

## **Legal wrongdoings, victim rights: the framework of liability**

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Liability is legal responsibility for the choices and actions that we have taken that cause injury to private or public interests. When liability is proven, it entails legal sanctions or consequences of some kind. If law is a vehicle for social stability and order in our society, then sanctions are the levers by which the law can be meaningfully enforced.

A sanction can come in different forms. A common sanction is an order to pay someone money. This may be to a private person or to a government. Another sanction might be to do something like take down a building that was illegally constructed. Still other sanctions could involve a loss of a person's natural rights such as the custody of one's children or one's own freedom.

### **Tort Liability**

In our inter-dependent community, each one of us engages in pursuing our own conception of the good life, the fruit of the free society which we cherish. However, the individual pursuit of the good life involves interaction with others. The conduct of each one of us affects the lives of others around us.

Thus, our rights to have a noisy party, to speed down the highway, or even to say anything we desire may bring unfavourable consequences upon others. The well-known decomposed snail in a ginger beer bottle case, called *Donoghue v. Stevenson*, 1932, articulated the neighbour principle. It asks who, when we are choosing to act or not act in a certain way, should we reasonably consider at risk of being injured by that act or omission? We need not know specific names or faces; rather, it is the relationship to ourselves that is important. For example, if we choose to drive carelessly down the highway, we might expect that other motorists, passengers, and pedestrians could be injured by our carelessness.

This is the concept of owing others, our neighbours in life's journey, a duty of care. It is the first level of analysis of whether we should be held civilly responsible for our actions when they cause injury to another person. It recognizes that you can do your own thing, but you must answer for it if it causes harm to another person. That is the domain of the law of torts (civil wrongs).

Torts is in the category of private law. If you are the victim of a wrong at the hands of another, you may bring a private lawsuit, usually to recover money to compensate for the injury caused. There may be other legal remedies, such as an injunction, but money compensation is normally used to right the wrong. The police or other public officials are not interested in the private lawsuit. The wrongdoer is not in jeopardy of imprisonment. It is entirely private liability which is enforced, if at all, in the public forum of a courtroom, by the injured person.

There are several legal issues in a tort case, such as whether the act or omission caused the injury, whether the injured person contributed to the injury, and how much is appropriate compensation.

Suppose there is an automobile accident. Driver Diane rear ends driver Jerry, who gets whiplash. Jerry would sue Diane directly, and must prove that Diane's lack of care while driving caused the whiplash. Then there would be the question of whether Jerry had done anything which made the injury worse; for instance, whether he was wearing his seatbelt. Third, there would be the question of how much Jerry should be paid in damages. If he had a pre-existing injury, Diane would be liable only for the aggravation of the injury.

The test for money damages is what does it take to put the injured person in the same position as before the tort occurred. The main issue, however, usually is how much care should have been shown in those particular circumstances; that is, how much care should Diane have shown while driving. For virtually all cases, the standard of care is what a reasonable and prudent person would have exercised in similar circumstances. For instance, if Diane was driving while looking down to dial a number on his cell phone, a judge might find that she was operating below the standard of care of a reasonable and prudent person while driving.

In rare cases, the care called for is extraordinary. This is what is known as a strict liability case, and will be discussed later.

### Contractual Liability

This is the other main source of private liability. Often people exchange promises and make agreements which are legally enforceable contracts. Businesses engage in contract-making as the way of doing business and earning a profit. Individuals also make contracts every day. Just as in the free pursuit of the good life, so they enter into contractual relationships to make themselves better off.

The contract is a private code of legal rights and obligations between the parties who consented to it. The law provides some rules to govern the formation of contracts (for example, which ones must be in writing), and the interpretation of those agreements, but is mostly concerned with enforcement of them. Again, the legal remedy for a breach of contract is most often money damages. The test for damages is what amount of money would it take to put the injured contracting party in the same position had the contract been fully performed.

As in torts, an aggrieved person, faced with a broken contract, must make a private decision: what to do about it? You might decide, in light of the anguish, time, and cost of formal legal actions, to do nothing. You might simply resolve to be more careful the next time. If you want to sue for enforcement or damages, it is a private liability matter that only applies to the contracting parties. Even if you are successful in obtaining a judgment for breach of contract damages, you are still alone to take the steps to collect on it.

