

Personal Injuries Bar Association Annual Lecture, London

Abolishing Personal Injuries Law - A project

Lord Sumption, Justice of The Supreme Court

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It is now exactly twenty years since Patrick Atiyah published *The Damages Lottery*, one of the most eloquent polemics ever to be directed against a firmly entrenched principle of law. Professor Atiyah was concerned with the law of negligence generally. But his book has generally been treated as an attack on personal injuries law and its practitioners. Most of his arguments and all of his solutions were directed against the concept of fault-based liability for personal injury. He proposed to abolish liability in tort for causing personal injury. In the case of road accidents, then as now by far the largest single source of personal injury claims, the right to sue for negligence would be replaced a system of compulsory, no fault, first-party insurance. In the case of other sources of personal injury, there would be no alternative source of provision. Atiyah proposed to encourage people to buy first-party insurance, but to leave it, in the final analysis, up to them.

Atiyah's criticisms had never previously been advanced with such rhetorical force. But they were not new. Many of them had appeared in his textbook *Accidents, Compensation and the Law*, the first edition of which appeared in 1970. A year before that, the Woodhouse Committee in New Zealand had proposed to replace the right to sue with a system of state-funded social provision. These recommendations were accepted by the New Zealand government and enacted in the Accident Compensation Act 1972. Even more radical proposals had been made by an Australian commission of inquiry, over which Sir Owen Woodhouse also presided, and of which Atiyah himself was a member. But these were never acted on. In England, the Pearson Commission had been appointed in 1973 and reported in 1978. They recommended a somewhat similar scheme, but funded from general taxation. After some years of hoping that the whole issue would go away, the British government eventually binned the report and resolved to take no action. As a result, the issue had almost disappeared from sight by the time that *The Damages Lottery* was published in 1997.

The book generated some brief ripples in the placid waters of academic journals, and was the subject of a formidable riposte by Professor Burrows as well as some more technical criticisms by other academic lawyers and sociologists. It is still read as a masterpiece of polemical contrarianism. But it completely failed in its main object, which was to interest the policy makers, journalists and general public to whom it was primarily addressed. More recent editions of *Accidents, Compensation and the Law*, which are due to Peter Cane, have kept the cause alive. But his proposals, which are slightly different from Atiyah's, have had limited influence.

You may well ask then why I should think it worth returning this controversy tonight. I think that there are at least two reasons for doing so.

One is that we are witnessing a renewed bout of indignation about "compensation culture". This has been a recurring source of controversy in the press for some years, but more recently, the cause has been taken up by the government. In 2004 and again in 2012 government intervention followed intensive and very public lobbying by motor insurers. This has resulted in a series of measures to curtail the activities of claims management companies, and changes to the solicitors' conduct rules with the same end in view. At the same time, there have been radical changes to the incidence of costs, most of which have been largely unfavourable to Claimants. More recently, the Queen's speech included proposals to introduce legislation requiring the submission of prescribed forms of medical evidence before insurance claims can be settled, and a statutory scale of damages awards for whiplash claims. The mounting concern about compensation culture is powered by a number of factors. The main ones are the upward pressure on motor insurance premiums arising from an increase in the number and value of claims, governmental concern about the cost of claims against the National Health Service, and persistent stories in the press (not always strictly accurate) about unmeritorious claims.

There is, however, a more fundamental reason for returning to Professor Atiyah's radical proposals. There are some propositions which are so deeply entrenched in the instincts of lawyers and the public at large that they are never critically examined. The duty of care to avoid injuring our fellow men may well be the most deeply entrenched of all. As Lady Justice Hale observed in her judgment in the Court of Appeal in *Parkinson v St. James and Seacroft University*

Hospital NHS Trust [2002] QB 266, at para 56, “the right to bodily integrity is the first and most important of the interests protected by the law of tort.”

