

RESPONSIBILITY, COMPENSATION AND ACCIDENT LAW REFORM

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ABSTRACT

This thesis considers two allegations which conservatives often level at no-fault systems — namely, that responsibility is abnegated under no-fault systems, and that no-fault systems under- and over-compensate.

I argue that although each of these allegations can be satisfactorily met — the *responsibility allegation* rests on the mistaken assumption that to properly take responsibility for our actions we must accept liability for those losses for which we are causally responsible; and the *compensation allegation* rests on the mistaken assumption that tort law's compensatory decisions provide a legitimate norm against which no-fault's decisions can be compared and criticized — doing so leads in a direction which is at odds with accident law reform advocates' typical recommendations.

On my account, accident law should not just be *reformed* in line with no-fault's principles, but rather it should be completely *abandoned* since the principles that protect no-fault systems from the conservatives' two allegations are incompatible with retaining the category of accident law, they entail that no-fault systems are a form of social welfare and not accident law systems, and that under these systems *serious deprivation* — and to a lesser extent *causal responsibility* — should be conditions of eligibility to claim benefits.

STATEMENT OF ORIGINALITY

To the best of my knowledge all of the material presented in this thesis, except where otherwise indicated, is my own original work, and has not been presented previously for the award of any other degree or diploma in any University. If accepted for the award of the degree of Doctor of Philosophy, I consent that this thesis be made available for loan and photocopying.

Nicole A Vincent

1. INTRODUCTION

This thesis considers two objections which are often levelled against no-fault systems, and it argues that although these objections can be met, doing so leads in a direction which is at odds with accident law reform advocates' typical recommendations.

1.1. DEFENCE OF NO-FAULT SYSTEMS FROM TWO ALLEGATIONS

Accident law is that part of the law which responds to accidents, and historically accident law systems have often been built around a central core component of *tort law* which requires victims to sue someone – typically, their injurer – if they wish to obtain compensation for their losses. But, as Chapter 2 will point out, tort law based accident law systems have been criticized for various reasons, and as an alternative some reformers have suggested that accident law should instead be based around *no-fault* principles — that is, that victims should not have to sue anyone in order to be compensated for their losses but rather that compensation should instead be provided by the state, but that different criteria of eligibility should be used to make particular compensatory decisions.

However, as Chapter 3 will explain, conservatives have responded with hostility to the suggestion that tort law be replaced with a no-fault system, and they have levelled two moral objections against such proposals. Firstly, they allege that since injurers would not be sued for their victims' injuries or losses under no-fault systems, and that since victims could be compensated for even those injuries and losses which they brought upon themselves, that the right people would therefore not necessarily take due responsibility for their actions under no-fault systems — I call this the *responsibility allegation*. Secondly, they also allege that since people could claim compensation whenever they suffered a serious injury or loss (i.e. an injury to- or a loss of something publicly-recognized as important or significant) but not otherwise, irrespective of whether someone else-, nobody else- or even they themselves were responsible for bringing about those injuries or losses, that no-fault systems would therefore result in both under- and over-compensation — I call this the *compensation allegation*. Given these two objections, conservatives therefore oppose such accident law reform proposals.

The responsibility allegation is levelled because conservatives believe that due responsibility can only be taken if those who are responsible for bringing about losses are made *liable* for them — i.e. on their account, accepting liability for the untoward consequences of our actions is an essential part of taking responsibility for our actions. Since

conservatives offer five arguments to support this position, to defend no-fault systems from this allegation, Chapter 4 will address and subsequently reject each of these arguments.

On the other hand, the compensation allegation is levelled because conservatives believe that what makes particular injuries and losses compensable are not *outcome-oriented* considerations (i.e. facts about *what* sort of injury or loss was sustained)¹ but rather *process-oriented* considerations (i.e. facts about *how* those injuries or losses came about)², and on their account compensatory decisions informed by the former kinds of considerations will at best only be correct by happenstance. Since conservatives offer two arguments to support their claim that what makes losses compensable are process- and not outcome-oriented considerations, to bolster the reformers' contrary claim (i.e. that compensability is determined by outcome-oriented considerations) my defence of no-fault systems from the compensation allegation in Chapter 5 will therefore address and subsequently reject those two arguments.

So, while Chapter 2 sets the scene by describing the reformers' arguments in favour of replacing tort law with no-fault systems, Chapter 3 sets out the conservatives' main reasons for opposing such reform proposals — i.e. it set out their two allegations against no-fault systems. Given my pro-reform leanings, one role which Chapters 4 and 5 play is to defend the reformers' position by offering responses to each of those two allegations. The other roles which Chapters 4 and 5 play in my overall argument are discussed below.

1.2. CRITIQUE OF THE REFORMERS' TYPICAL PROPOSALS

Although there is much variety among actual and proposed no-fault systems, these systems typically exhibit the following features: (i) they often aim to compensate victims for the full extent of their losses, and compensation is often paid both for items that do- and for items that do not have straight forward monetary equivalents — i.e. *corrective* compensation is often paid, and both *substitute* and *solace* as well as *equivalent* compensation is often offered; (ii) they usually only cover *accident* victims, victims of *work-place* injuries, or victims of *medical-* or *motor vehicle* accidents (or the like) — i.e. coverage is usually not *comprehensive* but *limited* to some sub-group for which membership is specified in *occupational* or *causal* terms; and (iii) people often retain the right to attempt to sue for damages in a tort action — i.e. these systems are often *mixed* or *dual*, rather than *pure*. However, §6.2. will argue that these features are problematic, and that no-fault systems should exhibit different features.

A central tenet of the position which I adopt in the context of defending no-fault systems from the compensation allegation in Chapter 5 – namely, that contrary to what

¹ e.g. the loss of an eye or a leg, a scratch to the duco of one's car, or simply a bruised ego.

² e.g. through another's faulty conduct versus as a consequence of the victim's own actions.

conservatives believe, what makes particular injuries and losses compensable are outcome- and not process-oriented considerations – also happens to impose certain *constraints* onto the sorts of features which no-fault systems may exhibit, and I will argue that these constraints are violated by many actual and proposed no-fault systems. Firstly, I argue that if compensability were indeed a matter of whether the injury or loss in question was sufficiently serious to warrant offering compensation to the victim (i.e. whether it involved harm to an interest which was publicly recognized as important or significant) rather than being a matter of whether it came about in a particular manner (e.g. through another’s actions), then victims should not necessarily be entitled to claim compensation for the *full* extent of *all* of their injuries or losses (both those that do- and those that do not have plausible monetary equivalents), but rather they should only be entitled to claim compensation for *that portion* of *those injuries or losses* which was indeed serious. Secondly, I argue that if the process or cause which brought about the said injury or loss was indeed irrelevant to its compensability, then it would also make little sense to limit the scope of coverage of such systems to groups for which membership was specified in the now-irrelevant *occupational* or *causal* terms. Thirdly, I also argue that if what made particular losses compensable were outcome- rather than process-oriented considerations, then our compensatory policies (i.e. the policies which identify those states of affairs which should be rectified) would not necessarily grant *victims* a right to be *compensated* for *accidental losses*, but rather, more accurately, they would only grant *entitled parties* a right to claim *benefits* for *serious deprivations*, and hence nobody should ever be granted a further special right to sue another party for their losses in a tort action, over and above their right to claim no-fault benefits.

On my account, no-fault systems should exhibit the following features (working backwards this time, relative to the previous order): (i) nobody should ever be entitled to receive special protection under the law against suffering deprivations characterized as losses (or accidental losses) *per se* by being granted the further right to sue others for damages in a court of law in addition to claiming their no-fault entitlements — i.e. such systems should be pure rather than mixed or dual; (ii) anybody who suffers from a relevant deprivation or disadvantage and not just victims of *losses* should be eligible for receipt of benefits — i.e. coverage should be comprehensive rather than limited through occupationally- or causally-specified criteria; and (iii) people should only be entitled to receive benefits for that portion of those deprivations or disadvantages which was indeed serious, rather than receiving compensation for the full extent of whatever injuries or losses they actually suffered, and irrespective of whether those injuries or losses even have plausible monetary equivalents — i.e. only redistributive benefits should be paid, and assistance should only be provided for those deprivations or disadvantages which have plausible monetary equivalents or correlates

since those are after all the sorts of cases where assistance is most likely to make a difference. Thus, on my account, a significant problem with typical accident law reform proposals and operational no-fault schemes is that they are often not sufficiently radical, since what we really ought to do is to *replace* accident law with a social welfare style system (see below), rather than retaining and attempting to *reform* accident law in accordance with no-fault principles, because in the end no-fault's principles are alien to- and incompatible with *accident* law.

1.3. IMPLICATIONS FOR SOCIAL WELFARE POLICY DESIGN

On my account, no-fault systems must be a form of social welfare if they are to withstand moral objections like the two allegations which conservatives level against them, and one distinct feature of the systems which I endorse is that *prima facie* those who experience a serious deprivation or disadvantage will be entitled to claim benefits. Importantly though, under the systems which I endorse, people's entitlements will not *necessarily* vanish if they happen to be responsible for their own deprivation — for instance, even if it turns out that a particular person's present neediness is a consequence of their own blameable gambling habits,³ *that fact alone* will not necessarily disentitle them from eligibility to claim benefits.

However, this aspect of my proposal is controversial because it also seems plausible that people should only have access to social welfare if they *were not* responsible for the fact that they are now in a needy situation, and hence that those who *are* responsible for their own present neediness should be denied access to social welfare⁴ rather than being allowed to 'sponge' off the state.⁵ On this account, social welfare systems should only provide assistance to people for those deprivations for which they are not responsible – i.e. it seems that social welfare systems should contain causally-based disentanglement clauses which reduce the entitlements of those who were responsible for their own deprivations – and so the systems

³ Let us suppose, for the sake of argument, that their responsibility was not undermined by some responsibility-undermining factors such as, perhaps, an unshakeable gambling addiction which was acquired involuntarily.

⁴ ... or at least that their entitlements should be lower than they would have been if they had not been responsible for their present neediness ...

⁵ For instance, in a relevantly similar context, it has been argued that smokers (and others who persist in indulging unhealthy habits despite repeated warnings and even offers to help them alter their damaging lifestyle) should not be entitled to receive government assistance (e.g. subsidized medical treatment) precisely because they are after all responsible for their own situation and hence that nobody else (other than perhaps them) should have to take responsibility for their resulting misfortune.

which I endorse may seem objectionable precisely because they do not necessarily bar those who are responsible for their own deprivations from claiming social welfare benefits.

Never the less, §6.3. will argue that this should not be seen as a problem because although the systems which I shall endorse will not treat a person's responsibility for their own deprivation as a sufficient reason to reduce their entitlements, they may still treat that responsibility as a necessary condition of their eligibility to claim benefits. An important feature of my defence of no-fault systems from the responsibility allegation in Chapter 4 is my denial of the existence of a *necessary* link between facts about people's *causal responsibility*⁶ and conclusions about their *liability responsibility*.⁷ Specifically, I argue that whether a causally responsible party should indeed take responsibility for something or not – or, for that matter, whether they should take responsibility *in that particular manner* (i.e. by accepting liability) – depends on various normative considerations such as, for instance, deterrence and not *just* on facts about their causal responsibility. This means that to determine how someone should be treated on account of their causal responsibility, we must go beyond mere facts about their causal responsibility and also reflect on such normative considerations. Thus, although on my account a person's causal responsibility for their own misfortune does not necessarily disentitle them from eligibility to claim no-fault (social welfare) benefits, this does not mean that those who are responsible for their own misfortune will necessarily be entitled to claim those benefits, since it is also conceivable that other factors (e.g. deterrence) may disentitle them from eligibility.