### Criminal Liability

Scarcely a day goes by that we do not hear about some criminal wrong being done. People are both fascinated and concerned with criminal activity. The reason is plain: a crime is an offence against all of society. As such, it is in the category of public liability.

If someone is robbed or attacked, we may be inclined to dismiss this as a private matter between two people. However, if the robbery or attack is a common problem in the community, we all begin to feel affected by it. When we hear of a police officer being injured or killed, we all worry slightly more about our safety. When we see a drunk driver speeding through a red light, narrowly missing another motorist, we are horrified to think, "that could easily have been me". A crime may directly injure one person, but it is a crime against all of society. That is why police and prisons are public institutions.

This is not to say that an injurious act cannot be both a tort (private or civil wrong) and a crime (a public wrong). It often is. Nevertheless, the sanctions, the paths to the respective sanctions, and the persons who benefit from those sanctions are definitively in separate categories (see chart below). Suppose that an over-zealous fan attacks a referee after a hockey game. The police could charge this fan with the crime of assault, for which if convicted, the fan could go to jail. However, the referee might also decide to sue the fan for money damages. The referee would sue in the tort of battery and would receive any money damages awarded.

A direct victim of a crime, such as the referee, would normally have a good basis upon which to mount a civil action in tort. Yet that person will have to prove the case and attempt to collect the money from the criminal, who may be in jail and without employment or assets. Restitution is rarely ordered in criminal cases. Fines do not go to the victim, but to the government. Proof of a criminal conviction is evidence only (though admittedly strong evidence) of civil wrongdoing; it is not proof of a tort. As you can see, the civil and criminal cases proceed along entirely separate tracks.

## Regulatory Law

There is a huge body of rules enacted by government in the public interest that are not technically crimes. These cover matters important and widespread enough to be most efficaciously regulated by government compared to private legal actions. They are created by federal, provincial, and municipal governments, whereas crimes are exclusively federal jurisdiction and are contained in the Criminal Code of Canada. These rules give rise to offences which are called quasi-crimes because criminal-like procedures and sanctions apply to them.

The array of quasi-crimes is vast. Parking and speeding convictions are examples of regulatory offences. Tax evasion, securities regulation, immigration rules, environmental standards, and minimum employment standards legislation are all in this realm. The purpose of regulatory law is to regulate conduct in the public interest.

An illustration of the distinction between the private and the public law is helpful. A customer who takes a product off the shelf in the store and wants to buy it at the price marked is in a private contract with the store owner. Perhaps the price marked was an error, intended to refer to another product. Or the sale might be over, but the store overlooked removing the sale price.

This is a private matter between business and its customer. The business may still allow the customer to buy it at that price. However, if there was some deliberate attempt to deceive customers, where for example large newspaper advertisements draw them into the store for certain bargains which do not exist, the legal concern has public implications. If a large number of unwary customers are misled by the marketing practice, public regulatory law exists to stop it. Each unwary customer would perhaps grumble but would not likely be motivated to take private legal action. The law recognizes this, so regulates in these circumstances.

While regulatory offences are not technically criminal, they are accompanied by sanctions which can include substantial fines, revocation of licenses, and even imprisonment (of an individual, such as a corporate director).

### Strict Liability

There are certain scenarios in both private and public law where the wrongful action is so serious that if damage occurs, there will be no legal justification or defence; or the offence is so minor that the offender's state of mind is irrelevant. In both of these scenarios, we can think of the liability that ensues as being strict in some manner.

### Strict Liability in Tort

Ordinarily, we are expected to take the care that an average and reasonably prudent person would take in similar circumstances. There is, however, one instance where the law holds that no amount of care will be a defence. This is called strict liability as is found in the old English case called *Rylands v. Fletcher*. If someone brings an inherently dangerous thing onto one's land, so that it constitutes an unnatural use of that land, the person will be strictly liable if the thing escapes and causes injury to another.

Wild animals, radioactive and other hazardous substances such as explosives, and toxic chemicals are the most common examples. Less dangerous things, such as water, used or stored in unnatural ways, will also be subject to the rule. You cannot avoid liability by maintaining that you acted reasonably in preventing the escape and damage. It may be taken to have been unreasonable to voluntarily create the danger in the first place.