By the leisurely standards of the common law, this is a relatively recent development. The modern law of negligence was made by nineteenth century judges, who first recognised the existence of duties of care independent of the much older duties recognised by the law of trespass. This major development of our law occurred largely in cases about negligently inflicted personal injury and property damage. The law of tort recognises these species of physical injury as inherently actionable, subject only to special defences such as *volenti*, or limitations on the recoverable damages, such as causation and remoteness. By comparison, purely economic interests are not inherently actionable, but only in specific and carefully circumscribed cases. It is, as a general principle, desirable that judges and practitioners should reflect on the social and moral foundations of the law which they practise. The duty not negligently to injure other people is imposed by law, in other words by the state. Like any non-consensual obligation, it must ultimately be founded either on social utility or on collective moral values.

Atiyah’s basic argument against the law of negligence was that it lacked social utility. Drawing mainly on the material collected by the Pearson Commission, he pointed out that almost all personal injury claims were brought against insured parties or public bodies. The Pearson Commission estimated that in 1973 88% of personal injury claims by number and 94% by value were brought against insured parties, and most of the rest against public bodies. That conclusion will surprise no one. In most cases it is not worth suing any one else. Given that most of the increase since Pearson comes from road accidents, where liability insurance is compulsory, the proportion of insured claims is likely to be at least as high today.

The cost of meeting claims for negligently caused personal injury was estimated by Pearson at about 1% of the gross national product of the United Kingdom. There is a measure of uncertainty about all such estimates, but whatever the true proportion, it is a significant figure, and it represents a substantial social cost. In the first place, liabilities that fall to be met by insurers or by the state are effectively socialised across the population at large. We all, or almost all, pay for them in the form of higher insurance premiums or taxes. Studies suggest that

although individual insurance premia do to some extent vary with an individual's personal claims record, premiums are still largely fixed according to class of business and risk category.

Secondly, the cost is not limited to the amount of the damages. Perhaps the most remarkable figure in the statistical annexes to the Pearson Report was the Committee's estimates of the cost of making and processing claims for personal injury. They concluded that legal and administrative costs amounted to 47% of the total cost of settling personal injury claims. This figure was proposed subject to a large margin of error, but it is broadly consistent with other evidence. According the Young Report, published in 2010, legal costs of resolving claims against the National Health Service had accounted for 36% of the total cost of settling personal injury claims in the previous year, and this figure does not include non-legal administration costs. There is no reason to think that the insurers' costs of processing claims against non-state bodies is any different.

Thirdly, although the taxpayer has a bottomless pocket, insurers do not. Beyond a certain point, the cost of rising claims volumes cannot simply be piled onto premiums and begin to erode profits. In the longer term, the result is likely to be a contraction of insurance capacity. In extreme cases, insurers can simply withdraw from the more exposed sectors of the liability market. This is not a purely hypothetical prospect. It is what actually happened to product liability insurance in the United States in the late 1980s, as a direct result of the explosion of claims for long-term latent industrial diseases and environmental pollution. The market effectively ceased to exist, and had to be recreated offshore on more restrictive terms.

A number of things might be thought to follow from the socialisation of the cost of personal injury claims. A system which makes compensation dependent on fault makes little sense if the damages are being paid not by the persons at fault, but by society as a whole. One is entitled to ask: why should the private law distribution of rights and liabilities between individuals or their employers determine the incidence of what is in reality a social cost? Let us leave the moral dimension out of it for the moment. I will return to it later. From a purely utilitarian point of view, if the cost of compensating people for personal injury falls on society at large, there is no rational reason to distinguish between personal injury which has been caused by some one's fault, and personal injury which has occurred without fault. Equally, there is no rational reason why the victims of accidents, however caused, should necessarily recover a full indemnity as the

law of tort presently requires. Since we are all paying for the tortiously inflicted injuries, we might as well treat it as a social service and make it respond to our collective social priorities rather than to the common law rights of individual claimants.

Let me start with compensation culture. The problem about this protean phrase is that it is a slogan, and not a carefully thought out position. It encompasses at least two complaints, which are very different although they share a common rhetoric. One is that too many fraudulent claims are being made: in other words people are being too greedy. The other is that too many justified claims are being made: in other words, the law is being too generous. The government seems to be making the first point, but Professor Atiyah was making the second.

