

Fault-based liability is the principle that refers to the idea that liability for harm or injury only arises when an individual is at fault by being responsible for an act or omission that results in harm of another person or to their property or if the individual has acted negligently, intentionally, or recklessly. This principle is a vital part of tort law in England and Wales, requiring proof of fault by establishing a duty of care, breach of the duty of care, and the causal link between the defendant's breach and the claimant's harm or injury.

Despite justifications of this system for promoting deterrence and giving closure and compensation to victims for their injuries and losses suffered, there are also many criticisms of gaps in the system which brings forth arguments about the tort compensation system being as fair as the lottery, with the award of damages depending entirely on chance.<sup>1</sup>

### **Strengths of Fault-based Liability**

Fault-based liability has many strengths. Burrows argues that the tort system rests on it being a system of individual responsibility to enable the claimant to receive compensation for injury caused due to another's blameworthy conduct.<sup>2</sup> Such liability clearly aligns with the principles of corrective justice and deterrence and upholds the system of fairness by holding those who cause harm to be accountable for their negligent actions. Such a compensation system allows the claimant to clear themselves of blame and proves that the tortfeasor was wrong, giving vindication and closure to the individual who was harmed.

Furthermore, Hershovitz argues that the main purpose of tort law is to empower an injured claimant to seek compensation for the defendant's blameworthy conduct.<sup>3</sup> This reinforces corrective justice and creates a balance of fairness and justice which the tortfeasor upsets by their acts of negligence. Fault-based liability encourages individuals to take precautions against injuring others. The judgement in the case of Robinson<sup>4</sup> also included acknowledgement by the supreme court that tort law not only offers financial compensation but also provides vindication by acknowledging that the police officer wronged the public and the claimant.

Moreover, fault-based liability allows the claimant and tortfeasor to rely on third party insurance for a road traffic accident so that the defendant is able to pay for the compensation in the event of liability and also ensures that the claimant receives compensation.

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<sup>1</sup> Patrick Selim Atiyah, *The Damages Lottery* (Hart Publishing, Oxford, 1997) 143

<sup>2</sup> Andrew Burrows, *Understanding the Law of Obligations: Essays on Contract, Tort and Restitution* (Hart Publishing, Oxford, 200) 122-123

<sup>3</sup> Scott Hershovitz, Treating Wrongs as Wrongs: An Expressive Argument for Tort Law (2017) 10(2) *Journal of Tort Law*, 405-447

<sup>4</sup> *Robinson v Chief Constable of West Yorkshire Police* [2018] UKSC 4

## **Weaknesses of Fault-based Liability**

Despite the many strengths of fault-based liability, there are also many criticisms against it. Atiyah argues that there are many inconsistencies within the tort compensation system, this greatly affects the compensation payable and brings forth the question of whether the award is proportional to the degree of fault.<sup>5</sup> Atiyah also proposes criticism about tort law imposing liability without fault in cases of vicarious or strict liability. Furthermore, the 'fault' is determined based on what a reasonable person would be expected to do but does not take individual circumstances into account.

In addition to that, Peter Cain and James Goudkamp argue that the fault principle requires compensation to be paid only when it can be proved that an injury was caused by another individual however it fails to compensate people whose injuries were not caused by another individual such as people who suffer injuries but are unable to identify the blameworthy individual.<sup>6</sup> This further proves Atiyah's argument of the tort system being like a lottery.

Lord Sumption also critiques the tort compensation system for requiring expensive litigation costs and for being a waste of resources which reduce the amount of compensation available for a victim.<sup>7</sup>

## **Compensation systems**

The current compensation system of fault-based liability is supported by third party insurance under which the claimant bears responsibility to prove that the defendant acted negligently and breached their duty of care. If the claimant is successful in their claim, the defendant is covered by their insurance to pay compensation for the harm they caused. This system protects the tortfeasor by making sure that he can pay in the event of liability and also ensures that the claimant receives the money to cover for the harm, injury, and losses suffered. This system emphasises the importance of individual responsibility by making sure that the person at fault compensates the individual who was harmed due to their negligent actions. A key example of this is how having insurance is necessary to drive on the roads of England and Wales, it is illegal to drive without insurance which not only ensures safety of the driver but also the safety of other drivers. Kawende states that this system incentivises individuals to take precautions against injuring other in circumstances of liability under personal injury law.<sup>8</sup> However, the many criticisms put forward by Atiyah and Lord Sumption regarding the uncertainty of compensation

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<sup>5</sup> Patrick Selim Atiyah, *The Damages Lottery* (Hart Publishing, Oxford, 1997) 143

<sup>6</sup> Peter Cane and James Goudkamp, 'Accident Compensation in the Twenty-First Century', Atiyah's *Accidents, Compensation and the Law* (9<sup>th</sup> edn, Cambridge University Press 2018)

<sup>7</sup> Lord Sumption, 'Abolishing Personal Injury Law – A Project', Lecture at the Personal Injuries Bar Association (2017)

<sup>8</sup> Dylan Kawende, 'The Merits of Fault-based Tort Law – Responding to Lord Sumption' (2021)

for victims, inconsistent outcomes, and unnecessary costs under fault-based liability bring attention to alternative compensation systems that have been proposed or have been implemented in different countries as a solution.

