so as to bring it into increased conformity with that model... [in other words,] simply pointing to respects in which private law is bilaterally orientated identifies no reason in support of its being so structured.”⁵¹

⁴⁸ G Williams, ‘The Aims of the Law of Tort’ (1951) 4 CLP 137, 144-151.

⁴⁹ See generally E Bant, W Courtney, J Goudkamp and J Paterson (eds), *Punishment and Private Law* (Hart Publishing 2021).

⁵⁰ E Weinrib, n 1.

⁵¹ n 49, 5.

Conclusion

Whilst it is apt to say that tort law prioritises individual interests, it would be wrong to say that it neglects the wider public interest. Not only have community welfare considerations been at the heart of much judicial decision-making, tort liability, as a concept, cannot be said to be misaligned with the public interest. The latter has to do with the inseparable community welfare justifications that ground individual rights, as well as the public functions tort law play in the community.

Bibliography

Cases

- Armes v Nottinghamshire County Council* [2017] UKSC 60
- Cox v Ministry of Justice* [2016] UKSC 10
- Reynolds v Times Newspapers Ltd* [2001] 2 AC 127
- Al-Fagih v H H Saudi Research & Marketing (UK) Ltd* [2002] EMLR 13
- Byrne v Dean* [1937] 1 KB 818
- Robinson v Chief Constable of West Yorkshire Police* [2018] UKSC 4
- Poole Borough Council v GN* [2019] UKSC 25
- Darnley v Croydon Health Services NHS Trust* [2018] UKSC 50
- Stovin v Wise* [1996] AC 923
- Hill v Chief Constable of West Yorkshire* [1989] AC 53
- Mitchell v Glasgow City Council* [2009] UKHL 11
- Michael v Chief Constable of South Wales* [2015] UKSC 2
- Kent v Griffiths* [2001] QB 36
- Capital and Counties plc v Hampshire County Council* [1997] QB 1004
- Barrett v Ministry of Defence* [1995] 1 WLR 1217
- Van Colle v Chief Constable of Hertfordshire; Smith (FC) v Chief Constable of Sussex Police* [2008] UKHL 50
- Barnett v Chelsea & Kensington Hospital Management Committee* [1969] 1 QB 428
- McGhee v National Coal Board* [1973] 1 WLR 1
- Wilsher v Essex Area Health Authority* [1988] AC 1074
- Fairchild v Glenhaven Funeral Services Ltd* [2003] 1 AC 32
- Barker v Corus UK Ltd* [2006] 2 AC 572
- Sienkiewicz v Greif (UK) Ltd* [2011] 2 AC 229
- Durham v BAI (Run Off) Ltd* [2012] 1 WLR 867
- Heneghan v Manchester Dry Docks* [2016] EWCA Civ 86
- Patel v Mizra* [2016] UKSC 42

Statutes

Compensation Act 2006

Defamation Act 2013

Journal articles and book chapters

P Cane, *Another Failed Sterilisation* (2004) 120 LQR 83

J Plunkett, *Principle and Policy in Private Law Reasoning* (2016) 75(2) CLJ 366

H Sheinman, 'Tort Law and Distributive Justice' in John Oberdiek, *Philosophical Foundations of the Law of Torts* (OUP 2014),

S Tofaris and S Steel, *Negligence Liability For Omissions And The Police* (2016) 75(1) CLJ 128

A Robertson, 'Rights, Pluralism and the Duty of Care' in D Nolan and A Robertson, *Rights and Private Law* (Bloomsbury Publishing 2011)

G Williams, *The Aims of the Law of Tort* (1951) 4 CLP 137

Books

A Beever, *Rediscovering the Law of Negligence* (Hart Publishing 2013)

E Bant, W Courtney, J Goudkamp and J Paterson (eds), *Punishment and Private Law* (Hart Publishing 2021)

J Coleman, *The Practice of Principle: In Defense of a Pragmatist Approach to Legal Theory* (Oxford University Press 2001)

E Weinrib, *The Idea of Private Law* (Harvard University Press 1995)

E Weinrib, *Corrective Justice* (Oxford University Press 2012)