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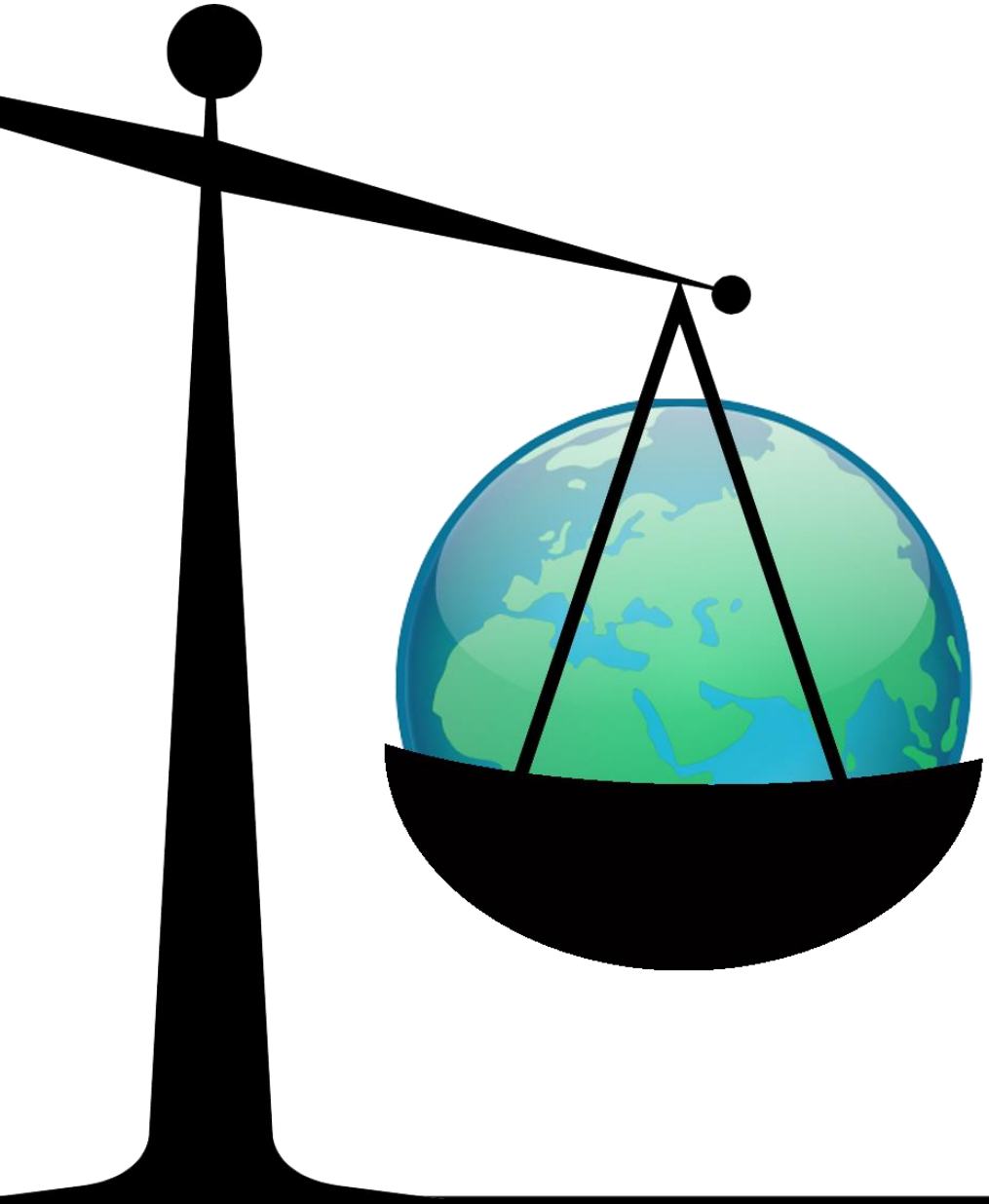
Thinking Small: The Possibilities of Tort Law in Strategic Litigation for the Right to Health



International Human Rights Internship Working Paper Series

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Introduction

Litigation for the right to health has not seen overwhelming success in the Anglosphere over the last half century. Some courts, notably the Supreme Court of Canada, have simply rejected the right to health, and lesser rulings on rights in the United States have been overturned by legislation.[1] In South Africa, the Constitutional Court found a right to health but gives the government wide discretion as to the implementation of the right.[2] Nonetheless, human rights advocates continue to seek a legally enforceable right to health. In Uganda, this advocacy has taken the form of, *inter alia*, a constitutional petition, currently on appeal at the Supreme Court, and a lower-level suit against the government surrounding a public doctor's absence that led to a woman's death.[3] This paper focuses on the latter case, arguing that its circumstances reveal how human rights litigators could find fertile ground for advocacy in private law. Rather than restricting themselves to public law, human rights advocates could use claims in tort as a supplementary tool for promoting the right to health.

Litigation in tort law differs from human rights litigation on several levels. This paper begins by telling the story of Irene Nanteza's denial of healthcare, which serves as a backdrop to the analysis (Part 2). Next, it compares the ideology of tort law with the ideology of human rights law, demonstrating that the two have more similarities than differences, though tort law has the unintuitive advantage of being less ambitious (Part 3). Finally, it compares strategic tort campaigns elsewhere, particularly in the United States, to human rights litigation and other reform in Uganda, suggesting that there may be similarities in practice between the campaigns.

The state of the literature, limits on legal resources in developing countries, and the diversity of legal systems and political contexts worldwide all set limits on the scope of this paper. There is relatively little academic work on tort law in developing countries, much less work on tort law campaigns there. Similarly, there is fairly little jurisprudence from developing countries on tort

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[1] *Chaoulli v Quebec (Attorney General)*, [2005] 1 SCR 791, 2005 SCC 35 (CanLII); Sylvia A Law, "A Right to Health Care that Cannot be Taken Away: The Lessons of Twenty-Five Years of Health Advocacy" (1993) 61 *Tennessee Law Review* 771 at 778.

[2] *South Africa v Grootboom*, [2000] ZACC 19 (S Afr CC) [*Grootboom*]; *Soobramoney v. Minister of Health (Kwazulu-Natal)*, [1997] ZACC 17 (S Afr CC) [*Soobramoney*].