1.4. SUMMARY

This thesis' first aim is to defend no-fault systems from the two allegations which conservatives level against them, and the primary role of Chapters 4 and 5 is to provide that defence. However, Chapter 6 will point out that if the arguments contained in those two chapters are accepted, then contrary to what accident law reform advocates have typically suggested, what we should endorse is not merely the *reform* of accident law but rather its complete *abandonment*, because those two chapters' arguments also entail that the right way to view no-fault systems is not as a form of accident law but as a form of social welfare.

⁶ i.e. facts about *what they have done*, and hence about what states of affairs can legitimately be attributed to them as something of their doing.

⁷ i.e. conclusions about *what they ought to do* to take due responsibility for what they have done.

2. IN FAVOUR OF RADICAL ACCIDENT LAW REFORM

This chapter explains the *reformers'* reasons for claiming that no-fault systems should replace tort law based accident law systems. However, the dispute between reformers and conservatives stems from the fact that no-fault and tort law systems differ so greatly from one another, and because each side views the features which characterize the opposite side's preferred system in a negative light. Hence, before §2.2. explains the reformers' main objections to tort law systems,¹ §2.1. will first characterize those systems. This will also pave the way for the following chapter which will offer a similar characterization but this time of no-fault systems, and which will then explain why *conservatives* object to no-fault systems by pointing to the differences which they find objectionable.

2.1. TORT LAW SYSTEMS

This section characterizes tort law systems in terms of the *strategies* which they use to respond to accidents – strategies which are composed of a *mechanism* and a *policy*² – and in terms of *eight general features* that accident law systems typically exhibit.

2.1.1. STRATEGIC CHARACTERIZATION — MECHANISMS AND POLICIES

According to Gifis, a tort is 'a private ... wrong or injury resulting from a breach of a legal duty that exists by virtue of society's expectations regarding interpersonal conduct, rather than [for example] by contract or other private relationship' (1996:516, emphasis removed). The significance of the word 'private' in this context is that tort law is often contrasted with criminal law, and it is alleged that while the state initiates legal action under a criminal law system for wrongs which are said to be committed by those individuals 'against the state' (e.g. Cross, Jones et al. 1988; Simester and Sullivan 2003; Williams 1955), under tort law it is the individuals who suffer the wrongs (or their representatives) that choose whether and when to initiate legal action against those who are alleged to have committed the wrong (Coleman

¹ My aim in this section is only to motivate the debate by summarizing the reformers' main arguments, and so I will not consider replies to these arguments at this point or devise novel objections of my own.

² The terms 'mechanism' and 'policy' are borrowed from the discipline of Computer Science where the term 'mechanism' refers to general purpose algorithms or pieces of code designed to facilitate the performance of some function, and the term 'policy' refers to a set of rules which guide the process of selecting which mechanism to use in a particular context. I will refer to combinations of mechanisms and policies as *strategies* for responding to accidents. These terms will be explained shortly.

and Murphy 1990a, b). Those who suffer a wrong at the hands of another and who initiate legal action (also called a ‘law suit’) are referred to as *plaintiffs*, while those who are alleged to have committed the wrong and who are sued by plaintiffs are called *defendants*.³ Hence, broadly speaking, in addition to whatever else an accident law system which is based around tort law might do, it also provides plaintiffs with a right to initiate legal action against defendants in response to the latter’s alleged wrongdoing towards the former.

One of the most important remedies provided to plaintiffs under tort law is the *loss-shifting* remedy, also referred to as *damages*.⁴ Luntz and Hambly suggest that:

[t]he law of torts determines whether a loss that befalls one person should or should not be *shifted to another person*, [and to this end it allows] some of the consequences ... such as medical expenses incurred or loss of wages [to] be made good by payment of sums of money called ‘damages’.

(Luntz and Hambly 1992:6, emphasis added)

Obviously, losses themselves can not be shifted – when someone loses an eye in an industrial accident, that loss can not itself be shifted to somebody else (e.g. to their employer whose negligence may have been the cause of that accident) – and so what *is* shifted by the loss shifting remedy are not literally the losses that the plaintiff suffered, but rather some portion of the burdens associated with suffering those losses. So, for instance, although the loss of an eye can not be shifted to the plaintiff’s employer, the employer can never the less be asked to compensate the victim for disadvantages which they suffered (and which they will suffer in the future) as a consequence of losing their eye. Tony Honoré also writes that:

[l]iability in tort is imposed, (a) if the dispute cannot be resolved without litigation, by the courts of the legal system having jurisdiction (b) at the instance of an individual whose right has been infringed (c) on a person who has committed a civil wrong (tort) against that person and (d) normally imposes on one who has committed the wrong an obligation to pay money by way of compensation to the person whose right has been infringed.

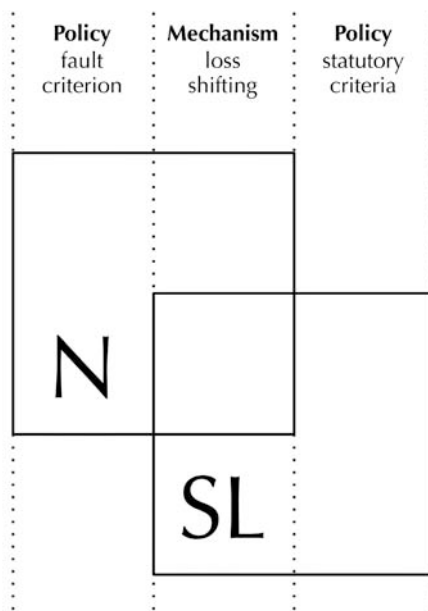
(Honoré 1999c:70)

³ In this thesis I will sometimes refer to plaintiffs as ‘victims’, and to defendants as ‘injurers’.

⁴ Other remedies include (e.g.) *restitution* and *injunctions*, however *damages* is of particular relevance to accident victims because it is designed to compensate victims for the losses which they suffered in the accident. Tony Honoré even asserts that ‘[o]ne may treat as subsidiary ... other remedies in tort law such as mandatory orders and injunctions’ (Honoré 1999c:70).

2. IN FAVOUR OF RADICAL ACCIDENT LAW REFORM

However the damages remedy is not available to all accident victims, and so in addition to the loss shifting *mechanism*, tort law systems must also specify a *policy* to guide courts in applying that mechanism. For example, one criterion that is commonly used to guide the application of the loss shifting mechanism is the criterion of *fault*, and systems that use this criterion to specify their policies are called either *fault-* or *negligence systems* (e.g. Coleman 1974). In a negligence system, to receive damages a plaintiff must show that their losses were a consequence of defendant's fault, and plaintiffs who can not show this will not recover damages — i.e. their losses will not be shifted. On the other hand, *strict liability systems* do not require plaintiffs to show defendant fault, but rather they use statutorily defined criteria such as *causation* to specify the circumstances under which the loss shifting mechanism may be used.⁵ In a strict liability system, plaintiffs must satisfy the evidentiary requirements of the statutorily defined criterion – for instance, they might have to show that defendant indeed *caused* their losses – and again, if those requirements are not satisfied then their losses will not be shifted to defendants (i.e. they will not recover). The following diagram shows the similarities and differences between negligence (N) and strict liability (SL) systems:



⁵ (e.g. Luntz and Hambly 1992:18; Coleman 1988b; Honoré 1999b:18, 23; Cane 2002b:82) Some say that strict liability systems shift losses *regardless of injurer fault*, which in effect means that victims receive compensation regardless of injurer fault too. In practice though, not only do strict liability and negligence systems reach very similar compensatory decisions, but defendants may also be able to cite plaintiff fault to defend themselves against an adverse judgment. Hence, although strict liability systems may compensate without regard for *injurer* fault, *victim* fault may still remain relevant.

While both systems use the loss shifting mechanism to give effect to the damages remedy – i.e. compensation is obtained in both systems through a mechanism which extracts it from defendants – these two systems use different criteria to specify the policies which determine when that mechanism can be engaged for the plaintiff’s benefit, and thus to identify the defendants who can be made liable.⁶

2.1.2. FEATURE-WISE CHARACTERIZATION — EIGHT GENERAL FEATURES

Tort law systems can also be characterized in terms of eight general features that accident law systems typically exhibit.⁷

Firstly, an accident law system can be either *comprehensive* or *limited* in the scope of its coverage.⁸ Accidents can come about in a number of different contexts – for instance, they

⁶ Another way to distinguish negligence systems from strict liability systems is by drawing attention to their different initial (or default) *liability rules* and the related *defences* that are available to escape this initial allocation of liability (Coleman 1988b). For instance, while negligence systems initially assume that by default all losses should be left where they fell unless plaintiffs can establish that they were a consequence of another’s fault in which case they will be shifted to defendants, by contrast strict liability systems initially assume that by default all losses should be shifted to defendants unless the defendants can establish that the plaintiffs’ losses were a consequence of the plaintiffs’ own fault in which case the losses may be left where they originally fell — i.e. upon the plaintiffs. Thus, on this account a negligence system would be characterized as the coupling of the *initial victim liability rule* together with the *defence of injurer fault*, while a strict liability system would be characterized as the coupling of the *initial injurer liability rule* together with the *defence of victim fault*.

⁷ Similar features are mentioned by other authors. For instance, Bovbjerg & Sloan also come up with a similar list of features to the one which I will use in this section, but they do this in the context of examining medical injury no-fault systems. The following features appear on their list: (i) administration — private, public or a combination; (ii) procedures — formal, informal or a combination; (iii) coverage — mandatory, voluntary, third or first party; (iv) eligibility — broad or targeted; (v) benefits — comprehensive or broad; (vi) coordination of benefits — is no-fault primary or secondary to other sources of payment; (vii) funding — open-ended or fixed, ample or minimum, rate-payers or premium-payers; (viii) premium-setting — experience rating and many or few risk classifications; (ix) solvency assured by whom — state taxation, regulatory oversight, private reinsurance; (x) loss-prevention mechanisms — built-in or reserved for other administrative mechanisms (Bovbjerg and Sloan 1998-9:68-9). Although my terminology differs from Bovbjerg & Sloan’s, we both draw attention to similar types of features.

⁸ The terms ‘comprehensive’ and ‘limited’ can also refer to the scope of proposed *reforms* (e.g. Robinson 1991), or to the *compensatory* aspects of a particular system (e.g. Szakats 1968e). I use the terms ‘incremental’ and ‘radical’ in the former context. On the other hand, the distinctions which are relevant to the compensatory context are discussed below at points six and seven.

2. IN FAVOUR OF RADICAL ACCIDENT LAW REFORM

can occur on the roads, in the workplace, in a medical context, or at home – and while limited accident law systems might restrict the scope of their coverage to only cater for (e.g.) medical accidents, comprehensive accident law systems will respond to accidents that occur in other contexts as well. The scope of tort law systems' coverage is generally comprehensive because their focus is broadly concerned with the question of *how the loss came about* — i.e. with whether it was a result of natural causes (e.g. lightning strike or earthquake), the victim's own (possibly negligent) actions, or another person's (possibly negligent) actions.⁹ Thus, the scope of tort law systems' coverage is generally comprehensive because these systems aim to protect a wide range of interests from wrongful infringement by others — i.e. where there is scope for losses to come about *through others' actions* (conceivably this may happen in any context), there may also be a context for tort law.