There undoubtedly is a problem about fraudulent claims, but I do not think that it is a problem calling for a fundamental rethink of our law. Detected frauds have increased significantly, although how much of this is due to more diligent detection and how much to declining standards of honesty is hard to say. The main issue concerns small consumer claims, where it is likely to cost the insurers a great deal more to investigate a claim than just to pay up. Motor insurance fraud, which accounts for nearly two thirds of detected fraud, is particularly difficult for insurers to control through the terms of their contracts. Insurance is compulsory and contractual restrictions on cover or procedural conditions for pay-outs are tightly controlled by statute. So it may well be that legislation is needed in order to deal with it. But it is hard to regard this as raising a great issue of principle. The law does not countenance fraud and never has. Subject to seeing the draft bill, the current proposals strike one as a relatively modest regulatory adjustment.

The more fundamental and controversial issue is not about fraudulent claims but about justified ones.

There has been a persistent rise in both the number and value of claims for personal injuries. The Pearson Commission estimated that in 1973 there had been about 250,000 claims a year. According the Association of British Insurers, the corresponding figure for 2013-14 was about 1,200,000. Almost all of this increase was attributable to road accidents, which now account for

about 80% of all accidents. Since the number of road accidents does not seem to have increased in proportion, it is reasonable to conclude that the main factor at work is an increased propensity to claim, especially among those involved in road accidents. The Pearson Commission concluded that only 11% of people injured in accidents even considered the possibility of claiming. Survey evidence suggested that by far the most significant reason was that they did not realise that they could. The main reason for that was ignorance: ignorance of the significance of their symptoms; ignorance of the law or the workings of the legal system; ignorance of the standards expected of others. It seems likely that the increased propensity to claim is due at least in part to greater knowledge of these matters. This is not in itself a bad thing. If people know more today about their rights, that may well be due, at least in part, to the active solicitation of claims by solicitors and claims management companies. To those like me who believe that litigation is an evil, the active solicitation of claims can seem distasteful. But it is really not a matter of taste, and I find it impossible to say that it is wrong. If the law entitles the victim of an accident to compensation, it ill becomes us to criticise him for knowing it and claiming. It is true, of course, that people who know that there is a claim to be made tend to reinterpret events in a way that justifies claiming. But there is nothing new about that, nor is it peculiar to personal injuries claims. Wish fulfilment is a basic trait of human nature, and a problem about witness evidence in every field of litigation.

Behind the growing propensity to claim lies another fundamental change which is perhaps even more significant. Unlike their forbears, people are no longer disposed to accept the wheel of fortune as an ordinary incident of human existence. They regard physical security not just as the normal state of affairs but as an entitlement. I do not find this surprising or discreditable. It is a perfectly rational response to some significant developments over the last half-century: higher expectations of government, to some extent encouraged by governments themselves; higher expectations of the law as an instrument of social welfare; higher professional standards; a more intense regulatory environment; and improvements in the technical competence of humanity, which have given us much more control over our own and other people's fortunes. The result of these developments is that a far higher proportion of personal injuries are regarded as avoidable. Now, to say that injury was avoidable does not mean that it was negligently caused. But it is a major step in that direction. It has inevitably affected the standards of responsibility which the law imposes on us in our treatment of each other.

Judges have undoubtedly expanded the scope of duties of care over the past half-century, as well as the range of consequences for which a wrongdoer may be liable. But in doing this, they have merely followed the collective instincts and values of the public at large, which within limits is a legitimate influence on the common law. If the law says that we are entitled to blame other people for rather more of our misfortunes than hitherto, it is really rather absurd to complain about a culture of blame, as if this was somehow a symptom of our collective moral degeneration. The importance of Professor Atiyah's work was that he was honest enough to recognise that if we want to influence the number and incidence of personal injury claims, the only way to do it is to alter peoples' legal rights, instead of going around lamenting the enforcement of what legal rights we have.

There are two basic criticisms to be made of the use of tort law to address the problems of personal injury, and they point in different directions. One is directed against the use of fault as the touchstone of liability. The other is directed at the scale of claims and at the corresponding social cost.