[3] *CEHURD v Attorney General*, [2012] UGCC 4 (CC Uganda) [*Petition 16*]; *CEHURD v Nakaseke District Local Admin*, Civil Suit 112/2012 [*Nakaseke*].

law, and what jurisprudence exists is not necessarily publicly available.[4] As a result, this paper will primarily discuss tort law and tort litigation in the developed world, arguing rather than demonstrating how it might apply in a development context. These two limitations partially resolve each other, since courts in Uganda readily cite foreign jurisprudence.[5] Finally, "developing countries" is a broad category. This paper will restrict itself to common law countries, with particular reference to Uganda. However, even among common law countries there is undoubtedly much variation, and even for Uganda, this paper is not an analysis of law as it stands. It merely provides an initial look at what is possible.

Part I. Background

The *Nakaseke* case began on May 5, 2011, when a farmer in central Uganda brought his wife to the public hospital at Nakaseke to give birth.[6] Irene was in labour with what would have been her fourth child. However, things soon went downhill. Irene began to show signs of an obstructed labour. The nursing staff recognized the obstruction and called the doctor to have him perform a caesarean section. The sole doctor on call was not in the ward, and took time to phone. He took several more hours to arrive in person, during which Irene was screaming in agony. By the time the doctor did arrive, she had gone into cardiac arrest, and could not be revived. Both mother and child died.

My host organization, the Center for Health, Human Rights and Development (CEHURD), took up Irene's case as part of its strategic litigation for the right to health. Prior to my arrival, CEHURD filed a claim at the High Court alleging that the circumstances of Ms. Nanteza's death violated constitutional and international prohibitions against torture, her right to health, her rights as a woman, and her children's right to their parent. The case proceeded throughout my time at CEHURD.

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[4] See e.g. *AKPM Lutaya v Attorney General*, Civil Appeal No.10 of 2002, [2004] UGSC 13 (Uganda) [*Lutaya*]. (The judgement cites cases as "unreported" in lieu of bibliographical information. The Uganda Legal Information Institute (<www.ulii.org>) only publishes rulings from the past few years, so even less is available online than in hard copy.)
[5] See e.g. *Petition 16*, *supra* note 3 (the Court largely takes its reasoning from the American case *Marbury v Madison*.)
[6] *Nakaseke*, *supra* note 3; the following paragraphs are taken from parties' submissions in that case, as yet unavailable publicly.

A. Legal options

CEHURD chose to sue the government of Uganda on human rights grounds, as it had in *Petition 16*. However, a case with similar facts as Ms. Nanteza's death could also give rise to a claim in tort in many common law jurisdictions. *Barnett v. Chelsea and Kensington Hospital Management Committee* is a particularly famous example.[7] In that case, a doctor refused over the phone to see to three patients who had been vomiting for three hours; as it turned out, the patients had been poisoned with arsenic, and one of them died.[8] Although the Court found for the doctor on the grounds that the patient would have died anyway, it also found that the doctor had been negligent.[9] In Canada, a doctor who absents him or herself when a patient is undergoing treatment would be negligent, if the treatment brought about high enough medical risks.[10] Hence, there is nothing legally controversial about how to characterize a doctor absenting himself when a patient is dire need of his attention. Injury caused by an absent doctor gives rise to a strong claim in negligence against the doctor.

Moreover, the case against the doctor would create a strong case against the government through vicarious liability. The common law, including in Uganda, accepts that an employer is liable for acts "done by the servant [employee] in the course of his employment"; this rule applies even to government employees and even when the employee was explicitly ordered not to do the thing he did.[11] In a public health system in a common law country, then, there will often arise a strong case for negligence.

B. The systemic context

CEHURD is still litigating over the particular causes of Irene's suffering and death — this paper will not speculate as to what systems led to that specific tragedy. However, the circumstances of Irene's death were hardly unique. One study elsewhere in Uganda (Bushenyi District) records an absenteeism rate of 44.2% among doctors and 47.9% among health workers

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[7] *Barnett v. Chelsea and Kensington Hospital Management Committee*, [1969] 1 QB 428 (QB (Eng)) [*Barnett*].
[8] *Ibid.*
[9] *Ibid*.
[10] *Roberts v. Petersiel*, 2005 CanLII 1053 (ON SC) at para 28.
[11] *Lutaya*, *supra* note 4.

generally;[12] a Uganda-wide study found a national rate of 37% among health workers.[13] Other developing countries suffer from comparable rates of absenteeism in the public health sector.[14] Irene's case illustrates the possible outcome of such absenteeism: patients who cannot afford private healthcare may be left to die, undermining the purpose of the public health system.

Absenteeism is not just a matter of dishonest doctors; it results from systemic shortcomings and abuses in public healthcare systems. The UNHCO Report on Bushenyi (a district elsewhere in Uganda) notes overwhelming dissatisfaction with salaries that amount to less than $200/mth.[15] Underpayment creates an obvious incentive to illicitly work elsewhere. Alternatively, absenteeism corresponds with poor infrastructure, insecure tenure, and a lack of accountability, as such shortcomings give rise to an unofficial, for-profit health sector that leeches public health employees.[16] As a result, wrongs incurred on a patients like Irene have both a private and a public component: they have been wronged by individual doctors through negligence, but they have also been wronged by deficient public health systems that allow or even encourage negligence.

C. General application

Absenteeism is not the only problem related to systemic problems that could lead to claims in tort. Doctors may demand bribes and refuse to treat their patients until the bribes are paid.[17] If a country has poor medical training programs, acts of gross incompetence will reflect that systemic failure. More generally, medical workers' performance corresponds inversely to stress load,[18] suggesting that overloaded and underresourced health systems will lead to more and worse errors in service delivery. Finally, Uganda's medical guidelines make respect for the right to health

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[12] Uganda National Health Users'/Consumers' Organization, "Prevalence and Factors Associated with Absenteeism of Health Providers from Work in Bushenyi District" [draft report] at 23 [*UNHCO*].
[13] Nazmul Chaudhury, Jeffrey Hammer, Michael Kremer, Karthik Muralidharan, and F Halsey Rogers, "Missing in Action: Teacher and Health Worker Absence in Developing Countries" (2006) 20:1 *Journal of Economic Perspectives* 91 at 92 [*Chaudhury*].
[14] *Ibid*; Craig Johnson, "Decentralisation in India: Poverty, Politics and *Panchayati Raj*" (2003) [working paper] at 8.
[15] *UNHCO*, *supra* note 12 at 21-22.
[16] *Chaudhury*, *supra* note 13 at 92-94; Gerald Walulya, "Reporting Corruption and Media Ownership: A comparative study of how government and privately owned media report on corruption in Uganda" (2008) [unpublished] University of Oslo at 31 [*Walulya*].
[17] *Petition 16*, *supra* note 3.
[18] Stephan J Motowidlo, John S Packard, and Michael R Manning, "Occupational stress: its causes and consequences for job performance" (1986) 71:4 *Journal of Applied Psychology* 618.

a fundamental duty of doctors, such that violations of individuals' right to health may *ipso facto* qualify as malpractice (as discussed below). As a result, claims based on the right to health will often arise from facts that could justify claims in tort as well.