Secondly, accident law systems can differ in respect of whether they are *compulsory* or *optional* (Atiyah 1997d:128-9). The rights and duties conferred by a compulsory system apply to anyone who gets involved in an accident that falls within that system's scope of coverage (see above), and nobody can 'bail out' of that system in preference for taking part in some other system. By contrast, the rights and duties conferred by an optional system may only be enjoyed and imposed if one has previously 'opted in' to that particular system. The rules laid down by tort law systems, and thus the rights and duties which tort systems confer and impose, generally apply to everybody. One can not usually choose to bail out of the tort system — e.g. to gain immunity from being sued in exchange for waiving one's own right to sue others in the event of suffering losses in an accident that was somebody else's fault. Thus tort law systems are compulsory because in the event of an accident, if a victim chooses to exercise their right to sue for damages, then the rules of tort law will apply and the onus will be on the defendant to rebut the allegations of causation and/or fault levelled at them.¹⁰

A third way in which accident law systems may be characterized is according to their *sources of funding*. While it is conceivable that a system could be funded solely out of the

⁹ Admittedly, special legislation may constrain how (e.g.) road or medical accidents are handled by the law. Furthermore, such legislation may also limit the sorts of losses that plaintiffs can sue defendants for — e.g. loss of earning capacity, damage to one's assets, or maybe even pain and suffering.

However, such legislation tends to only spell out the *finer* details of how the general strategy employed by tort systems should be used — i.e. it is there to specify exceptions to-, and slight variations on, the general rules. But as the passage quoted from Gifis at the start of this section points out, the broad focus still remains on specifying 'society's expectations regarding interpersonal conduct' and on enforcing the rights and duties that come about when people engage in inappropriate (e.g. overly risky or loss-causing) conduct, by shifting losses from plaintiffs to defendants.

¹⁰ Mixed and dual *no-fault* systems, discussed in §3.1.2., are exceptions to this general rule.

state's general income tax, other sources of funding may also include special taxes and duties levied on particular products or activities which contribute to the occurrence of accidents, by charging administrative or other fees, through the imposition of fines onto those who engage in dangerous and/or loss-causing activities, and even by levying insurance premiums. Although fees are charged by courts for the time spent in court hearing and deciding upon a case, and legal and associated professionals charge their own clients private consulting fees, tort law systems are invariably underwritten by third party liability insurance, and they also receive some funding from the state which maintains the infrastructure of the legal system out of general taxation coffers. Hence, tort law systems are best characterized as being funded out of plural sources (e.g. see Atiyah 1997d:117-34; or Cane 1999d; and especially Davies 1989). However, if we restrict our focus to just the source of funds used to *compensate* victims, then the source of funding for tort law systems will be private since damages are obtained from private individuals by imposing liability onto them.

A fourth way in which accident law systems may be characterized is in regards to how they are *administered*. The principal contenders for this task are the judicial system through its system of courts, judges, barristers and solicitors, the state through its legislative and regulatory bureaucracies, and private insurers in the case of systems which use it. In theory, the judicial system administers tort law — or at least, judicial officers determine who will be compensated and who will not.¹¹

Fifthly, accident law systems can differ in regard to whether they are intended as a sole source of compensation, or whether they can co-exist alongside other alternative sources of compensation. Those systems in the former category, which are supposed to provide an exclusive or sole source of compensation are often referred to as *pure systems*, and those which can co-exist alongside other sources of compensation are either *dual systems* or *mixed systems*.¹² Given that the state often maintains social security schemes which provide a 'safety net' to those who are not entitled to damages under tort law, and given that some people may be able to recover compensation under privately purchased first party insurance policies (e.g.

¹¹ However given that 99% of all cases are settled out of court, often by negotiation between two insurance companies (Atiyah 1997a:22), in reality private insurers play an important role in administering the massive bulk of accidents. Admittedly though, insurers work within a framework of rules set up by the judicial system.

¹² The difference between the latter two systems is that while in a *dual* system an attempt at recovery under one system would usually bar attempts at recovery under an alternative system, in a *mixed* system victims can try to recover compensation from both sources. Note that although both Cane and Klar use the term 'pure' systems, Klar's terminology and classification differs slightly from mine because he also refers to 'add-on' and 'threshold' systems (Cane 1999f; Klar 1989).

life insurance policies and private medical cover policies) and to waive their right to sue if they so desire, in practice tort law systems are mixed compensation systems.

A sixth way in which accident law systems may differ from one another is by whether they offer *corrective* or *redistributive* compensation (Cane 1999e:350). While the former systems try wherever possible to provide compensation for the full extent of the victims' losses with the hope of returning victims (at least financially) as close as possible to their pre-accident position, and in this sense they are 'backwards looking' or 'corrective', the latter only aim to provide sufficient compensation to bring victims up to some pre-determined level – for example, to work as a 'safety net' that prevents people from becoming destitute in the event of an accident – and so in this sense they are 'forward-looking'.¹³ Where corrective compensation is offered, sometimes a *cap* on the maximum amount of compensation might be imposed, or victims may find that unless the extent of their losses reaches a certain *threshold* then they will not be entitled to sue for damages. However, where caps and thresholds are imposed in a tort system, both are typically seen as regrettable pragmatic necessities not as an intrinsic part of the ideal.

Retaining our focus on the topic of the total extent of compensation that victims can expect to receive, a seventh way in which accident law systems may be characterized is in regards to whether they only offer *equivalent* compensation, or whether they also provide *substitute and solace* compensation (Cane 1999e:351-2). While some losses such as medical expenses, vehicle repair costs and income losses have relatively straight forward monetary value equivalents,¹⁴ other 'losses' such as the pain and suffering one might endure, the loss of one's life expectancy, or the death of a loved one do not come attached with convenient and unambiguous monetary price tags. Correspondingly, those systems which offer compensation only for the former types of losses are referred to as offering only equivalent compensation, while those which are prepared to offer some compensation for the latter types of 'losses' as well are referred to as offering substitute and solace compensation.

As the previous two paragraphs suggested, at least in principle tort law systems adopt the '100% principle' – a commitment to, wherever possible, return the plaintiff to the position that they were in prior to the accident – but sometimes they reluctantly impose caps on the

¹³ Please refer to §3.1.1.(ii), where the difference between corrective and redistributive compensation is characterized in terms of the reasons that might be offered in support of offering either one or the other type of compensation — a characterization which I borrow from Robert Nozick.

¹⁴ I say 'relatively' because there is nothing simple about predicting the extent of earnings which a victim may have lost had they not been involved in an accident. But in comparison to placing a dollar figure on their loss of a limb, this task is relatively simple and straight forward.

maximum amount of damages that can be recovered, or even thresholds below which victims are not entitled to sue for compensation. This means that at least in theory tort law systems aim to provide both equivalent as well as substitute and solace corrective compensation, and where possible caps and thresholds are avoided (Cane 1999b).

An eighth and final way in which accident law systems may be characterized is that while in some systems the sum of compensation paid to victims is calculated on just one occasion and victims are paid this amount in a single *lump sum*, others offer *periodical payments* or *annuities* (Cane 1999f; Atiyah 1997e; Klar 1989; Szakats 1968e). The extent of these annuities may be based on just one original calculation (as in systems that offer lump sum compensation payments), though more commonly if an annuity is paid then the amount of compensation will be periodically re-calculated to take into account the victim's changing circumstances. In tort law systems, the calculation of damages is performed on one occasion, though actually arriving at this figure may be a long and drawn out process. But once this figure is calculated, the damages are then usually awarded in a single lump sum that is said to settle the case between the plaintiff and defendant once and for all.

So, speaking in general terms, tort law systems are *compulsory* and *comprehensive*, they aim to provide both *equivalent* as well as *substitute and solace corrective* compensation, caps and thresholds are avoided wherever possible, and damages are calculated and paid in a single *lump sum*; they usually operate as either *mixed* or *dual* systems (e.g. they operate alongside the social welfare system); and they are *funded out of plural sources*, and they are *administered by the courts*.

2.2. COMMON CRITIQUES OF TORT LAW SYSTEMS

A crucial function of tort law based accident law systems is to provide compensation to victims,¹⁵ and some have also thought that tort law expresses our society's ideas about justice and morality.¹⁶ But reformers have argued that tort law does a very poor job of compensating accident victims and that it fails to achieve justice. Reformers allege that luck plays a central role in determining who will receive compensation under tort law systems, how much compensation they will receive, and who will be liable to provide that compensation. They also claim that tort law systems are insensitive to considerations of the victims' desert or needs for compensation, and that they ignore the injurer's ability or inability to pay damages,

¹⁵ (e.g. Atiyah 1997a; Cane 1999e; Luntz and Hambly 1992)

¹⁶ For instance, it is often argued that tort law is geared towards achieving corrective justice, or that it attempts to ensure that people take due responsibility for their actions (e.g. Weinrib 1992; Perry 2000a; Benson 1991-2; Honoré 1999e; Coleman 1992b; Klepper 1990). In depth discussion of corrective justice is postponed until §4.2.4..

but yet moral intuition suggests that these considerations may also be relevant to morality and justice. Reformers tender that on further reflection it becomes increasingly less clear precisely what aims tort law based accident law systems could even hope to achieve, because tort law's reliance on liability insurance frustrates its ability to ensure that justice is done since *insurers* end up taking responsibility for injurers' actions by providing the funds to compensate victims, and tort law's attempt to solve every problem¹⁷ by imposing liability is similarly worrying since liability is at best only a blunt and imprecise tool.

Perhaps if some of tort law's shortcomings could be addressed through incremental reforms then tort law's utility could be salvaged, however reformers allege that attempts at moderate, piecemeal or incremental reform inevitably violate tort law's basic theoretical commitments and hence that on pain of inconsistency conservatives are not entitled to endorse incremental accident law reform proposals. Finally, they contend that in the end, the only part of the community which consistently benefits from a tort law based accident law system are a few privileged victims who receive excessively generous compensation payments, the legal profession, and other associated professionals, and so they conclude that for these reasons we should indeed engage in radical reform of accident law — i.e. that the tort law based accident law system should be replaced with a no-fault accident law system.

The problems associated with using tort law to address the issues which arise in accidents have been discussed at length by many others. Particularly notable summaries of this literature include Patrick Atiyah's book *The Damages Lottery* (1997g), and Peter Cane's book *Atiyah's Accidents, Compensation and the Law* (1999a). Jane Stapleton's book *Disease and the Compensation Debate* (1986d) offers piercing analysis of the specific problems which tort law presents for victims of man-made disease. Hence, in what follows I present my own highly compressed discussion of these arguments.

2.2.1. MORAL OBJECTIONS

It might be thought that tort law ensures that the right people are compensated for the right amount, that the right people pay to provide this compensation, and that those who end up paying for this compensation are only liable for the right amount. Unfortunately, tort law critics argue that this is far from what actually occurs under tort law because the question of who receives damages, and the related question of who will be liable for providing that compensation to the victim, are both determined by the criterion of injurer fault or by some surrogate for fault.¹⁸ However taken from a *victim's* perspective, it is not clear why facts

¹⁷ The so-called *economic* aims of accident law are probably the most relevant example.

¹⁸ Often a surrogate for fault is used even when liability is imposed strictly. The reason why it is appropriate to talk of *surrogates* for fault even in the context of strict liability systems is because, as

concerning injurer fault should even be relevant to compensatory decisions, because irrespective of whether their loss was a consequence of another person's (possibly faulty) actions or not, they will still face having to live with the very same burdens. On the other hand, taken from an *injurer's* perspective, given the role that luck and the victim's own actions play in determining the eventual type and extent of losses that will be suffered, it is again not clear why being at fault (or accidentally causing another person to suffer losses) should bestow on one such a heavy burden. The discussion in this sub-section points to some of the reasons why others have thought that it is difficult to justify tort law's use of the fault criterion to assess a victim's entitlement to compensation, and to determine whether it would indeed be appropriate to impose a correlative compensatory duty onto their injurers.