Let me deal with fault first. There are a number of arguments in favour of fault-free systems on the New Zealand model. One is that they are more efficient, because they avoid considerable investigatory and legal costs of attributing blame. The second is that if the object of the exercise is to address the problem of personal injury, there is no obvious reason to give special treatment to those victims who have had the good fortune to discover that their injuries were some one else's fault. A third is that fault-based systems tend to influence behaviour in ways that are over-defensive and not necessarily in the public interest.

Let me take a well-known example, which illustrates all three points: the disputes in latter half of the twentieth century about birth deformities attributed to drugs designed to relieve the symptoms of morning sickness in pregnancy. Thalidomide was invented in Germany. It was marketed as a treatment for nausea and insomnia in pregnancy, at a time when scientists believed that drugs taken by pregnant women could not cross the placental barrier and affect the developing foetus. This view was tragically mistaken, and as a result many thousands of babies were born with serious physical deformities. The drug was marketed in the UK between 1958 and 1961 by Distillers Biochemicals. The only cause of action available in England to the

children who suffered the deformities was an action in tort against Distillers. This depended on proving negligence against Distillers, which formulated the product under licence but was neither the inventor nor the manufacturer of the active ingredient. That proved to be an expensive and time-consuming process with distinctly uncertain prospects of success. After six years of litigation there was a settlement in 1968 under which the allegations of negligence were withdrawn in return for an offer of 40% of the proved damages. That even this much was achieved was due to a press campaign in which the main theme was that Distillers owed social and moral obligations going beyond the legal obligations imposed by the law of tort.

Now let me turn to another well-known case. Bendectin was the brand name of a product comprising vitamin B6 and a standard anti-histamine, which was marketed in the United States in the early 1980s for the treatment of morning sickness and insomnia in pregnancy. A number of women who had taken it gave birth to deformed babies. Yet these deformities were never shown to have been caused by Bendectin. Comprehensive testing both before and after the event showed it to be safe. It had been approved by the US Food and Drugs Administration, one of the world's more effective drug licensing authorities, which had persistently refused to allow the marketing of Thalidomide at a time when it was available in most other countries of the world. Indeed, the FDA has recently reauthorized the marketing of the active ingredient of Bendectin under a different brand name. Yet the manufacturers had been forced to withdraw it from the market in 1983 because the cost of defending class actions made it unprofitable, even though none of these actions succeeded. Some of the literature suggests that the disappearance of Bendectin from the market for 30 years had really quite serious consequences. It deterred drug companies from developing any drugs specifically designed for pregnant patients, and pushed many patients towards other less reputable and less intensively tested treatments.

The legal environment is very different in the United States, but Thalidomide was primarily a British and German tragedy, and defensive responses to the threat of liability are certainly not confined to the United States. *Tomlinson v Congleton Borough Council* [2004] 1 AC 46 is a good illustration of the way in which the fear of liability in tort can lead to the total withdrawal of facilities that are valued by the great majority of the population who use them responsibly. The basic problem in *Tomlinson* was the attempt of the local authority to eliminate all risk, instead drawing a balance between risk and the adverse consequences of eliminating it. In doing this, they went beyond what the law required. The effect on the liberty of others was deplorable, and

the House of Lords duly deplored it. But the reaction of the local authority was in fact a perfectly rational response to a real problem posed by the current state of the law. Balancing risk of injury against the consequences of eliminating it requires a complex and no doubt expensive case-by-case assessment. For every case in which the risk is too remote to justify the infringement of liberty, there will be half a dozen where a judge will decide the other way. From the point of view of the rational Defendant, it is simpler, cheaper and safer to ban the relevant activity, and far more likely to protect council officers from criticism when something goes wrong.

These are all in their different ways extreme cases. Nevertheless, they do I think illustrate why the law of tort is an extraordinarily clumsy and inefficient way of dealing with serious cases of personal injury. It often misses the target, or hits the wrong target. It makes us no safer, while producing undesirable side effects. What is more, it does all of these things at disproportionate cost and with altogether excessive delay.

It is sometimes suggested that the fault is a necessary element in any scheme of compensation, because it deters sloppy practices, thereby improving general standards of safety. I am sceptical about this proposition. Most of the available empirical studies have been carried out in the United States. I cannot claim to have read all of them, although I have read a fair number. My tentative conclusion is that in spite of the dramatically higher level of US damages awards, there is no consistent evidence of any deterrent effect specifically attributable to the prospect of fault-based civil liability.