### First party insurance

Atiyah argues that tort law should be abolished for road traffic accident cases and should instead be replaced with compulsory first-party insurance. This system would allow individuals to ensure themselves against their own losses regardless of who is at fault which means that there would be no need to take such claims to court as the person injured would directly be able to receive compensation from their insurer. This would also allow a person to recover losses in situations where the injury is caused by an unidentified person. However, despite the advantages of this system, the question arises that if first-party insurance was made available, would there be any legal action that would be there to incentivise drivers to take care to not harm others? An argument of morality arises from this question however, in the event of negligence or recklessness such as an accident caused by a driver who despite being tired chose not to rest and continued driving against the Highway Code<sup>9</sup> Rules, what would legally incentivise them to not drive for the sole purpose of avoiding harm to others if they know that they will not be held responsible for injuring them. Additionally, there are concerns about first-party insurance being accessible and affordable for all individuals as a person's income may limit their choices and cause unfairness in the justice system.

### Strict liability

Strict liability schemes remove the need to prove that someone was at fault by being negligent, the only proof required is to show that harm occurred, this can be seen in the Consumer Protection Act<sup>10</sup> where the law had to move towards strict liability due to the difficulty in proving the negligence of drug companies however, this scheme still requires proof of the existence of a causal link between the act and injury and the need to find a responsible defendant.<sup>11</sup>

It may be argued that this system is unfair as if there is no need to prove fault, a defendant may still be held liable even if they had taken all reasonable steps to avoid causing harm. Furthermore, this scheme also would also remain unfair if the victim is unable to identify the wrongdoer.

### No-Fault schemes

This scheme allows victims to receive compensation without the need to prove who caused the harm and focus on the actual injury rather than the way it was caused. This process is efficient and saves legal costs. New Zealand operates under the no-

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<sup>9</sup> The Highway Code (Rule 91, updated 2025)

<sup>10</sup> Consumer Protection Act 1987

<sup>11</sup> Peter Cane and James Goudkamp, 'Accident Compensation in the Twenty-First Century', Atiyah's *Accidents, Compensation and the Law* (9<sup>th</sup> edn, Cambridge University Press 2018)

fault scheme however, issues arise for the victim in proving that the injury was caused directly by the accident and in cases of medical negligence as it is difficult to establish whether the injury was the result of the negligent treatment and not of the condition being treated.<sup>12</sup> Although New Zealand's ACC scheme provides full coverage of personal injuries, the compensation may be limited in recovering damages for pain and suffering. Critics also argue that this may reduce the incentive for people to act responsibly as they know they will be compensated with or without fault.

### Social security systems

Like the UK's National Insurance system, they offer compensation regardless of fault such as medical expenses however, this system only covers basic financial needs, which is not enough to put the claimant in the position before the injury they suffered. Additionally, even though it is easier to access than tort compensation, it lacks corrective justice by removing the need to compensate based on fault.

### **Reform**

Atiyah argues that the tort system should be abolished, and that people should buy first-party insurance. I believe that despite the fault-based system having some gaps and valid criticisms, it should not be abolished entirely. The fault principle is vital to uphold corrective justice, vindicate individual rights and promote deterrence. Agreeing with Burrows, it is an important part of Tort law to hold those who have caused harm responsible. It is not only financial justice but also moral and social justice which sets an example for others without which it could cause chaos.

However, reform is essential to tackle the issues of accessibility, efficiency, and high costs of litigation. In my opinion, values of fault-based liability should still be upheld, and alternative dispute resolution should be more encouraged. Additionally, first-party insurance should be available as an option alongside third-party insurance. This way it would be up to the individual if they want to ensure that they are still compensated if they are unable to prove fault, but this must be done in a way that allows accessibility to everyone regardless of income to promote equality.

Furthermore, fault-based should be applied in the same way but no-fault schemes should be introduced in a limited way to address cases where fault is too difficult to prove, this decision should be made by a judge. Similar to New Zealand's ACC model, such schemes could be beneficial for cases like medical negligence. This change would address the efficiency concerns raised by Atiyah and Lord Sumption while also maintaining Burrows and Kawende's concern of upholding corrective justice.

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<sup>12</sup> Peter Cane and James Goudkamp, 'Accident Compensation in the Twenty-First Century', Atiyah's *Accidents, Compensation and the Law* (9<sup>th</sup> edn, Cambridge University Press 2018)

## **Conclusion**

The fault-based liability system is an essential part of tort law in England and Wales. Despite the criticisms of inconsistencies, inefficiency, and high litigation costs, I believe that its benefits outweigh the arguments of abolishing tort law. The legal system is present to provide justice to those who have been wronged and that is exactly what fault-based liability does.

A dual approach of reform should be adopted, like the proposed reform of the NHS Redress Scheme in Wales. Reform should focus on increasing accessibility and efficiency through ADR and on implementing no-fault schemes in specific areas without undermining the importance of tort law.

[1750 words]

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