Organizations litigating strategically for the right to health need to think seriously about whether to include tort claims in their litigation. Strategic interests and the clients' interests may clash during strategic litigation. A victim of a rights violation who has been put in a position of hardship may desperately need compensation. On the other hand, compensation is less important to litigators; a precedent, such as a court-backed right to health, has an obvious rhetorical benefit in advocating for enduring reform. Lawyers typically have a duty of "client-centered" advocacy: they must "adopt legal strategies that align with the needs and desires of the client", even when those strategies are "less profitable to the advocate".[19] Even when strategic litigation is conducted *pro bono*, lawyers should not place their clients' interests below their organizational strategy. As a result, if a client is more likely to succeed through claims in human rights *and* tort rather than only in human rights, the litigator has a *prima facie* duty to make both claims. Hence, it must be asked how a tort claim could fit into a grand strategy.

Part II. The Idea of Tort

Although private law and human rights law come from different traditions, they share some common ground, both ideologically and substantively. This section discusses four distinguishable areas of law and regulation. There are two relevant areas of human rights law: international human rights law and domestic constitutional law, for which we treat Uganda as a reasonably typical Anglosphere example. In addition, this section considers private law in the form of tort law and glances on specific medical standards. Both private and public law rest on a conception of right and wrong, but the public law conception is more expansive and universalist, which is not a strength. Human rights law also bears a stronger colonial legacy, making private law more resistant to accusations against its legitimacy.

[19] See e.g. D Bryan Dennison and Pamela Tibihikirra-Kalyegira, *Legal Ethics and Professionalism: A Handbook for Uganda* (Geneva: Globalethics.net, 2014) at 72.

A. The extent of the claim

The relevant public law is more ambitious than private law regarding the right to health. Public international law tends toward expansive but vague rights; private law tends toward limited but enforceable rights; and the Ugandan Constitution contains a mixture of both. A claim within the stronger and less expansive doctrine is preferable where such a claim is available.

The *International Covenant on Economic, Social and Cultural Rights*, which we take as a solid representative of the relevant human rights law, has two expansive provisions establishing to the right to health. Article 12(1) lays out the substantive right to health:

> The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.[20]

Article 12(2) continues with particular State obligations, e.g. ensuring medical service to the sick. Article 2(1) requires a State to realize, *inter alia*, the right in Article 12:

> 1. Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and cooperation… to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.[21]

Evidently, both provisions go beyond the idea of doing no harm. Actual implementation of the Covenant requires immediate shifts in national budgets, since services to enable the right to health are not free and countries are obliged to move "as expeditiously and effectively as possible towards the full realization" of the right.[22] Although the mandatory level of services may to some extent correspond with national capacity, there is an expansive core of services that must always be offered.[23] Budget priorities are fundamentally a zero-sum game; in a country that struggles to ensure a minimal health system, building a football stadium or a national monument — or, perhaps more importantly for a country prone to civil war, buying weapons for the military — likely violates the right to health. Applied seriously to a developing country, the implementation of the right to health would effectively restrict legislative control over the budget to the implementation of

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[20] *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) [*ICESCR*].
[21] *Ibid.*
[22] Committee on Economic, Social and Cultural Rights, *General Comment 14: The Right to the Highest Attainable Standard of Health*, (2000) e/c 12/2000/4 at paras 31-33 [*Comment 14*].
[23] *Ibid* at para 44.

a human rights programme, to the point that one would have to question whether the government even *could* express the social will.

Perhaps as a result of its expansiveness, and certainly because it applies to countries with vastly different resources, the legal right to health is necessarily vague. Although *General Comment 14* of the Committee on Economic, Social and Cultural Rights adds some specificity to obligations and explicitly bars some conduct, it is fundamentally impossible to judge when an "information campaign" is extensive enough or whether provisions for "safe motherhood, particularly in rural areas" have been adequately balanced with advanced care in centralized hubs.[24] Such choices must necessarily be left to the discretion of regulators and legislators above them. Moreover, the commentary is not the Covenant, and its prescriptions do not necessarily follow from the actual text of the *ICESCR*. As a result, the *ICESCR* is limited as a measure of government action.

The Ugandan Constitution protects the right to health through both minimal-but-enforceable provisions and maximal-but-unenforceable guidelines. Among the former is a prohibition against "cruel, degrading and inhumane treatment",[25] which has been found to bar, *inter alia*, police brutality and female genital mutilation.[26] Art. 22(1) protects the right to life, saying "no person shall be deprived of life intentionally except in execution of a [death] sentence". It closely matches a provision in the Indian Constitution that forms the basis of a government duty to give emergency medical care to someone who is dying,[27] and a provision in the Canadian *Charter of Rights and Freedoms* that does not grant a right to healthcare.[28]

The Ugandan Constitution's National Objectives and Directive Principles of State Policy are comparatively vast in scope, but they do not necessarily establish court-enforceable rights. The Directive Principles direct "all organs" of the State to "fulfill the fundamental rights of all Ugandans to social justice", including "access to… health services".[29] This language mirrors that of the *ICESCR*, and should lead to similarly vast obligations. However, the Directive Principles

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[24] *Ibid* at paras 34ff.
[25] *Constitution of the Republic of Uganda*, 1995, art 24.
[26] *Tumwekwasize v Attorney General*, [2010] UGHC 36 (HC Uganda) [*Tumwekwasize*]; *Law & Advocacy for Women in Uganda v Attorney General*, [2010] UGCC 4 (CC Uganda).
[27] See *Pt. Parmanand Katara v India*, [1989] INSC 254 (SC India); *Paschim Banga Khet Mazdoorsamity v West Bengal*, [1996] INSC 659 (SC India).
[28] See the Supreme Court of Canada's interpretation of s. 7 in *Chaoulli*, *supra* note 1 at para 104.
[29] *Constitution of the Republic of Uganda*, 1995, Dirs. I, XIV.

read like "statements of aspiration" from the start, and the Constitutional Court has thus far left their enforcement in the hands of the government.[30] As a result, Uganda's Constitution does not *necessarily* establish a positive right to health; successful litigation in the right to health could lead to the establishment of such a right in a way that tort litigation could not.