I. INSENSITIVITY TO VICTIMS' NEEDS

Appeals to victims' *needs* are certainly not likely to provide a plausible justification for why victims' entitlements to compensation should be based on considerations of injurer fault. Usually, the fact that somebody is in dire need provides at least *prima facie* reasons for rendering assistance to them. For example, Peter Singer has argued that the needs of people who live in poverty-ridden third world countries impose certain duties upon those who are fortunate enough to live in the first world (Singer 1985). Admittedly, some have argued that even the most pressing needs do not place quite as severe a demand upon us as Singer would seem to suggest, and others still have tried to diminish the force of this moral demand by suggesting that it is lessened by spatial and temporal distance such that we actually owe a greater duty to those needy people who are in our own back yard and who are alive today, than we do to (e.g.) the future generations that will occupy sub-Saharan Africa.¹⁹ However although the precise force of the moral demand placed upon us by others' needs is a point still in debate, few would argue that the needs of others have *no* moral weight whatsoever.

But facts about injurer fault have little if anything to do with how needy a victim is likely to be in a particular accident. Atiyah recounts and compares two examples which make this point rather clearly:

a man ... slipped on a dance floor and fractured his leg. It was quite a bad injury which caused him some pain, and he was off work for several months, though in the end he made a full recovery. The dance hall was owned by the local authority

Coleman and Ripstein put it, '[f]or certain types of activities, no amount of care will do' (Coleman and Ripstein 1995:118).

¹⁹ For discussion see Chatterjee's (2003) paper, as well as the other contributions, in the related issue of *The Monist* which is devoted to the topic of moral distance, as well as Kamm (2000), Scheffler (1995), Unger (1996), and Murphy (1993).

and the injured man obtained over £10,000 in damages ... because he was able to prove that the floor had been over polished and was hence too slippery. [In the second case,] a little girl of five years of age ... was taken to hospital with a severe attack of meningitis. The doctors saved her life, but in order to do so they had to amputate both her legs. She had no chance of obtaining damages from anybody because her injuries were nobody's fault.

(Atiyah 1997a:1)

In the first example, although the 'dancing man' undoubtedly suffered a not insubstantial amount of pain and inconvenience, and his income losses may also have been sizeable, these pale into insignificance when compared to the impact that the little girl's loss would have on her life prospects and on her needs. From a perspective that considers both parties' *needs*, the man's injury was really only a bruise — a minor and temporary nuisance. By comparison, the little girl's life options would have been severely restricted as she would now be bound for life to a wheelchair, she may likely experience discrimination and miss out on opportunities offered to able-bodied individuals, and she may be burdened with a lifetime's worth of ongoing medical costs, as well as experience both physical and mental pain. Facts concerning injurer fault do not bear any discernable relationship to a victim's *needs*, and given what was said above in the context of mentioning Singer's argument and the related debate, one might suppose that the fact that someone is now in need should bear at least some weight in our deliberations about how they should now be treated. But yet, tort law systems do not take victims' needs *qua* needs into account when deciding whether those victims should be entitled to compensation or how much compensation they should be entitled to receive, but rather they only take them into account *qua* consequences of defendants' negligent actions.

II. INSENSITIVITY TO VICTIMS' DESERT

Another candidate that is not likely to provide a satisfactory justification for using the criterion of injurer fault to distinguish those cases where a victim should receive compensation from those cases where they should not receive it, is the criterion of *desert*. If somebody deserves to receive something then this is usually taken as a good *prima facie* reason to give it to them, barring of course the existence of compelling countervailing reasons (Kekes 1995). In fact, the classic argument that is often cited as an explanation for why tort law imposes an *objective* standard of care onto defendants (see the following sub-section) has its basis precisely in the notion of desert. In a much-quoted passage, Oliver Wendell Holmes Jr. argued that:

If for instance, a man is born hasty and awkward, is always having accidents and hurting himself or his neighbours, no doubt his congenital defects will be allowed for in the courts of Heaven, but his slips are no less troublesome to his neighbours than if they [had] sprang from guilty neglect. His neighbours accordingly require him, at his proper peril, to come up to their standard, and the courts which they establish decline to take his personal equation into account.

(Holmes 2000:108)

On Holmes' own account, as far as victims are concerned, it makes little difference whether their loss was brought about by this rather than that sort of person, because that loss will be just as troublesome, or as Howard Klepper puts it, 'the person who finds her body or property damaged will find it little consolation that her injurer acted without fault' (Klepper 1990:226). Hence, it is precisely because victims deserve to be compensated for burdensome losses that tort law refuses to take *injurers'* subjective circumstances into account — i.e. because tort law supporters believe that the *injurer's* constitution should make no difference to how we treat the *victim*. But if, as Cane points out, 'the plaintiff ... deserves to be compensated whether or not there has been subjective fault, [then] it is hard to see why it does not also follow that a plaintiff should be compensated whether or not there is fault *at all*, whether objectively or subjectively judged' (Cane 1999c:149, emphasis added).

Thus another reason why we might feel troubled by the above two cases is because while the little girl was innocent and so her case might seem relatively meritorious (i.e. she seems deserving), there are reasons to suspect that the man may have been at least partly to blame for his own misfortune (he did after all take up an activity which carries with it precisely these sorts of risks, and it is conceivable that he may even have tried to dance beyond his actual level of skill) and these considerations may diminish the relative merit of his case (i.e. he may not be quite as deserving). For instance, one may wonder whether the man really had to take quite as much time off work as he actually did to recover — whether he was perhaps malingering — and about whether his employer would have been prepared to pay him sick leave to cover a shorter span of absence, if only he had not malingered for such a long time. For that matter, if income security was so important to him, then perhaps he should have prepared himself for such contingencies by, for example, taking out some form of income or life insurance. And in the absence of having prepared himself against such risks, one might even wonder why he did not apply for social security benefits during the period of his recovery instead of suing somebody else. In fact, given that the injury would never have happened had he not taken up dancing in the first place, one might also wonder whether the man should not have been prepared to take some responsibility for this misfortune and just

‘grin and bear it’ for a little while, and perhaps lived off his savings. Such considerations, where accurate, tend to lower the merit of the man’s case.

But quite the opposite picture emerges when we consider the little girl’s case. From what we can go on, she was not to blame for her own misfortune — children rarely are to blame for such things. Furthermore, being so young, she could not have been expected to insure herself against such an event, and she certainly does not deserve to bear such burdens once she grows up to be an adult merely because her parents did not think to insure her against such contingencies when she was only a child. Finally, while the man could reasonably have been expected to ‘tighten his belt’ and make use of social security payments for a little while, expecting the little girl to rely on social welfare for the rest of her life would in the very least be uncaring. So, although innocence can increase the level of a person’s desert and guilt can reduce it, in these two cases the little girl’s innocence and the possibility of the man’s (at least partial) guilt did not impact their relative levels of desert anywhere near as much as one would have expected it to do if desert had been taken seriously.

Some might of course retort that tort law does take guilt, innocence and desert into account, because it does after all reduce a victim’s damages if they were contributorily negligent in bringing about their own losses — i.e. some might object to this attack on tort law by pointing out that victims’ damages are reduced for contributory negligence precisely because their partial guilt means that their case has less merit. However as Atiyah (1997b:38-40) and Cane (1999c:153) point out, the practice of reducing a victim’s damages for contributory negligence just means that the arbitrariness of tort law is all the more pronounced, because while a partially blameworthy victim may still recover often not insubstantial damages (as long as somebody else was also partly to blame, and even if the latter’s blame was only minimal), a totally innocent victim will receive nothing unless somebody else was also blameworthy. This observation — that under tort law partial guilt can receive more generous treatment than complete innocence — demonstrates that tort law really only pays lip service to the notion of desert, because if desert was truly regarded as important, then (other things being equal) accident victims who were totally innocent would receive better and not worse treatment than those who were partially guilty. As it stands, critics maintain that tort law’s practice of reducing damages for contributory negligence makes mockery of the arguably important moral notion of desert.

III. OBJECTIVE FAULT IS NOT A FAIR BASIS FOR IMPOSING LIABILITY

Although tort law’s use of the criterion of injurer fault to distinguish compensable from non-compensable losses results in compensatory decisions which are difficult to reconcile with our moral intuitions regarding the victim’s needs or their desert for compensation, tort law

supporters could change tact and attempt to argue that victims only have a *right* to be compensated when injurer fault is present because that is the only time when their injurers can be legitimately made liable for their victims' losses. On the other hand, when injurer fault is absent tort law supporters could argue that victims would not have a right to be compensated precisely because their injurers would not deserve to bear those losses.²⁰ However this line of argument is also problematic because it is doubtful that the sort of faultiness which is exhibited in injurers' actions in accidents provides a sound basis for claiming that injurers deserve to bear the burdens of their victims' losses.

Firstly, as I already mentioned above, the criterion of fault imposes an objective duty of care onto defendants, '[a]ccording to [which] a defendant is at fault whenever he fails to exercise the care of a reasonable man of ordinary prudence' (Coleman 1982:375). However, as Cane points out, '[i]t does not matter that the defendant is not [in fact] a "reasonable person" but [rather that he] is clumsy or stupid or forgetful or has bad judgment [or indeed] that the defendant could not personally have foreseen the risk or avoided the accident' (1999c:148-9), because the defendant's personal attributes, and questions concerning what they could or could not have done, are treated as being irrelevant to the question of whether they were at fault in causing the accident. In other words, when someone is objectively at fault they need not necessarily have violated a standard of care which they could even have been expected to live up to, and so it may therefore be argued that faulty injurers are not necessarily morally blameworthy (Cane 1999c:148-50; Coleman 1982:372-6). But if injurers are not necessarily deserving of moral blame, then they may not in fact deserve to suffer the burdens of their victims' losses either, and this in turn might be thought to undermine the tort law supporters' claim that only when injurer fault is present will the victim have a right to be compensated for their losses.

In any case, the sort of failings that cause accidents are often common errors which all of us repeatedly make (e.g. failing to check the side vision mirror before changing lanes), and often we are not even aware that we made those errors.²¹ Most of the time such errors go by unnoticed because through good fortune they do not cause accidents, and we do not usually judge harshly those who make such errors. But sometimes luck is not on our side and our slip-

²⁰ I return to discuss this point at greater length, and to develop it properly as an argument in support of the tort law supporters' position, in §3.2.2.(i) of the following chapter. For now though, since my focus is on explaining the no-fault supporters' side of the argument, I will not develop this point any further.

²¹ For example, Luntz & Hambly draw attention to three separate studies which show that the standard of care that is imposed on drivers is totally unrealistic because even "good" drivers committed an average of nine driving errors of four different types every five minutes' (Luntz and Hambly 1992:27). Coleman also runs a similar argument (Coleman 1974).

ups may indeed result in tragedy, and when tragedy does strike we should recognize that the accident's occurrence may simply be a consequence of our rotten bad luck and not a consequence of the fact that we did something particularly morally reprehensible — more so than others who did likewise but who were fortunate. Thus, since we would not usually judge people harshly when they commit such common errors but when fortune was on their side, we should likewise refrain from judging people particularly harshly when their lapses in concentration do on some occasions cause harm to others through a sheer lack of fortune.