This principle was modified by the English House of Lords, the same court that decided *Rylands*, in *Cambridge Water Co. v. Eastern Counties Leather* in 1993. This recent case decided that reasonable foreseeability of the damage is also required for strict liability.<sup>(f.1)</sup> If *Cambridge Waters* is adopted by the courts in Canada, we might argue that the principle of strict liability has been weakened and does not represent much of a departure from ordinary negligence rules.

### Strict Liability in Regulatory Offences

For pure criminal offences, the Crown must generally prove not only that the accused actually did the actions (i.e. the *actus reus*), but that the accused also had the mental intention to do so (i.e. the *mens rea*). An accused may, therefore, present a number of defences which refute this intent. If successful, the accused will be acquitted.

Intention for doing or not doing something is an unsteady horse. Intention must be inferred from surrounding circumstances and actions. Occasionally, the accused will have said something to others which may indicate intention. Most of the time, the evidence of intention is equivocal: the Crown argues that it was demonstrated, but the accused denies any intention to go along with actions. Only the accused really knows what his or her intention was. This dilemma is acknowledged for regulatory offences.

It is first always a question of examining the language of the particular statute creating the offence to determine how much intention need be proven for a conviction. The use of such terms such as "wilfully" or "intentionally" describes a "full mens rea offence". At the other end of the spectrum, the nature of the offence (if not the statute) will suggest that no mens rea is required for conviction. It does not matter, for example, if you intended to speed or overstay at the parking meter. The law is concerned only with whether you did it. These are called absolute liability offences.

For many other regulatory offences, the Crown often presents a basic (prima facie) case for conviction. It proves that the accused did it, apparently intended to do it, and had no defense for violating that regulation. Then it is open to the accused to show that he or she "on a balance of probabilities . . . took all reasonable steps to prevent its commission" (Alberta Environmental Protection and Enhancement Act, 1992).

For example, the manager of an industrial plant might be charged, along with the company, for an unlawful discharge of a polluting substance. The manager may defend against the charge by showing that he or she did all the things (acted with due diligence) any reasonable manager would do in similar circumstances.

Such due diligence does not operate to shift the burden of proving guilt on to the accused. Instead, as in the case of *R. v. Wholesale Travel Group Inc*, 1991, it furnishes the accused with a legitimate defence which is similar to the reasonable person standard in tort law. We can see that through the legal device of proof of care and intent, the law can add or take away defences of the alleged wrongdoer. In this way, by deciding to punish certain conduct, liability for our actions can be calibrated to generate the kind of social behaviours desired in society.

Footnote

f.1 See Peter *Bowal* and Nicole Koroluk, "Closing the Floodgates: Environmental Implications of Revisiting *Rylands v. Fletcher*", (1994) 4 J.E.L.P. 310.

The Private vs. Public Framework for Legal Liability

The following chart reads as follows:

Row 1: NATURE OF LIABILITY Row 2: PRIVATE Row 3: PUBLIC

Subject Areas tort law; contract law criminal law; regulatory law (quasi-criminal)

Who Initiates and Pursues Legal Action? the private party who is individually aggrieved the state (or the "Crown") on behalf of all citizens

Who Bears the Costs of the Proceeding? in the discretion of the judge at the end of the trial (usually losing party pays some costs of winning party) Crown and accused normally bear their own costs, regardless of outcome

Parties' Nomenclature plaintiff vs. defendant Crown vs. accused

Action civil lawsuit prosecution

Burden and Standard of Proof on the person suing; "balance of probabilities" (more likely than not)

on the Crown; "beyond a reasonable doubt"

Requirements of Proof that negligence or breach occurred (motives are not relevant) Actus reus (that the offensive act occurred) and mens rea (criminal intent)

Who Benefits from the Action and Sanction? the private person who sues all members of society

Available Sanctions primarily money damages fines; imprisonment; loss of natural rights (eg. property); loss of privileges (eg. operating licenses to drive or conduct certain kinds of business)

Purpose of Sanctions compensation of injured party punishment, deterrence, rehabilitation, security of society

Outcome civil liability or not in a "judgment" criminal (or quasi-criminal) liability; in a "verdict" that is an acquittal or conviction of guilt