Contrast these various provisions with the requirements of tort law. Lord Atkin's foundational explanation of negligence in *Donoghue v. Stevenson* gives a good sense of how unambitious the law is: "The rule that you are to love your neighbour becomes in law [that] you must not injure your neighbour… You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour."[31] Though Lord Atkin uses the active voice, it is not hard to see how such a rule is mostly a negative bar on actions. In fact, the common law grants relief only for misfeasance, not nonfeasance; a person must actively take care only insofar as s/he created the initial risk.[32] Hence, the tort of negligence is not a fertile ground for expansive duties to one another; it demands a bare minimum of care.

That said, in the context of medical malpractice, law and professional ethics impose somewhat more stringent demands on the doctor. Charles Kramer, working in the American context, lists three essential elements for malpractice, which he terms "professional negligence": 1) a doctor-patient relationship; 2) the physician "departed from a duty he owed the patient"; and 3) the departure caused an injury.[33] The Uganda Medical and Dental Practitioners Council's *Code of Professional Ethics* serves as a reasonable example of what such duties might contain, and Art. 8 of the *Code* makes a doctor's duties expansive: s/he must "not deny emergency treatment… to a patient" and must "exercise due diligence and provide services of good quality of good quality especially where he or she [b]ears responsibility for the resources that determine the quality of care".[34] As a result, medical malpractice is a wide enough concept to encompass the wrongs of a dysfunctional medical system; it requires, in essence, that doctors do their job properly.

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[30] Joseph Oloka-Onyango, "Constitutional Transition in Museveni's Uganda: New Horizons or Another False Start?" (1995) 39:2 *Journal of African Law* 156 at 165 [*Oloka-Onyango*]; *Petition 16*, *supra* note 3.
[31] *Donoghue v Stevenson*, [1931] UKHL 3 (HL UK).
[32] Jean Elting Rowe and Theodore Silver, "The Jurisprudence of Action and Inaction in the Law of Tort: Solving the Puzzle of Nonfeasance and Misfeasance from the Fifteenth Through the Twentieth Centuries" (1995) 33:4 *Duquesne Law Revue* 807 at 854.
[33] Charles Kramer, *Medical Malpractice*, 4th ed (New York: Practising Law Institute, 1976).
[34] Uganda Medical and Dental Practitioners Council, *Code of Professional Ethics* (2013) art 8.

Human rights law and private law may inform each other, to the point that there is explicit overlap. The *Code of Professional Ethics* bars the practitioner from "violat[ing] the human rights of a patient [,] the patient's family[,] or his or her caregiver" or participating in a violation.[35] Doctors are barred, *inter alia*, from discriminating against patients on the basis of any vulnerability, from violating patients' confidentiality, and from acting without a patient's consent.[36] Such demands are generally enshrined in human rights instruments as well — governmental discrimination, for instance, is barred by the Ugandan Constitution generally under Art. 21 and the *ICESCR* in the delivery of economic and social rights under Art. 2(2). As a result, private and public law share a significant amount of their content.

From a rhetorical perspective, tort law's relatively limited demands are a good thing. Although human rights arguably set ground rules, ergo a bare minimum of what is permissible, it is hard to imagine a point where one could not demand further government action on the basis of the *ICESCR*: as discussed prior, there is a *prima facie* claim so long as the health system does not provide state-of-the-art facilities and the government engages in any non-essential spending. The South African Constitutional Court essentially realized this problem in *Soobramoney*; even though the plaintiff would die without government-provided dialysis, the Court accepted that the government might limit spending on dialysis in favour of other health goals, and limit spending on other health goals in other social goals.[37] (Though the Court does not inquire into the matter, it seems highly likely that South Africa also engages in non-essential spending.) As the Court pointed out in that case, "A court will be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibility it is to deal with such matters."[38] In short, the expansive nature of the human right to health limits its strategic use; courts are afraid of usurping government power, and thus refuse to enforce it.

Tort law is not so vulnerable to the objection of expansiveness; at some point, a doctor has done as much as is reasonable and cannot be held liable for going no further. Tort law will not lead to a universally effective public healthcare system. However, human rights law has not done so either over the last half century, at least in Uganda or (per *Soobramoney*) in South Africa. Where strategic litigation attempts to put the spotlight on particular dysfunctions in a public health

[35] *Ibid* art 4 (1-2).
[36] *Ibid* arts 5, 6, 7.
[37] *Soobramoney*, *supra* note 2 at paras 19-28, 31.
[38] *Ibid* at para 29.

system, tort law can make the powerful claim that the health system and its employees have failed to do *even what they were constructed and empowered to do*. This is an inherently stronger claim than the claim which arises in human rights that the health system could have done more; it sets a lower threshold for government action with the knowledge that government action has utterly failed to meet that threshold. As a result, in a case where the tortfeasor violated both the right to health and the tortious duty of care, a claim in tort has more moral power.

B. The basis for the claim

Both tort law and human rights law make reference to a basic conception of wrong conduct and the right to be free of others' wrong conduct. However, the foundation and expression of the wrongs and rights are, in the case of human rights law, more expansive.

Human rights law and private law share the goal of *vindication*. A successful legal petition makes a statement, both morally in the form of the ruling and practically in the form of compensation, that the plaintiff has rights, that those rights have been violated, and that the violation is worthy of public censure. However, private law provides the stronger form of vindication: unlike public law, it "makes a determined and systematic commitment to vindicating rights in the important sense of reversing the effects of their infringement as between right-holder and wrongdoer", at least where the infringement caused tangible harm.[39] Hence, private law makes a stronger claim to vindication.

Human rights law bases the entitlement to vindication on a claim of universal morality. The *ICESCR* begins with a recognition of "the equal and inalienable rights of all members of the human family" that derives from "the inherent dignity of the human person", and it seeks "universal respect for, and observance of, human rights and freedoms".[40] Such an ideological claim does not depend on a country's acceptance of the texts, though countries (including Uganda) did in fact consent to it through ratification.[41] Nor does the claim depend on continued democratic support;

[39] Kit Barker, "Private and Public: The Mixed Concept of Vindication in Torts and Private Law" in Stephen GA Pitel, Jason W Neyers, and Erika Chamberlain, eds, *Tort Law: Challenging Orthodoxy* (Oxford: Hart Publishing, 2013) 60 at 83.
[40] *ICESCR*, *supra* note 20.
[41] Office of the High Commissioner on Human Rights, "Committee on Economic, Social and Cultural Rights" (August 2014), online: <http://www.ohchr.org/EN/HRBodies/CESCR/Pages/CESCRIndex.aspx>.

human rights are always open to the objection that moral understandings have moved on since ratification, and their ideological legitimacy depends on their correctness.