Finally, not only is it a matter of luck whether someone's actions will cause a loss or not, but it is also a matter of luck (as far as the injurer is concerned) what extent of loss will actually be suffered by the victims of that accident, and so our moral assessment of accidental injurers should not be determined by the extent of losses which the victims actually suffered. As I have argued elsewhere, the extent of victims' losses is no more determined by the faultiness of the injurers' actions than it is by the victims' own actions. The following examples demonstrate this point:

(1) You lose concentration whilst driving and your car ploughs into the back of a stationary car causing considerable damage to both cars.

(2) Same as above, except that you drive a cheap 'rust bucket', so the financial burden of the damage to your car is insignificant, but your innocent victim is driving a very expensive Rolls Royce Silver Seraph.

(3) Same as (1) – i.e. both cars are of approximately the same value – except that the other car's owner had strapped her rare Stradivarius violin to her back bumper bar, which is now lying in splinters on the asphalt, making the accident as expensive as if you had crashed into a Rolls Royce Silver Seraph.

(Vincent 2001:83-4)

Since victims can often exercise a considerable degree of control over whether they will expose themselves to the risk of a small loss or to the risk of a relatively large loss — for instance, each of us has the capacity to choose to drive a cheap (but still equally safe) motor vehicle, and thus to lower the extent of losses which we might suffer in the event of an accident — the extent of victims' losses can therefore sometimes be more a result of their own choices than it is a result of their injurers' fault, and so we have no special reason to attribute greater moral blame to injurers when the extent of losses suffered by their victims is larger than how much blame we would attribute to them if the victims suffered a smaller extent of losses or even no losses at all. If such special reasons do exist, then they would probably work to the injurer's and not to the victim's favour in such cases, and so we should

acknowledge that as regards the injurer's fault, the extent of losses that their inattentiveness may ultimately occasion is often a matter of sheer luck and hence that it has little if any bearing on their moral culpability.²²

In order to establish that victims whose losses were a result of another's fault have a right to compensation which is correlative of their injurer's compensatory duty, and that those victims whose losses were not a result of another's fault ought not to be granted any compensatory right (because nobody would have a correlative compensatory duty), tort law supporters would first have to explain why compensatory duties for the actual extent of losses suffered by victims should be imposed specifically onto accidental loss-causers rather than onto somebody else. However tort law critics argue that the presence of luck in accidents removes the moral blame component, and hence that it would therefore be morally arbitrary to single out any particular accidental loss-causer as having the moral duty to provide their particular victims with the particular amount of compensation to which they claim to be entitled.²³

IV. INSURANCE UNDERMINES TORT LAW'S EFFECTIVENESS

One last reason to doubt that injurer fault should be thought of in moral terms, and hence to doubt that its presence justifies the imposition of liability onto accidental injurers, is that tort law is inextricably linked to liability insurance. If the fault that was present in accidents was of a specifically moral variety – i.e. of a variety that might, for example, require us to inflict punishment on faulty injurers, or to ensure that *they* bear the burdens which are appropriate to their having been at fault – then tort law systems ought to ensure that faulty parties could not avoid the burdens that were rightfully theirs to bear. However not only is liability insurance made available to people in many accident-producing walks of life, but in some areas it is even compulsory. Furthermore, as Martin Davies has pointed out, tort law is inextricably linked to, and underwritten by, insurance-providing institutions. Davis argues that the

²² Oliver Wendell Holmes Jr acknowledges that sometimes humans are just 'instruments of misfortune', but strangely this does not deter him from favouring tort law's strategy for dealing with accidents (Holmes 2000:94). Also see Harris' comments on how under tort law 'the level of the sanction is not related to the degree of carelessness' (Harris 1991:290).

²³ This sort of argument has been used both Guido Calabresi, Jules Coleman as well as others to suggest that if tort systems had to be retained, then it would be morally more appropriate to set up something like an 'at-fault pool' scheme where all faulty parties – i.e. everybody who makes the sorts of slip-ups that may lead to the occurrence of similar losses – would share in the total burden of compensating the whole pool of their victims (Calabresi 1970b; Coleman 1994; also Harris 1991:293). However this is simply not what tort law actually does, and so this offers tort law systems no refuge from the present critique. I discuss the at-fault pool suggestion below.

expansion of tort law since the late 1800's has been constantly underwritten by the presence and ready availability of relatively inexpensive liability insurance, and that in its absence tort law could not even function (Davies 1989). But given that insurance distributes losses thinly across everyone who pays the premiums, if the reason why injurers were supposed to have a duty to bear the burden of compensating their victims was because of their alleged moral responsibility for their victims' losses, then it would only frustrate our injurer-relative moral reasons to insist that they should take out insurance coverage against their own liability (e.g. see Coleman 1974; Thomson 1984:106; Harris 1991:289-90; Vincent 2001; Atiyah 1997d:111-3). The fact that liability insurance is available and so often even compulsory under tort law, indicates that what really matters to us when accidents occur is not that injurers take responsibility for their wrongdoing, but rather that their victims are compensated for their losses.²⁴ In light of this, it is indeed perplexing why tort law systems spend so much time and effort worrying about injurer fault, when in the end it is not the injurer but society collectively (through its purchase of insurance premiums) that bears the burdens of compensating victims anyway.

An analysis of the role of liability insurance in tort law is particularly eye-opening because not only does it point out who really pays the victims' compensation under tort law and hence the peculiarity of tort law's insistence that only victims who were injured through another's fault should recover compensation, but also because it draws attention to the critical but often purposefully disregarded criterion which determines whether a particular victim will receive damages in the event of an accident — i.e. whether the defendant has sufficiently deep pockets (often as a consequence of being insured) to withstand an award of damages being made against them. As a matter of fact, in most successful tort suits defendants either have independently deep pockets (e.g. because they are wealthy or because they are corporations or public authorities) or else they are insured, and as many have often pointed out, this is not just co-incidence but it is rather a simple consequence of the fact that there is no point in suing someone for damages unless they are financially capable of paying the often huge sums of money that may be awarded. Both Patrick Atiyah as well as Donald Harris

²⁴ This point should not be over-stated though, since insurers do quite often pass on their costs to their insured clients in cases that saw those clients being at fault, by such means as (e.g.) increasing their insurance premiums in subsequent years. Indeed, the very fact that we expect people to take out insurance 'in order to do the responsible thing', suggests that perhaps taking out insurance is indeed just another way of taking responsibility. Never the less, to whatever extent our aim in imposing liability onto people is to ensure that *they personally* feel the consequences of their actions – and this is allegedly the case on at least some accounts of what corrective justice requires (I discuss corrective justice in §4.2.4.) – to that extent that aim will be at least partially frustrated.

point out that victims of certain sorts of accidents have a much higher chance of recovery than victims of other sorts of accidents (e.g. 1 in 3 victims for motor vehicle accidents, 1 in 5 victims for workplace accidents, and only 1 in 50 for other types of accidents), and they claim that this is basically due to the fact that unless there is already an entrenched practice of requiring people to take out compulsory liability insurance, then without the underwriting function that insurance provides, often no action for damages is even initiated (Atiyah 1997c; Harris 1991:295, 297-8).

Furthermore, initiating legal action is an expensive procedure, and victims who choose to pursue this course of action are often not in a financially secure position having just suffered losses. Thus, it is only when defendants have the wherewithal to discharge their legal compensatory obligations in the event of damages being awarded, that plaintiffs would even be advised to proceed with the case. If someone is not insured or does not have sufficiently deep pockets for some other reason (e.g. poverty), then they will not make a good defendant – it is simply not worth it to sue them since it costs too much time and money to do so – and given the risk that they may not be able to discharge their compensatory obligations, plaintiffs will often be advised to not pursue a case against such a defendant even when they may otherwise have a *prima facie* legitimate legal claim to sue for damages under tort law against that defendant (Atiyah 1997c).

Finally, judges are also reluctant to award damages against defendants who would be placed in severe personal hardship by a ruling made against them. For instance, when faced with a choice to either award damages against a public authority which will spread these costs thinly among the community and which will ensure that a victim is taken care of properly, or denying them compensation on grounds that the public authority may not really have been at fault, judges have shown a tendency to see the facts of a case in such a light that the public authority will be deemed as having been at fault in some way.²⁵ On the other hand, if the choice involves either awarding damages against another poor hapless individual whose life would be ruined by such an award, or finding in the defendant's favour and not compensating the victim, then judges may decide that it is bad enough that one person is already hurt, without then adding to the total amount of misery in the world by awarding damages against the other person who really does not have the wherewithal to carry such an award anyway. Although such considerations are not supposed to be taken into account, judges are compassionate and so they naturally empathize with both plaintiffs and defendants, and hence especially when the fault involved is not of a moral variety, there can be a tendency to balance the merits of compensating the plaintiff against the draw-backs related to imposing

²⁵ Greg Pynt's discussion of various 'failure to warn' cases suggests this (Pynt 1999).

such a burden on a defendant who is not financially secure, and this can result in rulings that do not in fact even give plaintiffs their legally-due compensation despite the fact that an injurer may well have been technically at fault.

V. OTHER MORAL PROBLEMS WITH TORT LAW SYSTEMS

The moral problems with tort law do not stop here either. Firstly, whether a victim suffers a loss in this rather than in that context is also important in a tort law based accident law system because while in some areas liability insurance is compulsory (e.g. motor vehicle, industrial and medical accidents), and hence victims are more likely to recover damages if injured in those contexts because defendants will have deep pockets by virtue of being insured, in other areas liability insurance is not compulsory and so plaintiffs are less likely to recover damages (Atiyah 1997c; Harris 1991:295, 297-8). Thus, some victims get worse treatment than others under tort law merely because they were unlucky enough to be injured in a context where people are not usually expected to purchase compulsory liability insurance.

Secondly, since causation can only be established by the provision of ‘deterministic evidence’ – i.e. evidence which establishes that it is *more likely than not* that the defendant caused the loss, and not evidence which only points to a statistically significant probability that this defendant’s actions may have contributed to harming this plaintiff (see §2.2.3.(ii)) – many otherwise meritorious cases are excluded under tort law simply because fault could only be established in these cases if probabilistic evidence had been admissible. However probabilistic evidence is only rarely admissible, and in those cases where it is accepted it is often the cause of serious dissensions (see forthcoming comments in §2.2.3.(ii)), which yet again means that tort law’s focus on establishing injurer fault need not necessarily lead to decisions that are morally defensible (Mann 2001; Robinson 1985; Vincent 2005).

Finally, it might be thought that even though philosophers believe that it is not morally appropriate to base entitlements to compensation on considerations of injurer fault, that ordinary people’s ideas about compensation do fall in line with tort law’s practice and hence that entitlements to compensation based on considerations of fault can after all be shielded from these criticisms. However, as Lloyd-Bostock has established through empirical studies, it would actually appear that the ordinary person’s ideas about when compensation should be offered to victims and about who should pay to provide it do *not* coincide with tort law’s practice. To the contrary, ordinary people seem to think that fault (or some surrogate for it) should not be the basis upon which compensatory decisions are made (Lloyd-Bostock 1984). Hence, since even the ordinary person does not think that this is what ought to be done, it would indeed appear that tort law is out of step with the average person’s moral intuitions about whether compensatory decisions should be based on facts about injurer fault.

VI. SUMMARY OF MORAL OBJECTIONS

None of the above arguments is particularly novel or new. For a long time it has been acknowledged that the real problem for tort law is that so much about accidents is just a matter of brute luck, and tort law's insistence on allocating losses between a victim and their injurer on the basis of the criterion of injurer fault can not be reconciled with reflective moral intuition in a context where luck plays such a prominent role. Precisely the same injuries can come about in different contexts and it is just a matter of luck whether one suffers a particular injury (e.g. loss of both legs) at home, in a hospital, in the workplace or on the roads. But yet, as I have argued, the context makes all the difference to victims in a tort law system because in one context compensation will be forthcoming but in others it will not. It is also just as much a matter of luck whether the injurer was at fault, as it is whether fault and causation can even be established in line with tort law's often obscure and counter intuitive evidentiary requirements. Luck determines whether your inattention will on this occasion result in another's tragic losses, or whether it will go unnoticed and have no adverse impact on anyone, as well as whether your victim will suffer extensive or only limited losses.