The whole notion of deterrence assumes that there is a minimum of reflection behind the actor's decisions. Negligence normally consists in the absence of the very processes of reflection which the notion of deterrence assumes. It generally happens through ignorance, incompetence or oversight, none of them states of mind which are normally associated with reflection upon the possible consequences. On the roads, which is where the great majority of personal injuries occur, a collision is just as likely to injure the negligent driver himself as other road-users. Yet for all that, personal injuries sustained in road accidents have risen inexorably.

The deterrence theory has more to be said for it at what one might call the procedural level. The designer of a safety procedure or a product is deliberately applying his mind to the question of safety. But even here, any deterrent effect is heavily diluted by the availability of liability insurance, which is compulsory in the case of liability to employees and normal in the case of product liability. The evidence tends to suggest that the prospect of liability in tort achieves nothing that would not be achieved anyway by the prospect of reputational damage or criminal sanctions. Criminal sanctions are now more widely enacted and more efficiently enforced. They are also, as a general rule, uninsurable. All the survey evidence tends to suggest that as a way of educating those whose job it is to design for safety, they are a great deal more persuasive than the law of tort.

I suspect that the main reason why most people instinctively approve of the fault principle has nothing to do with utilitarian considerations of this kind. The law is generally sensitive to considerations of economic efficiency, although judges rarely acknowledge the fact. But one area which has been more or less impervious to considerations of economic efficiency is the legal right to bodily integrity. It is a right founded on profound cultural instincts. Questions of cost tend to seem trivial by comparison. The debate about compensation culture really turns on complex cultural issues about moral responsibility and blame which have very little to do with economic efficiency. The public's view is based on two simple moral judgments. One is that he who causes physical injury must make it good financially. The other is that it is a proper function of the courts to find facts and distribute blame, simply as a satisfaction for victims or their relatives.

Personally, I would question whether there really is a moral case for imposing liability in damages on the ground of negligence. One might perhaps make an exception for professional failures where the Defendant has undertaken to exercise an appropriate measure of care and the relationship with the victim, although not actually contractual, is equivalent to contract. Except in that situation, negligence is not morally culpable. It is a normal feature of human behaviour. This is not the place and 6.40 in the evening is certainly not the time to embark on a profound survey of corrective or distributive justice. I will only say this. I can imagine a moral case for imposing an absolute liability on those who cause physical damage to others, simply on the ground that they are the agents of some invasion of the victim's physical integrity. That was the basis of the more limited and now largely redundant tort of trespass to the person. I can also imagine a moral case for imposing liability on those who intentionally or recklessly cause physical damage to others. But liability for

negligence does not depend on a person's mere infliction of damage, nor on his state of mind. It depends on his falling below some objective standard of conduct to which he has not usually assented, but which the law imposes upon him. It seems to me that the only possible justification for the law doing that is its social utility. Yet the arbitrary results and incomplete coverage of a fault-based system, combined with its prodigious cost and unwelcome side-effects, seriously undermine the social utility of the law of tort as a way of dealing with personal injury.

To some extent, we are already moving towards a system of strict liability, or at any rate of stricter liability. This has been the tendency of legislation on the subject for some years. Thus strict liability is in principle imposed by the Animals Act for physical injury done by animals and by the Consumer Protection Act for injury done by defective products offered for sale commercially. There are special defences in each case, but they are narrowly framed and even more narrowly construed. Such legislation seems to me to be a perfectly reasonable response to the general availability and widespread use of liability insurance in these classes of case. It would probably have made litigation like thalidomide a great deal easier to resolve, had it been in force at the time.