In contrast, tort law makes a moral claim, albeit a complex one, on society's behalf. As Peter Cane points out, private law "concretizes" broad moral principles and mediates conflicting moral views.[42] When properly constructed, private law establishes "a fair and reasonable regime of personal responsibility for society to adopt and enforce".[43] Tort law starts from moral premises comparable to the idea of human dignity, namely that "every human being has an interest in good health and in being whole in body and mind".[44] Private law claims against the government add a second premise, namely that the government should be subject to the same rules as its citizens when acting in a private capacity.[45] However, since tort law can be modified and even extinguished by the legislature,[46] it ultimately represents the government's choice; hence, the law is as legitimate as the government is.

The aspect of choice again makes tort law's moral claim stronger. Where a government could object, rhetorically if not legally, that an international human rights norm is outmoded and incorrect (and we will see momentarily that they sometimes do so), that argument makes little sense against rules over which the government has continued authority. Because a tort claim relies on the continued consent of the government, it cannot be characterized as an imposition.

C. Colonial law

Both tort law and human rights law are subject to criticism for their colonial histories. In either case, the principles and content of the law reflect their European heritage. However, the problem of colonialism forms a stronger challenge to human rights law than to tort law, due to the structural differences between the two.

Human rights law is subject to constant criticism on the grounds that it bears a colonial history and Western content. According to this critique, the "universality" of human rights law is in fact an assertion of Western cultural supremacy — the claim of supremacy follows necessarily

[42] Peter Cane, *The Anatomy of Tort Law* (Oxford: Hart Publishing, 1997) at 25 [*Cane 1997*].
[43] *Ibid.*
[44] *Ibid* at 67.
[45] Peter Cane, *Responsibility in Law and Morality* (Oxford: Hart Publishing, 2002) at 252.
[46] See e.g. *Public Health Act*, Cap 281 (Uganda) s 132 [*Public Health Act*].

from the claim of universality, since the assumption that objective, true knowledge exists is a Western concept.[47] Moreover, human rights talk ignores, masks, and even justifies transnational domination.[48] Authoritarian leaders have in fact used the idea of human rights as "Western" to argue against democratic accountability.[49] Such criticisms apply less convincingly to the right to health than to civil and political rights; the right to health, as an economic and social right, falls into the category of human rights that the West *degrades* rather than promotes for developing countries.[50] Additionally, two intra-African covenants, the *African Charter on Human and People's Rights* and the *Abuja Declaration*, reinforce and even add specific goals to the basic commitment to provide healthcare.[51] Still, the colonial narrative of human rights could serve as a serious source of opposition to holding governments accountable for the right to health.

Constitutional law, where it becomes the basis of human rights claims, has greater domestic legitimacy but still bears signs of its colonial history. Writing a Constitution can be an colonial project, insofar as it is negotiated with the mother country as part of a peaceful transition to independence — in the case of Uganda's first constitution, this meant a great deal of British oversight and, accordingly, questions of domestic legitimacy.[52] However, constitutions can also be written as part of a process of internal reorganization, as occurred with Uganda's current constitution.[53] In the latter case, there may be questions of *democratic* legitimacy,[54] but it becomes difficult to argue that the Constitution is a colonial imposition. At the same time, the constitution of a developing country may borrow as much substance from more powerful countries' constitutions as their tort law does. As mentioned above, Uganda's constitutional provision protecting life follows other Anglosphere constitutions fairly closely. In addition, much like in tort cases, domestic courts can and do cite to Western rulings in constitutional cases.[55] As

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[47] Dianne Otto, "Rethinking the 'Universality' of Human Rights Law" (1997) 29:1 *Columbia Human Rights Law Revue* 1 at 7 [*Otto*].
[48] *Ibid* at 2.
[49] Fareed Zakaria, "A Conversation with Lee Kuan Yew", *Foreign Affairs* (March/April 1994) online: <http://www.foreignaffairs.com/articles/49691/fareed-zakaria/a-conversation-with-lee-kuan-yew>; Amartya Sen, *Human Rights and Asian Values*, (New York: Carnegie Council on Ethics and International Affairs, 1997) at 8-9.
[50] *Otto*, *supra* note 45 at 2-3.
[51] *African Charter on Human and People's Rights*, OAU Doc CAB/LEG/67/3, 21 ILM 59 (in force 21 October 1986), sec 26; *Abuja Declaration on HIV/AIDS, Tuberculosis and other Related Infectious Diseases*, 24-27 April 2001, OAU Doc OAU/SPS/ABUJA/3 at paras 18, 26.
[52] See e.g. *Oloka-Onyango*, *supra* note 29 at 157-158.
[53] *Ibid* at 158-159.
[54] *Ibid*.
[55] See e.g. *Petition 16*, *supra* note 3.

a result, the substantive content of Constitutional law, much like tort law, may in large part reflect Western and colonial legal traditions.

Substantive local control partially undermines the colonial narrative of tort law in a way that cannot occur with international and domestic human rights law. To be sure, tort law in Uganda and elsewhere takes a great deal of content from common law, especially British common law.[56] However, local customary law can also play a significant role in tort law by informing domestic common law principles, for instance by recognizing the importance of communitarianism.[57] Customary private law enjoys special legitimacy, because it changes as customs do.[58] In addition, it legitimizes Westernized tort law by limiting it to areas that customary law do not cover, such as vehicular negligence[59] - standards of medical care may be another category where custom would not have answers. Moreover, the legislature can modify tort law through normal legislation if it considers the law unacceptable. Domestic professional organizations also play a role in establishing medical standards by which doctors will be measured, as shown by the *Code of Professional Ethics*. These domestic inputs do not eliminate the colonial history of tort law. Nonetheless, they make it difficult for a government to argue that tort law is a colonial imposition it.

As the basis of strategic litigation, then, tort law's sub-constitutional, malleable nature protects it from challenge on the basis of perceived "colonialism". As with its substantive content, tort law's ideational weakness is its strength: it can be changed, but the fact that it can be changed means that it cannot be portrayed so readily as an alien imposition.

