

The main issue with the tort of negligence is that the claimant must prove the fault of the defendant in order to be awarded compensation. Fault means the legal blameworthiness for causing the injuries or damage to the victim. This need to prove fault can result in problems of cost, delay, the need to use lawyers and confrontation between the parties.

Cost:

- It is costly. Evidence is required to show how injuries occurred and proof it was caused by D. can be evidence of eyewitnesses or experts who need to be paid e.g. investigators.
- Medical evidence may be required to show extent of injury and the effect that the injury may have on the victim's future.
- If property is lost or damaged, valuations will have to be obtained
- All these costs may act as a deterrent to the potential claimant to bring action

Delay:

- In many cases, the person is covered by insurance e.g. cars for getting in an accident where there is injury or damage, insurance company is likely to take over the conduct of the case
- Benefits of this – victim will receive compensation if they can prove the fault of the D
- However, insurance companies get many claims so they become suspicious and investigate thoroughly
- to ensure it is genuine – delays, if it is complicated it can take up to months or years
- Delay place strain emotionally and financially on claimant and they may decide to not go through with it
- If the case must be taken to court = more delays

Need for lawyers:

- The process with lawyers is costly and time consuming
- Benefit of lawyers, cost may be covered by a 'no win no fee' arrangement – solicitors only
- In order to offer this policy, there must be a 'before the event' or 'after the event' insurance policy in place
- However, this will only be offered if there is a good chance of succeeding at least 75%
- chance

Confrontation:

- Can lead to confrontation between parties and their representatives – may mean negotiated settlement is less likely – case goes to court, cost + delays

Judicial law making:

- Tort law has been developed mainly from judicial precedent
- Judges are unelected, lack technical competence to deal with civil liability, uninformed or experienced enough to make the economic and social judgements.
- On the other hand, it can be said that the development of precedent in tort has come from centuries of judicial experience in dealing from a range of cases

Establishing duty of care:

- The courts have used an incremental approach to decide whether a duty of care is owed in a novel situation. Courts can be reluctant to find it fair, just and reasonable where the D is part of the public authority which results in injustice and unfairness

Policy:

- Especially in the higher courts, judges have been prepared to make policy decisions which go against established precedent e.g. *White v Jones*. This means the court can consider that policy or justice requires a departure from an established principle, depart from it. This may be beneficial for claimants, but it provides confusion for future cases and injustice for cases decided on the 'old' principle. Judges owe it to lawyers and public to provide clarity in the law

Changing the law:

- Judges in appeal courts sometimes make new principle as they recognize that a principle is wrong e.g. *Bolam* case 1957 and then in *Montgomery v Lanarkshire Health Board* it was stated that a doctor is now 'under a duty to take reasonable care to ensure the patient is aware of the maternal risks involved in any treatment'. This may provide justice but confusion and lack of clarity in the law

Ideas for reform:

- One possible reform of compensating victims is state - run benefit scheme which pays compensation in lumps or regular payments without the need to prove how or why the accident happened and funded through tax or levy on motorists or employer. Benefits of this – no need for insurance companies to be involved + delay claims. No need to pay lawyers' costs – cheaper, quicker payouts and less confrontational. Another benefit is compensation would be paid to all those who were injured not just those who can prove fault
- Require every adult to have compulsory liability insurance which would pay out in event of accident
- Online courts or out of court dispute resolving methods e.g. ODR, mediation, ADR provided that if the responsible individual offered an apology to the injured person this could end a claim