My own experience, and perhaps yours too, is that even in areas where traditional notions of fault prevail in theory, the courts have in practice moved noticeably closer to strict liability, albeit very gradually and without acknowledging that they are doing it. This is because the whole forensic process of attributing fault is inherently biased in favour of the Claimant. Once it is established that something has gone wrong that was caused by the Defendant's act, it can be very difficult to persuade a judge that it wasn't the Defendant's fault. The law determines the standard of care which it imposes on individuals in advance. But the court finds fault in arrears with all the forensic advantages of hindsight. The evidence will commonly reconstruct the exact chain of causation by which the injury occurred, starting from the injury and working backwards to the act. But the judge finding fault, looks at the chain from the other end, starting with the Defendant's act. The outcome seems obvious. What actually has happened was always going to happen. And what was always going to happen should have been obvious to the reasonable man, even if it wasn't at all obvious to the particular Defendant. The whole forensic process lends a spurious clarity and inevitability to a chain of events that actually a lot less straightforward. The result may be very like strict liability, but it is strict liability with most of the uncertainty and all of the costs associated with a fault-based system.

It will by now be apparent that I am not a great admirer of our current system of distributing liability according to fault. But, and this is where the title of my lecture is misleading, I have no doubt that it will survive. There are at least three reasons why it will survive.

In the first place the only obvious alternative is a system of fault-free compensation funded either from taxation or by compulsory insurance. This would be a great deal less wasteful, because it would reduce the proportion of the cost of settling personal injury claims represented by investigatory and legal costs. But the additional coverage involved in dispensing with fault would enormously increase the overall cost. The New Zealand example is said to have been accepted by public opinion there, but it has not been adopted in a single other common law country. The second reason why fault will survive as the essential criterion for compensation is the phenomenon so familiar to economists of concentrated benefits but diffused costs. The hardships and costs associated with grave disabilities are visible and for those affected catastrophic; while the costs are subtle, indirect and thinly spread across the whole population. The one area where the public feels the cost directly is motor accidents. Annual motor premiums are a significant item in family budgets and we all notice when they have gone up. That no doubt accounts for the fact that government initiatives in this area have been concentrated in the motor sector. The third and perhaps most significant reason why it will survive is that it responds to widespread public notions about personal responsibility and the proper function of law. I do not myself share these notions, but I am in a minority on this. It is fundamental to my conception of the judicial function, that I do not sit just to give effect to my personal moral preferences.

My prediction would be that fault will remain the touchstone of our law of personal injuries, but that the principle will be eroded at the edges by statutory intervention from one end and judicial hindsight from the other. The result will be to increase the overall cost of personal injury claims and, I suspect to provoke a legislative reaction as mounting insurance premiums and pressures on the NHS budget lead to calls to control the costs. The outcome is likely to be the abolition of the principle of full indemnity and its replacement by a statutory measure of damages with a view to achieving a better balance between public and private interests.

I would expect this to take two forms. One is the imposition of value thresholds on personal injury claims, with a view to eliminating small claims. Small claims account for the great majority of claims and are disproportionately costly and cumbersome to administer. The second will be the capping or abolition of certain heads of loss. There is a case for abolishing damages for non-pecuniary losses, or at least limiting it to long-term pain and suffering and loss of amenity. There is a case for limiting damages for loss of earnings to the amount necessary to support a reasonable standard of living, rather than the superior standard of living which the richest accident victims might have expected if they had not been injured. To some extent these things are already happening. Successive decisions of the Supreme Court of Canada have limited the scope for large awards of non-pecuniary loss. The same trend is observable in the Judicial College guidelines in this country. In New South Wales liability thresholds and caps on awards for loss of earnings were adopted for motor accidents by legislation enacted in 1999, and extended to other personal injury claims in 2002. The British government's current proposals appear to envisage a rather similar system of thresholds and caps for whiplash injuries. It is I think significant, and indicative of the direction of travel, that the New South Wales legislation followed large and unpopular increases in insurance premiums. But it is also right to point out that it was accompanied by other measures making altogether more generous statutory provision for certain categories of victim than anything that has so far been contemplated in the United Kingdom. The statutory damages scheme for motor accidents extends in New South Wales to personal injuries occurring without fault. Moreover, since 2006 there has been a generous statutory scheme for compensating those suffering from personal injuries involving long-term care. Looking after the principal losers may be the price to be paid for limiting the generality of accident claims.

What all of this means is that the officers of this association can rest easy in their seats. It is likely to be needed for a considerable time to come.