The use of the criterion of injurer fault to distinguish those cases where compensation will be paid from those where compensation will not be paid is morally problematic because in the end it is morally arbitrary who will be compensated, how much they will receive, and who will pay to provide that compensation. Decisions concerning the allocation of compensation which look to the presence of injurer fault do not square up with our moral intuitions concerning victims' need, victims' desert, nor with our intuitions about a victim's compensatory rights (as derived from correlative compensatory duties), and they do not square-up with the ordinary person's moral intuitions either. Furthermore, the fact that liability insurance underwrites tort law at such a basic level gives us ample reasons to suspect that the real moral problem which tort law tries to address (albeit ineffectively), is the compensatory one that comes about as a result of the unwelcome effects of bad luck upon our lives. But since the compensatory inquiry is ultimately concerned with the victims' dire situation and not with injurers' wrongdoing, and it is luck and not moral guilt that is the true source of mischief in accidents, it is thus not clear why injurer fault should play *any* role whatsoever in the compensatory inquiry when it only leads to arbitrary and unjust discrimination between victims who find themselves in otherwise very similar situations.

Hence tort law critics argue that it is not true that under tort law the right people receive compensation, that this compensation is paid for by the right people, and that both parties receive and pay the correct amount of compensation. Morally speaking, all of these factors are left up to chance under tort law, and given that moral intuition suggests that our

compensatory decisions should differ from tort law's actual decisions, this constitutes a serious moral complaint against using tort law as a component of our accident law system.

2.2.2. ECONOMIC OBJECTIONS

Despite these shortcomings, it might be thought that tort law still has some other redeeming features — for example, it might be thought that tort law is effective at achieving the economic aim of accident cost reduction.²⁶ Some have argued that when the decisions that judges make concerning the apportionment of liability are analysed, it may appear almost as though these judges were actually taking economic considerations into account, and some even suggest that if only judges did base their decisions more explicitly on economic considerations then the outcomes of tort law would be all the more efficient.²⁷ Furthermore, since the burden that accidents impose on society is an evil, the promise of achieving this 'economic aim' might also be thought to have significant moral appeal, and so these economic benefits may be thought to offset the force of some of the above mentioned moral objections to tort law. However, here too tort law critics argue that the realities of tort law are a lot less appealing, and I will briefly summarize these economic problems under Guido Calabresi's (1970a) headings of *primary*, *secondary* and *tertiary* accident cost reduction.

I. PRIMARY ACCIDENT COST REDUCTION

Primary accident cost reduction aims at reducing the number and severity of accidents. In order to achieve this aim, we must first discover the most common causes of accidents and implement preventative strategies to neutralise those causes, as well as to use deterrent measures that discourage those who might otherwise engage in dangerous activities from doing so, and to ensure that counter-measures can not be taken by anyone to escape the effects of these deterrents. However, tort law focuses not on the *common* causes of accidents in general, but only on the *extraordinary* human causes of particular accidents. In focusing on

²⁶ Apart from the brief remarks contained in this sub-section, economic aims of accident law will not be discussed in this thesis. What follows is only a very rudimentary summary of what I take to be the main features of the pro-reform part of this literature which largely seems to favour no-fault systems.

²⁷ The Learned Hand test for the existence of the duty of care, formulated in 1947 by Judge Hand, does indeed sound like a test concerned with economic efficiency. According to this test, a defendant is at fault when they breached a duty of care, and they will be held to have been in breach of a duty of care just in case it would have been cheaper for them to have avoided endangering the plaintiff, than it would have been for the plaintiff to have avoided being endangered by them. Richard Posner, a long-time advocate of the Economic Analysis of Law movement, also points to later formulations of this test which have the same economic ring to them; these include Lord Justice Denning's comments in *Latimer v A.E.C. Ltd* in 1952, and Lord Reid's formulation in the *Wagon Mount* case in 1966 (Posner 1996b:39-41; Landes and Posner 1987).

injurer fault, tort law pays too much attention to human causes at the expense of not noticing the more common structural causes that more frequently bring accidents about, and at the expense of forgetting that these causes can often be addressed more effectively than specific human causes.²⁸ Furthermore, reformers object to the fact that tort law promotes the collection of unreliable information regarding what causes accidents to occur in the first place because the focus on injurer fault encourages injurers to cover up their fault to escape liability, it leads victims to exaggerate the extent to which another's fault was involved to maximize their chances of receiving compensation, and out-of-court settlements often involve secrecy agreements which further hinder the information collection process, and all of these problems hinder the aim of primary accident cost reduction.

Additionally, since tort law is married to liability insurance, a large portion of the deterrent effects that the threat of liability could have otherwise had on prospective injurers are markedly reduced because instead of facing the threat of having to dig into their own pockets, prospective injurers know that their insurers will pay for their victims' compensation.²⁹ Furthermore, losses are spread all the more widely under tort law because third party (i.e. liability) rather than first party (e.g. comprehensive) insurance is used. Unlike first party insurance, where it makes sense for an insurer to raise the premiums in accordance with an individual's accident history, it makes little sense to do so with third party insurance because it is not the victim but the yet-unknown others who will benefit from their third party insurance policy. The precise victims can never be known prior to the accident, and hence insurers can not predict what extent of losses needs to be insured against, which is why most ordinary motorists pay roughly the same third party insurance premiums.³⁰ And in any case,

²⁸ Harris puts this point rather succinctly when he points out that 'the law of torts focuses only on the *additional* risk created by [negligence] at a specific time, not on the [general riskiness of] the activity as such'. His point is that since other factors also cause accidents, a focus on carelessness can at best only prevent those accidents which would have been caused by carelessness. He also cites relatively recent empirical evidence, gathered by the Harvard Medical Practice Study conducted at the Harvard School of Public Health and the Harvard Law School, which he claims provides very good reasons to suspect that tort law achieves very little if any deterrence (Harris 1991:294, 298-302, 305). Another recent study conducted by the Committee on Quality of Health Care in America, cited by Studdert and Brennan, also supports the same conclusion (Studdert and Brennan 2001:226).

²⁹ Though note again that some deterrence is still achieved, both from the fact that the said party's insurance premiums may be increased in subsequent years, and because the associated public exposure that goes along with some tort cases is itself something that many (e.g. corporations, medical practitioners) want to avoid.

³⁰ Although a person with a steady history of motor vehicle accidents is probably more likely to be involved in another accident, we can not know whether the third party to this accident will drive a

charging some people more for third party insurance would only open up the possibility that some victims would be deprived of compensation because this may discourage some defendants from purchasing insurance, and since victims rely on others being insured, it would be them and not the injurers that would suffer as a result of such a policy. Thus, since tort law utilizes third party (rather than first party) insurance where the premiums are spread relatively widely and evenly, this further reduces the deterrent effect of tort law and hence hinders its ability to achieve the aim of primary accident cost reduction.³¹

II. SECONDARY ACCIDENT COST REDUCTION

No matter how hard we try, unfortunately some accidents will still continue to occur, and so secondary accident cost reduction is concerned with reducing the impact that those accidents which do occur will eventually have. To achieve this aim it is important to provide victims with prompt access to rehabilitation programs, and to encourage them to make as full a recovery as possible. However tort law's procedures involve very long delays, and these reduce the extent to which victims can make a prompt and successful recovery. For instance, in the early 1980s, only 10% of all cases which were settled by a judicial ruling involved a delay of 12 months or less. Two thirds of all cases experienced delays of between one and three years, another 10% – i.e. as much as the first group which took up to 12 months to recover damages – took five years or longer to resolve, and the balance of cases took between three and five years to resolve (Luntz and Hambly 1992:36). Furthermore, because the amount of damages that will be awarded to victims is based on the extent of losses that they have suffered, under tort law victims are actually encouraged to maximize rather than to minimize their losses (or at least to exaggerate the impact of the accident on their lives) because this can increase their damages award, and this provides yet more disincentive for them to enter a rehabilitation program early after their injury. These time delays and financial disincentives both contribute significantly to tort law's inadequacy as regards reducing the impact of accidents on their victims and on society.

One of the basic principles of insurance is that when losses which would otherwise be very burdensome if borne by just one person are spread throughout a large group of people, then their impact can be minimized. Hence, in general terms, to maximally reduce the impact of accidents, their burdens must be spread as thinly and widely as possible throughout society, rather than being focused on any single person or group thereof, since those persons or groups can also be adversely affected by them. However there is a tension between the aims of

cheap or an expensive car. On the other hand, with comprehensive insurance the extent of the insured's potential losses increases with the value of the car which they drive.

³¹ See below for more discussion of the link between deterrence and insurance.

primary and secondary accident cost reduction because if the costs of accidents are spread too widely and indiscriminately, then although their impact may indeed be greatly reduced, this may lower the amount of deterrence that can be achieved. Thus, in spreading the costs of accidents, care should be taken to ensure that greater amounts of secondary cost reduction do not come at the price of lower amounts of primary cost reduction,³² and the way to ensure this is to have precise control over whom the costs of accidents will eventually be spread onto.

Unfortunately, tort law does not fare particularly well in this regard either because rather than acknowledging that it is the insurer who will pay the award of damages to victims, there is still a tendency to carry on with the fairytale that defendants will pay these damages out of their own pockets and that this will deter other prospective injurers from engaging in similar dangerous conduct, and perhaps even ensure that the injurers take personal responsibility for the accident. However in entertaining such fairytales, sufficient attention can not be paid to precisely how the insurer will eventually spread those costs, and in any case even if this attention could be paid, it would make little difference because if insurance coverage is provided by private insurers, then it is the insurers and not the courts or the state that would control how the costs would eventually be spread. Hence, the other reason why tort law fails in regard to secondary accident cost reduction is because it abdicates responsibility for overseeing how the costs of accidents will eventually be spread, and this lack of control may result in its secondary accident cost reduction targets being achieved only at the questionably high price of sub-optimal primary accident cost reduction.

III. TERTIARY ACCIDENT COST REDUCTION

Finally, for the same reason that the set-up and operation of a commercial corporation must unavoidably incur various administrative operational costs, so too the set-up and operation of any accident law system will also incur administrative costs. In order for a corporation to make profit it must spend some of its receipts on employing people, and similarly people must also be employed in order to achieve the first two aims of accident cost reduction. However the costs which are incurred in the process of achieving our primary and secondary accident cost reduction aims (or making profit in the case of a corporation) must ultimately be offset and justified in terms of the savings that are made in terms of a reduction in the number, severity and impact of accidents (or in terms of the receipts made by the operation of the corporation), and hence for the same reason that a corporation must try to minimize its administrative costs, so too an accident law system should minimize its operational costs.

Unfortunately, tort law is notoriously inadequate in this regard too. Under tort law, in order for a victim to recover damages, a large number of people needs to be employed, often

³² ... or at least we should know how much of one we sacrifice to get more of the other ...