D. Conclusion

Human rights law and tort law share more common ground than might be immediately obvious. Both areas of law rest on a conception of morality, universal in the former case and societal in the latter. Both impose obligations on healthcare providers, many of them identical. However, human rights obligations tend to be broad and vague, and they interfere with

[56] See e.g. *Lutaya*, *supra* note 11; Julie A Davies and Dominic N Dagbanja, "The Role and Future of Customary Tort Law in Ghana: A Cross-Cultural Perspective" (2009) 26 *Arizona Journal of International and Comparative Law* 303 at 304 [*Davies*] (referring to Ghana).
[57] *Ibid* at 304, 309-310 (The authors also note that Ghanaian customary law and Ugandan customary law are quite similar (at 311)).
[58] *Ibid* at 307.
[59] *Ibid* at 304.

governmental power. In contrast, tortious obligations are reasonably narrow and well-enforced, falling within the government's powers. As a result, where a government act violates citizens' rights under both tort and human rights law, the tortious claim against the government bears more moral weight.

Part IV. Strategic Tort Litigation in Practice

Both tort law and human rights law have been used extensively in campaigns to change public policy. This is no surprise; as one commentator points out, lawsuits "can frame issues in new ways, give them greater prominence on the agendas of regulatory institutions, uncover policy-relevant information, and mobilize reform advocates".[60] This section surveys how tort law has been used thus far in strategic litigation and compares it to human rights campaigning. Tort litigation lacks one rhetorical benefit of a ruling that says, "Everyone has a right to health", which would be helpful to other advocacy efforts. However, notwithstanding its private law nature, tort focuses public outrage on institutional failures using claims that are difficult for governments to counter. In that important regard, it is equal to human rights advocacy.

A. Common ground and joint considerations

Strategic litigation in an authoritarian regime, whether in human rights law or in tort law, is valuable in large part because it promotes public awareness. Rule of law is linked closely to democracy;[61] in a non-democratic or quasi-democratic regime, the judiciary may be reluctant to make rulings that blatantly undermine government legitimacy, and the legal outcome of a court case may not suffice to ensure government compliance. After all, the Ugandan Constitution's Directive Principles did not in fact induce the government to protect Ms. Nanteza. At the same time, even authoritarian regimes are sensitive to public pressure; countless examples exist of authoritarian governments dramatically reforming institutions in response to public demand.[62]

[60] Timothy D Lytton, "Using Tort Litigation to Enhance Regulatory Policy Making: Evaluating Climate-Change Litigation in Light of Lessons from Gun-Industry and Clergy-Sexual Abuse Lawsuits" (2008) *Texas Law Review* 1837 at1837 [*Lytton 2008*].

[61] See e.g. Barry R Weingast, "The Political Foundations of Democracy and the Rule of Law" (1997) 91:2 *The American Political Science Review* 245 at p 260.

[62] See e.g. Annabelle Sreberny, "Television, Gender, and Democratization in the Middle East" and Helge Rønningawana Kupe, "The Dual Legacy of Democracy and Authoritarianism: The Media and State in Zimbabwe", both

Even if a society cannot effectively withhold legitimacy where the government violates the rule of law,[63] the government may be sensitive to embarrassments that threaten its legitimacy through other means. As a result, the effectiveness of tort litigation, much like the effectiveness of human rights litigation, should be assessed in large part through the lens of public awareness and embarrassment.

A number of tort litigation's major downsides are identical to human rights litigation's downsides, and indeed inherent to all strategic litigation. Litigation can be costly and protracted, it may lead to inconsistent and unpredictable outcomes, and it relies on an institution (the judiciary) that lacks in technical expertise.[64] To some extent, a human rights claim increases unpredictability, since a claim in tort is generally less tenuous legally than a claim in the right to health, as discussed prior. However, particularly where judges are susceptible to political pressure, a tort case remains uncertain. Court fees in Uganda typically run around 10% of the amount claimed,[65] so they present a significant expense even before the cost of representation is accounted for. Hence, strategic litigation through tort law does not completely avoid the risks of human rights litigation; many of those risks are inherent to strategic litigation, regardless of its legal basis.

B. Individualizing blame

The reduced scope of tort law does suffer from one significant disadvantage: it gives the government slightly more leeway to displace blame than human rights law. When an organization faces accusations of systemic malfeasance, it will have an institutional interest in shifting blame to individuals. For instance, during the molestation scandal in the Roman Catholic Church, Church officials tended to portray molestation as the work of a few "bad apples", rather than an institutional failure.[66] Insofar as strategic litigation hopes to improve institutions, rather than finding justice for just one plaintiff, this framing directly opposes the efforts of the litigator.

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in Myung-Jin Park and James Curran, eds, *De-Westernizing Media Studies* (New York: Routledge, 2000) 54 and 138 at pp 59, 145; Shiping Zheng, "Leadership Change, Legitimacy, and Party Transition in China", (2003) 8:1 *Journal of Chinese Political Science* 47 at p 56.

[63] *Weingast*, *supra* note 59.

[64] *Lytton*, *supra* note 58 at 1837.

[65] Courts of Judicature, *Judicial Handbook*, 1st ed (2006), Appendix 1.

[66] Timothy D Lytton, "Clergy Sexual Abuse Litigation: The Policymaking Role of Tort Law" (2007) 39:3 *Connecticut Law Review* 809 at 833-834.

Advocacy in tort law encourages, and to some extent relies upon, an individual framing. Ms. Nanteza's death provides a suitable example. In tort, at least, there was one health worker whose faulty behaviour clearly led to Ms. Nanteza's death. Even if a tort claim can be made against a government agency on the basis of vicarious liability, the claim must focus on the agency of the negligent individual, since that individual's negligence must be proven for the case to succeed. A human rights claim, by contrast, ultimately rests on the *government's* failure to provide adequate healthcare, whether through the doctor or through anybody else. That said, both parties' submissions in the Irene Nanteza case have thus far tended to focus on whether the doctor's delay in arrival was unreasonable or, by the opposite account, the doctor did everything he could.[67] This tendency is not surprising, for a number of reasons: as noted prior, a general critique of a system's shortcomings may exceed a judge's capacities and courage. Since individual government employees can violate human rights through their misdeeds,[68] an analysis of those misdeeds suffices to establish a legal claim based on human rights. Hence, human rights claims that arise from tortious acts may be framed in individualistic terms, regardless of the ultimate purpose of litigation; this problem is encouraged by tort law advocacy, but it is a likely outcome in either case.