2. IN FAVOUR OF RADICAL ACCIDENT LAW REFORM

for protracted periods of time, to perform such tasks as assessing the extent of the victim's losses and arguing their case inside and outside of a courtroom. Moreover, much duplication of effort also occurs because defendants employ their own 'posse' of highly paid professionals to defend them from the plaintiff's allegations. Finally, the time of judges and others who are employed by the infrastructure of the legal system incurs further expenses, which must in the end be borne by someone. Data suggests that at the bottom line tort law comes in at a very hefty price tag — the Pearson Commission suggested that close to half of all the money that is awarded in damages goes to pay for these operational costs associated with administering the tort system. On the other hand, when this is compared to other compensation systems (loosely conceived) such as the social welfare system, administrative costs make up only around 10% of all the outgoings, and this shows that the tort system is indeed excessively expensive (e.g. Harris 1991:307; Luntz and Hambly 1992:50; Atiyah 1997e:153). In the end these costs are usually borne by the public through taxes which fund the operation of public organizations such as municipality councils and utilities which are often the targets of private law suits, and through the purchase of insurance premiums (paid either directly by the public or indirectly through premiums levied on goods and services by providers). However since these costs are ultimately the wastage that is involved in achieving our *other* aims, and society as a whole is in the end worse off the more of these costs it has to cover, tort law is therefore also problematic because of its excessively high administrative and operational costs.

IV. SUMMARY OF ECONOMIC OBJECTIONS

Economic analysis does not favour tort law systems. From a purely economic standpoint, tort law's ability to reduce the number and severity of accidents is hampered by its dependence on liability insurance, its courtroom and loss evaluation procedures retard rather than promote its ability to reduce the impact that accidents have on their victims, and its administrative costs are excessively high and thus they arguably squander any economic benefits which society may have otherwise gained from using them.

2.2.3. TORT LAW IS INFLEXIBLE AND BEYOND REPAIR

Over the years these criticisms have not fallen on deaf ears, and it could be argued that it is precisely because of their positive disposition towards these arguments that the judiciary have tried their hand at *de facto* accident law reform by incrementally expanding the scope of the duty of care through their continual preparedness to recognize an ever increasing number of new types of cases in which such duties are said to exist, such that the noose of this duty now encompasses a much broader range of cases than it ever did. Some academics have also suggested their own reform proposals which they believe could overcome a number of the

above shortcomings of accident law without having to abandon tort law completely.³³ However invariably, history has shown that an expansion of the scope of the duty of care leads to escalating insurance premium costs and associated social problems, and incremental reforms proposed by academics which attempt to retain the basic machinery of tort law (i.e. the loss-shifting mechanism) while tinkering with the policies that guide its application (or the evidentiary requirements that must be met to satisfy these criteria) have a tendency to create internally incoherent systems that run against the grain of the basic principles and commitments which are supposed to underpin tort law in the first place.

I. JUDICIAL ATTEMPTS AT DE FACTO ACCIDENT LAW REFORM

One need not look far afield to find examples of how an expansion of the scope of tort liability can lead to disastrous consequences in all walks of social life. For example, in July 2002 the then president of the Australian Medical Association, Dr Kerry Phelps, pointed out that although a further expansion of the medical profession's duty of care may in theory provide better legal recourse to victims of medical accidents who were not catered for by the tort law system, in practice this would be counter-productive since it would force the costs of medical indemnity insurance premiums to rise so high that many medical practitioners would simply cease to offer their services altogether and so the public would in fact be worse off rather than better off (Phelps 2002). During that and the following year, a number of other similar claims were made in the media that pertained to other walks of life in which the cost of insurance premiums also soared to unprecedented levels,³⁴ and such observations were also supported by government inquiries which confirmed that society could not afford a further expansion of the scope of the duty of care.³⁵ Prior to this local crisis, and prior to the events of

³³ Among the strongest advocates of the calls to incrementally reform accident law have been such self-proclaimed left theorists as Ralph Nader and Wesley Smith (1996), who allege that no-fault systems are essentially a pro big business invasion because they protect big business from being sued.

However, given this chapter's aim of motivating the debate between the radical reform advocates and the conservatives (see the first note in this chapter), my discussion of incremental accident law reform proposals will not discuss Nader's and Smith's critiques of no-fault systems.

³⁴ These ranged from claims against Municipal Councils for injuries sustained while swimming at the beach and strolling down a footpath, to the restriction of access to public places where friendly cricket games had once been played, and even to the impact on charitable organizations which could no longer afford to operate due to the escalating cost of public liability insurance (Graham 2002; McNicoll 2002; Pippas 2002; Hurrell 2002; Dare 2003; Carlisle 2003; Sullivan 2002).

³⁵ The Federal Government's preparedness to 'subsidise doctors' medical indemnity costs by 80c in the dollar once premiums are higher than 7.5 per cent of their incomes', is a tactic that is likely to result in an even greater expansion of the scope of the duty of care (Schubert and Marris 2003).

11 September 2001,³⁶ similar crises were also experienced in America during the 1980s, and they came about for precisely the same reasons — namely, that since tort law is ultimately underwritten by liability insurance, as the noose of the duty of care is widened to include yet more cases, the cost of liability insurance premiums must necessarily rise to cover the increased costs facing insurers due to the new cases in which damages will be awarded to victims (Robinson 1985). Hence, although an expansion of the scope of tort law does initially widen the protective noose of tort law's loss-shifting remedy to encompass more victims, this noose must ultimately be contracted around society's collective purse because it simply becomes too expensive for society to bear.

The practice of attempting to curb the costs associated with an expansion of the scope of the duty of care by placing caps on the maximum damages that can be recovered by plaintiffs (and by the imposition of minimum claim thresholds) is also problematic from tort law supporters' own perspective because although this reduces the total financial burden on society at the time that the awards are made, it arguably frustrates tort law's commitment to provide full compensation — i.e. to provide corrective equivalent as well as substitute and solace compensation — which is a commitment that lies at the heart of tort law systems (see §2.1.2.). Perhaps more worrying though is the fact that the imposition of caps raises the possibility that those victims who were particularly severely injured, and who are therefore in especially great need of receiving expensive and ongoing treatment for protracted periods of time, will not recover sufficient damages to receive the required level of care for the duration of time that it is required because the caps will cut in and deprive them of the compensation

³⁶ Some reporters in the popular media have suggested that the rise in insurance premiums has been a consequence of the September 11th terrorist attacks — that insurers are now simply trying to recover the losses which they suffered in that attack; however the fact that this crisis began long before this attack was even planned tells against this hypothesis. Others have argued that the hikes in insurance premiums are a consequence of the insurers' recognition of the true risks with which they are faced — i.e. the risk that their clients might be the victims of terrorist attacks — and that they have simply decided to 'play it safer' by collecting greater premiums; however given that insurers have been very quick to include clauses in their contracts which exempt them from liability for the consequences of a terrorist attack (not dissimilar other exemptions which have been a common feature of such contracts), this candidate is also not a likely explanation for the rise in insurance premiums. Finally, others have asserted that the recent hike in insurance premiums is yet another attempt by insurers to increase their profits, but little firm evidence is usually presented to support this hypothesis other than appeals to distrust of large corporations. Hence, I maintain that the explanation which is being offered here — i.e. that this hike in insurance premiums is due to the continual and progressive expansion of the scope of the duty of care — is a highly plausible and useful explanation.

which they need. These caps are most likely to affect *them*, rather than those whose injuries were relatively trivial, and hence the imposition of caps is not desirable either.

II. ACADEMIC INCREMENTAL ACCIDENT LAW REFORM PROPOSALS

As far back as the late 1960s and early 1970s it has also been suggested that perhaps some of tort law's problems could be resolved by instituting an 'at-fault pool' scheme (Calabresi 1970b; Coleman 1994; Feinberg 1970; Keeton 1963), or by allowing plaintiffs to sue defendants who exposed them to a risk of suffering future losses even before those risks become fully manifest as materialized losses (Robinson 1985; Schroeder 1989-90, 1990-1), or maybe even by allowing courts to accept statistical evidence to establish that causation and breach of duty had occurred and hence that defendants were at fault (Mann 2001). Unfortunately, the at-fault pool concept³⁷ is problematic because it does not tackle the question of whether only those who are caught in the act of doing something wrong should take part in financing the victims' collective compensation, or whether everybody in society that takes part in that activity whether caught red handed in the middle of a slip-up or not, should also pay an equal share since everybody tends to make the same sorts of errors at some time or another. It also fails to explain how to get around the apparent requirement that only injurers should be liable and only to *their* victims.³⁸ Furthermore, the at-fault pool idea also fails to address important questions concerning precisely how much compensation should be paid to victims, because as the Rolls Royce Silver Seraph example suggests, it is not clear that victims should necessarily receive compensation for the full extent of their losses, because they do after all have some degree of control over how much they choose to put at risk when they engage in various activities, and so it may after all be reasonable to expect them to bear some responsibility for the actual extent of their own losses.³⁹

Secondly, although some (e.g. Glen Robinson) have argued that there is already sufficient precedent in tort law to justify allowing plaintiffs to sue defendants for mere

³⁷ In an 'at-fault pool' scheme, instead of each injurer compensating their own specific victim, the losses of all victims who were injured in a similar manner (i.e. by similarly faulty conduct) are first pooled together, then each injurer is asked to pay an equal portion of this total burden into a compensation fund, and finally each victim is then compensated for the actual losses which they suffered from this compensation fund. The alleged advantage of such schemes is that injurers who exhibited a similar degree of fault in their actions are treated even-handedly – i.e. each is expected to pay an equal share of the compensatory burden – while the victims still get fully compensated.

³⁸ For instance, this is the line of argument that Alan Strudler pursues (Strudler 1992, 1997). Feinberg criticizes at fault pool schemes for precisely this reason (1970:215-6, note 19).

³⁹ This is especially so if *society* would collectively underwrite their claims.

exposure to yet un-manifested risks,⁴⁰ what becomes all the more obvious when we consider this incremental reform proposal is that it is not clear why anybody should ever be entitled to receive compensation when they have not actually suffered a materialized loss. A fundamental idea that lies not just behind tort law, but behind the very idea of compensation itself, is that compensation should pay for *losses suffered*, and Robinson's suggestion comes up hard against this idea since he believes that people may be entitled to sue for the mere exposure to a future but yet un-manifested (and uncertain) *risk* of loss. Furthermore, although exposing others to unreasonable risks is indeed a way of being at fault, tort law's commitment is to provide compensation for wrongful *losses* and not just for *wrongs*, and so this again suggests that such incremental reforms should not be endorsed by tort law supporters.⁴¹

Finally, although allowing plaintiffs to establish causation merely by appeal to probabilistic standards of proof as per Mann's and others' suggestions would have some benefits (e.g. everyone who was equally faulty would be treated equally), one can't help but wonder about whether this would not violate another fundamental idea behind tort law — namely, the idea that the only people who should ever be made liable for a plaintiff's losses are those who were *actually* responsible for causing those losses and not just those who *may* have been responsible had things been different.

III. SUMMARY OF WHY TORT LAW IS INFLEXIBLE AND BEYOND REPAIR

All of these proposals try to retain what they see as the essential features of tort law — i.e. the idea that victims should sue someone if they wish to be compensated for their losses, and that only those losses which are a consequence of another's wrongdoing should be compensated —

⁴⁰ The alleged advantage of allowing such suits is that everyone, and not just those who were unlucky enough to cause a loss, would be liable to pay damages, and so everyone would allegedly feel deterred. Others who would also appear to endorse such an expansion of tort law (but not necessarily for precisely the same reasons as Robinson) include Joseph King (1981), Christopher Schroeder (1989-90; 1990-1), Mark Parascandola (1997), Jody Kraus (1997), and Scott Mann (2001).