In addition, tort law's focus on the individual wrongdoer is counterbalanced by its focus on human suffering. The *International Covenant on Economic, Social and Cultural Rights*, in its ambitiousness, encourages tame complaints. As mentioned, the *ICESCR* includes budgetary requirements. The failure to provide such healthcare violates the *ICESCR* whether it leads to anyone's injury or not — for instance, a person who is not vaccinated has not received preventative care to which they may be entitled under the *ICESCR*, even if they never contract the disease in question.[69] Even when the failure to provide healthcare inevitably kills a person, it will not always be easy to draw the line between violation and the inevitable reality of death — after all, everyone dies eventually, and the state's obligation to extend life cannot extend indefinitely. The South African Constitutional Court recognized this problem by leaving the task of prioritization to the government.[70] By contrast, harm done to the plaintiff takes center stage in tort law; without

[67] See e.g. Statement of Claim and Statement of Response, *Nakaseke*, *supra* note 3.
[68] See e.g. *Tumwekwasize*, *supra* note 25.
[69] *Comment 14*, *supra* note 21 at para 17.
[70] *Soobramoney*, *supra* note 2 at paras19-28, 31.

damage, the plaintiff may or may not be entitled to a serious remedy.[71] As a result, plaintiffs have every incentive to express their suffering. Typically, tort claimants frame their claims around "severe" injuries caused by "egregious" wrongdoing, then "dramatize this basic narrative structure as a morality tale about right and wrong".[72] As a result, the takeaway from a tort law claim may serve well to underline how a government's wrongdoing hurt its citizen; although the substantive law varies from in human rights, the moral outrage remains and is even magnified.

C. From individual to institutional blame

Although tort law often focuses on the individual wrongdoer, tort litigation may have a profound effect on public perceptions of the entire institution. The history of lawsuits against the Roman Catholic Church during its sexual abuse scandal show that tort-based campaigns can nonetheless shift the public eye from individual wrongdoing to institutional failures, especially due to private interests. The tort claims against the Roman Catholic Church had a cascading effect: the earliest cases to be reported on widely encouraged other victims to bring forward their own tort complaints.[73] Plaintiffs invoked the aforementioned "morality tale" against the Roman Catholic Church, and that narrative ultimately dominated discussion of the scandal.[74] In short, tort litigation for individual wrongdoing led changes in the perception of the Church at large.

Media also play an active role in shifting the blame toward or away from institutions. Media frame issues for public consumption; in that role, they favour narratives "with clear implications and straightforward moral lessons".[75] From the very beginning of the Catholic sexual abuse scandal and up to the present, local and eventually national media have focused on the Church's institutional role in covering up the abuse, rather than the primary defendants' crimes.[76] Arguably, the institutional failings behind Irene Nanteza's death tell a more complex story than simply pinning the death on her doctor's greed or incompetence; but the same observation applies to the Catholic Church scandal. The moral framework of institutional corruption should have resonance

[71] *Barker*, *supra* note 38 at 62.
[72] Timothy D Lytton, "Framing Clergy Sexual Abuse as an Institutional Failure: How Tort Litigation Influences Media Coverage" (2009) 36 *William Mitchell Law Review* 169 at 174 (referring to first-world, and particularly thinking of jury trials).
[73] *Ibid* at 171.
[74] *Ibid* at 174ff.
[75] *Ibid* at 175.
[76] *Ibid* at 177-178.

with ordinary Ugandans, who regularly experience the health system's problems themselves; stories based on that framework will be easy to communicate within Ugandan society.

Uganda's media, divided as it is between governmental and private news sources, illustrates how narratives may be promoted to fit particular interests. In 2005, Global Fund discovered that part of grants it had donated for disease prevention in Uganda had been siphoned off by corrupt practices.[77] Global Fund briefly suspended its grants, and the Ugandan government eventually established a commission, though its recommendations were largely ignored.[78] During the scandal, both the government paper *New Vision* and the private paper *Daily Monitor* reported extensively on the scandal. However, the *New Vision* tended to downplay the systemic problem of corruption and minimize the consequences of government mismanagement, though it still sometimes criticized the government.[79] The *Daily Monitor* was far more critical of the government, and it portrayed the scandal as more consequential.[80] In addition, *New Vision* tended to focus its criticism on individuals within the government, whereas the *Daily Monitor* struck at the ruling party and the government more broadly.[81] Since both human rights litigation and tort litigation include both frameworks, media will have much the same choice of frameworks.

In CEHURD's case against Nakaseke Hospital, controversies surrounding the doctor's personal malfeasance still raised awareness of the poor state of medical care and facilities in Uganda. The judge in the *Nakaseke* case went on a fact-finding mission to the hospital grounds to gain a clearer picture of where the doctor had been when Irena was in need of help.[82] He was accompanied by both parties' lawyers, hospital staff, an entire bus full of reporters from national newspapers and stations, both private and public, and also the author of this paper, who served as CEHURD's staff photographer for the day. The outing became something of a circus, as the irate In-Charge of Nakaseke Hospital tried to contain the crowd of nosy journalists following the judge around the facilities. Outside the operating theatre, a pipe in the ceiling cracked open, spilling water in front of the bemused reporters. As we proceeded around the hospital grounds, it became increasingly obvious that the doctor in Ms. Nanteza's case would have needed only a couple minutes to reach the maternity ward, had he been where he claimed to be on the day Ms.

[77] *Walulya*, *supra* note 16 at 21-24.
[78] *Ibid* at 24.
[79] *Ibid* at 82-88.
[80] *Ibid*.
[81] *Ibid*.
[82] Events viewed directly by the author, 16 July 2014.

Nanteza died. In short, the hospital tour was not good publicity either for the doctor involved or for Uganda's healthcare system.

News coverage to varying degrees critiqued the facilities and the public health system. The Nile Broadcasting Station took the opportunity to bemoan the facilities at Nakaseke Hospital and, implicitly, staffing there:

> During the tour at the hospital premises, all looked abandoned since no hospital medical staff could be seen around but the accused doctor and the hospital administrator [sic]
>
> The hospital wards looked abandoned with no beds save for the few patients at the outpatient and the theaters had a leaking roof.[83]

The *Daily Monitor* declined to report on the facilities, but it did give a damning overview of Uganda's poor maternal healthcare.

> Medical statistics show that 17 pregnant women die on daily basis from preventable maternal deaths in Uganda.
>
> The leading causes of maternal death in Uganda include; massive shortage of trained, motivated and equitably deployed professional health workers to attend to births, lack of access to emergency obstetric care, and lack of family planning services.[84]

The *Red Pepper*, generally not considered an opposition paper, included that same passage verbatim.[85] Clearly, a reader of any of the three papers would be either reminded of their government's poor record at maintaining the right to health or made aware of the appalling state of Nakaseke Hospital.

This incident illustrates how cases involving individualized wrongs can turn into referenda on broader institutional failures. Ugandan media generally prefer their stories to involve "big personalities",[86] a tendency that cannot be unique to Uganda. On the other hand, news organizations include context in their stories, and the institutional failures enter accordingly. Both

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[83] Namuli Zahra, "Jugde [sic] takes hearing to crime scene", Nile Broadcasting Station (undated) online: <http://www.nbs.ug/details.php?option=acat&a=3551#.VHdpkYvSmhY>.
[84] Anthony Wesaka. "Judge visits hospital over death of pregnant mother", *Daily Monitor* (16 July 2014) online: <http://www.monitor.co.ug/News/National/Judge-visits-hospital-over-death-of-pregnant-mother-/-/688334/2390086/-/qk4lbv/-/index.html>.
[85] "Judge Visits Nakaseke Hospital Over Death of Expectant Mother", *Red Pepper* (16 July 2014) online: <http://www.redpepper.co.ug/judge-visits-nakaseke-hospital-over-death-of-expectant-mother/>.
[86] *Walulya*, *supra* note 16 at 71.

human rights litigation, tort litigation, and even non-litigious scandals provide ample room for both individual and institutional narratives. As a result, media will have the choice of focus through either type of litigation; it is the advocates' public efforts, not their legal arguments, that are most likely to move public opinion toward or away from public reform.

D. Government Responses and Reform Gone Wrong

Strategic litigation ultimately cares about reforming systems, not just achieving the right outcome in a particular case. Tort litigation has historically led to reform, for instance of gun control laws, even when court rulings were not positive.[87] It has this effect because litigation can reframe issues and excite public interest, in turn leading to pressure for change.[88] In this regard, it does not differ significantly from human rights law.

Should litigation induce the government to respond, either because of a positive court ruling or because of public pressure, the next question must be whether the government's response will actually improve access to health. The answer is not always yes; but the use of tort law does not increase the likelihood of negative outcomes.

The private nature of tort law does not necessarily make it more prone to a negative government response. It was noted earlier that tort law is the creation of the government, and can be extinguished accordingly. In fact, Uganda has already limited tort law to some extent. Section 132 of the *Public Health Act* already gives public health authorities broad immunity from private liability, both in contract and in tort:

> No matter or thing done and no contract entered into by any local authority, and no matter or thing done by any member of any local authority or by any officer of or acting on behalf of the local authority or by any other person acting under the direction of the local authority, shall, if the matter or thing were done or the contract entered into bona fide for the purpose of executing this Act, subject that member, officer or person personally to any action, liability, claim or demand.[89]

This section is not an absolute barrier to an action against the doctor or the health authority — many wrongs committed by health authorities and workers, especially demanding bribes and other acts of corruption, probably are not "bona fide for the purpose of executing this Act". It would

[87] *Lytton 2008*, *supra* note 58 at 1843-1845.
[88] *Ibid* at 1840-1841.
[89] *Supra* note 44.

be more worrying if a government acted to eliminate liability altogether in certain areas. However, since such a move would require legislation, the process of modification would necessarily be public and extended. Recalling that public pressure is as powerful under an authoritarian regime as the rule of law, such a move to limit liability would not necessarily be preferable to the government as opposed to either paying its expenses or, ideally, working to improve the system so that causes for liability do not arise in the first place.

In the same spirit, the possibility of a government undermining tort law is no greater a worry than the reality of governments ignoring human rights law, especially the right to health. If the *ICESCR* and the more-specific *Abuja Declaration* have not been met with compliance, there is no reason to think that court rulings underlining the right to health will bring about compliance, either.

The greater concern will generally be counterproductive attempts to comply with public or judicial demands. Uganda's response to repeated corruption scandals and the accompanying international pressure has been the creation of various bodies to monitor and punish low-level corruption.[90] These bodies have had no real impact on corruption in Uganda, in part because the top level of government runs on patronage.[91] Further, one stakeholder worried that the threat of prosecution for corruption discouraged doctors from taking initiative to transport medications personally, to the point that the supervision actually decreased access to medication.[92] As a result, sloppy or partial compliance with pressure may at times be worse than non-compliance.

The risk of negative policy responses is no lower, and probably higher, under human rights law than under tort law. As Barker points out, the over-reliance on public law for private wrongs, premised on the abandonment of private law's vindicatory capacity, leads to weak mechanisms of redress, such as administrative compensation schemes, in place of the comparatively strong judicial compensation.[93] Additionally, the *ICESCR*'s focus on systems rather than individual outcomes may encourage a "do-something" attitude without any serious attempt to actually keep the individual wrongs from occurring. That said, any litigation that heaps embarrassment on a local government and requires it to pay out compensation, as Irene Nanteza's case may do to

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[90] "Letting the Big Fish Swim" (21 October 2013), *Human Rights Watch* (website), online: <http://www.hrw.org/node/119830/section/5>; *Walulya*, *supra* note 16.
[91] *Ibid*.
[92] Anonymous interview, June 2014.
[93] *Barker*, *supra* note 38 at 66.

Nakaseke District, gives the government a strong incentive to prevent further violations.[94] As a result, either type of strategic litigation creates some good incentives.

In summation, strategic litigation under any type of law does not ensure that access to the right to health will actually improve. However, this problem arises under both human rights litigation and tort litigation. There is no particular reason to think that tort litigation will increase the possibility of negativity consequences, and two *prima facie* reasons to think that it will have the opposite effect.

Conclusion

Strategic litigation invokes difficult choices. The litigator takes a wrong like the tragic demise of Irene Nanteza and, through the medium of the judiciary, attempts to turn the outrage into a positive change in society. Though a claim in tort may improve the chances of success in a particular case, it runs an apparent risk of deflecting attention away from the human rights issue. Yet appearances are deceiving. Private and public law make comparable moral claims. Moreover, a private tort makes a stronger claim against the state precisely because it is limited in scope. Insofar as strategic litigation focuses public pressure, tort law and human rights both serve the same basic purpose of drawing public outrage toward institutional failings; although tort law views wrong in a more individualistic way that human rights law, their actual effect in public discourse is likely to be similar. As a result, strategic litigators should carefully consider actions against the government based on vicarious liability, not just based on the right to health.

[94] Compare this to economic incentives from tort litigation encouraging corporations to improve their health practies, e.g. in Nicholas Freudenberg and Sandro Galea, "The Impact of Corporate Practices on Health: Implications for Health Policy" (2008) 29 *Journal of Public Health Policy* 86.

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