⁴¹ Furthermore, unless plaintiffs were compelled to use their damages to insure themselves against the likelihood that their risk exposure may eventually materialize into harm, then such a system could fail to provide sufficient compensation. The problems that are currently encountered by tort law in the context of estimating the extent of future losses would also be multiplied as the courts would now also have to estimate the effects of un-manifested risks. On the other hand, if plaintiffs were compelled to purchase insurance with their damages, then since the insurance system would now be doing all the work of compensating victims, one could again start to wonder about whether a better solution may not involve a complete abandon of the infrastructure of tort law and just compelling those who engage in risky activities to pay levies into an insurance fund which would later be drawn upon to compensate their victims. For a detailed discussion of Robinson's suggestion please see my paper (Vincent 2005).

while modifying the policies which they see as the source of tort law's ills, or even by suggesting that different evidentiary requirements (e.g. probabilistic standards of proof in causation) should be met to satisfy the criteria which specify those policies. Unfortunately, the link between the mechanism of loss shifting and the policies which tort law uses appears to be a lot more intimate,⁴² and these unsatisfactory attempts at piecemeal reform are testimony to this.⁴³ Thus, in light of these problems, a better solution is surely for accident law to expand its repertoire beyond the limited strategies that tort law offers – i.e. to use more than just a loss-shifting mechanism coupled with a policy for its application to achieve its goals⁴⁴ – however doing this may involve nothing short of abandoning tort law completely. Doing so would have considerable advantages since accident law could then achieve better deterrence, it could offer a more appropriate scope of coverage and more appropriate levels of compensation for accident victims, greater responsibility might actually be taken by those who should take that responsibility, and we might even gain the ability to properly penalize those who need to be reprimanded for engaging in grossly inappropriate conduct. Unfortunately, these aims will remain elusive as long as tort law remains a key component of accident law systems.

2.3. CHAPTER SUMMARY

The first part of this chapter provided an outline of the characteristic features of tort based accident law systems, and the second part then sketched out the broad brushstrokes of the reformers' main objections to them. Broadly speaking, tort based accident law systems have been criticized on both moral as well as economic grounds, and reform advocates have also argued that since attempts at incremental or piecemeal reform are unlikely to succeed and are problematic for other reasons as well, that we should therefore engage in radical reform of accident law — i.e. that tort based accident law systems should be replaced with no-fault accident law systems, or put another way, that accident law should be reformed so as to fall in line with no-fault's principles. Having presented what I take to be the broad brush strokes of

⁴² See comments in §3.1.1.(iii). for an elaboration of this point.

⁴³ Jane Stapleton also argues that in addition to the problems mentioned in this chapter, there are also 'doubts as to whether the [tort] system could adequately be reformed' (1986b:105). Even Posner, who often champions tort law for its supposed ability to arrive at economically efficient outcomes, has argued that the social structures that surround tort law are so intricately linked with the various components of a working tort law system, that he warns against piecemeal reform because it runs the risk of doing damage to an otherwise very finely tuned system (Posner 1996a).

⁴⁴ Harris also points out that 'the attempt to meet either goal [with the single mechanism] is seriously restricted by the need to accommodate the other goal[s]' (Harris 1991:307).

2. IN FAVOUR OF RADICAL ACCIDENT LAW REFORM

the reformers' main arguments in favour of engaging in radical reform of accident law, we can now turn to examine why conservatives have resisted such reform proposals.

3. AGAINST RADICAL ACCIDENT LAW REFORM

Having explained the reformers' arguments in favour of engaging in radical reform of accident law in the previous chapter, this chapter will now explain the *conservatives'* reasons for opposing proposals to replace tort based accident law systems with no-fault systems.¹ Following a similar structure to the previous chapter, §3.1. will first characterize no-fault systems in two different ways, and then the following two sections will outline the broad brush strokes of the conservatives' reasons for opposing such reform proposals — reasons which stem from the strategic and feature-wise differences between tort law and no-fault systems, and which relate to the issues of responsibility and compensation.

3.1. NO-FAULT SYSTEMS

Conservatives criticize no-fault systems because these systems differ from tort law systems, and because they view these differences in a negative light. To help make these differences apparent, this section will characterize no-fault systems in terms of the strategies (i.e. mechanisms and policies) with which they respond to accidents, and in terms of the eight general features which were previously used to characterize tort law systems.

3.1.1. STRATEGIC CHARACTERIZATION

This section argues that no-fault systems are characterized by the coupling of a compensatory policy specified by a *non-fault based criterion* together with a *loss distribution* mechanism.

I. FAULT CRITERION IS NOT USED TO SPECIFY COMPENSATORY POLICIES

It is often suggested that the central defining feature of no-fault systems is that a victim's right to compensation does *not* depend on whether their loss was a consequence of another party's fault. For instance, Jules Coleman suggests that '[a]ll we mean to imply by the label "no-fault" is that the criterion of *fault is irrelevant to the issue of recompense*. [The] victim [should simply] receive ... the compensation to which [they are] entitled' (Coleman and Murphy 1990b:157, emphasis added). In a similar vein, Peter Cane suggests that 'so-called

¹ As I noted in the previous chapter, conservatives are not the only ones who object to no-fault systems; some left-leaning theorists also criticize no-fault systems because they see them as an attempt by big business to protect its own interests by getting the government to agree to abolish individuals' rights to sue (Nader and Smith 1996). However given that this thesis aims to address a dispute between the conservatives and the radical reform advocates, these other criticisms will not be discussed here.

“no-fault” proposals ... eliminate the need both to find a responsible defendant and to prove a causal link between a specific act or omission and the victim’s injuries. No-fault schemes concentrate on the injuries rather than on the way the injuries were caused. For example, *a no-fault road accident scheme will provide compensation for injuries suffered in a road accident regardless of whether those injuries were caused by another road user or by the injured person; and regardless of fault* (Cane 1999f:399, emphasis added). In his critique of no-fault systems (in response to- and in support of the Osborne Report’s findings) Lewis Klar suggests that the essence of the accident compensation scheme in operation in Ontario, Canada, which the report referred to as a ‘tort system with add on no-fault benefits’ was ‘that there are immediate no-fault benefits paid on a first party basis to all those injured in a motor vehicle accident, *regardless of fault*’ (Klar 1989:304, emphasis added). James Nickel, who coined a more appropriate label for no-fault systems (though which unfortunately has not been taken up by others) suggests that ‘*nonfault systems ... provide compensation for losses without determining who was at fault*’ (Nickel 1976-7:381, emphasis added). Mark Robinson, who presents a probing discussion and defence of no-fault systems, suggests that ‘[n]o-fault compensation means, simply, that you *do not have to prove the fault of somebody else* to receive compensation’ (Robinson 1987b:xii, emphasis added). Later in the same book, he also quotes the New South Wales Law Reform Commission’s report which suggested that in a no-fault system ‘victims ... should receive ... compensation, *regardless of whether [they] can prove that somebody else was at fault, or [even] whether [they themselves were] at fault for the accident*’ (Robinson 1987a:57-8, emphasis added). Finally, Patrick Atiyah also suggests that while no-fault systems ‘vary widely, ... they are all designed to compensate those injured ... *without the need to prove fault*’ (Atiyah 1997f:185, emphasis added).

Given such consensus, it does indeed seem that an essential feature of no-fault systems is that they do not use the fault criterion to specify their compensatory policies.²

II. LOSSES ARE DISTRIBUTED RATHER THAN SHIFTED

However, despite this consensus regarding the sorts of *policies* which no-fault systems use – i.e. *not* ones specified by the fault criterion – more must surely be said to properly characterize them, because technically strict liability systems also provide compensation without requiring plaintiffs to establish defendant fault. If the only distinguishing feature of no-fault systems was that they do not use the fault criterion to specify their compensatory policies, then strict liability systems would end up being mis-classified as no-fault systems

² This does not preclude considerations of injurer fault from remaining relevant to other non-compensatory inquiries. For instance, fault probably remains completely relevant in the context of deciding what should happen to the injurer — e.g. whether they should perhaps be punished.

since they too do not use the fault criterion, and so to properly characterize them we should also explain what *mechanism* no-fault systems use to achieve their compensatory aim.³

Some suggest (e.g. Klepper 1990:226, note 6) that no-fault systems distribute rather than shift losses – i.e. that they use a loss *distribution* mechanism, rather than a loss shifting mechanism – because under no-fault systems the burden of compensating victims is borne collectively by society rather than being imposed onto specific injurers. People do not sue one another when accidents occur under no-fault systems, but rather the state assesses the loss and on the basis of this assessment it determines whether it should offer them compensation (out of its own coffers rather than from the injurer’s pocket) or not. Nevertheless, although it may indeed be true that under no-fault systems losses are spread across a (possibly large) number of individuals none of whom may even have had anything to do with causing the victim to suffer their loss, the distinction between loss shifting and loss distribution still seems rather imprecise because in at least one obvious sense losses *are* still shifted under no-fault systems — they are shifted from victims to society. Although losses are not shifted onto *injurers*, they do still appear to be shifted, and so before accepting the claim that no-fault and tort law systems use different mechanisms and hence that we can distinguish strict liability from no-fault systems by reference to the mechanism which each of them uses, we should first explain why it would be more appropriate to see what no-fault systems do as an instance of loss distribution rather than as an instance of loss shifting.

The difference between loss shifting and loss distribution is not unlike the difference between wealth redistribution and compensation, because in both cases what determines whether something will be seen as an instance of one rather than the other are the *reasons* that are offered in support of engaging in that practice. Robert Nozick famously argued that the difference between redistribution and compensation was that different reasons are usually offered in favour of engaging in each of these practices — namely, while compensation is usually intended to rectify the effects of wrongful transactions between specific parties, redistribution is usually intended to bring one party’s level of welfare or resources up to the level of some reference group by shifting resources from the latter to the former, even though the former’s level of welfare may not be a consequence of their having been wronged by the latter. Nozick pointed out that if these reasons went by un-noticed then both practices would seem identical, which is why he argued that to properly distinguish redistribution from compensation we should note these reasons (Nozick 1974b:27). Likewise, I too would like to suggest that the difference between loss shifting and loss distribution is in the reasons that

³ Another problem with this way of characterizing no-fault systems is that it tells us nothing positive about what sorts of criteria no-fault systems *do* actually use to specify their compensatory policies – such as, for instance, the criterion of *victim need* – since this is only a negative account.

ultimately underpin the claim that someone should be compensated, and to see how this is so let us briefly consider the reasons that ultimately underpin victims' compensatory rights under tort law and no-fault systems.

Under tort law, victims are only entitled to compensation when somebody else ought to be liable for their losses, and no other independent considerations are supposed to enter into the compensatory inquiry. Admittedly, losses are indeed only shifted from victims to injurers when it would be inappropriate for victims to bear them, but what is crucial is that this situation is only supposed to obtain *when the injurer should bear those losses*.⁴ Under tort law, injurers bear the burdens of compensating their victims because they allegedly have a responsibility or positive duty to offer compensation to their victims, and so in an important sense the victim's right to compensation is only coincidental to-, derivative from-, or parasitic upon the injurer's compensatory duty. In an important sense, that the victim is compensated is only a happy coincidence,⁵ because their compensatory right would not come about if their injurer had no prior responsibility or positive duty to make good their transgression.

On the other hand, what leads to the claim that a victim should be compensated under no-fault systems is the belief that that is the sort of loss for which people should be compensated. The existence of injurer fault is seen as an irrelevant consideration, and instead the loss' wrongfulness is seen as a matter of such things as the nature and extent of that loss' impact on the said victim — for instance, whether it was the loss of an arm or a leg or merely a bruised ego (i.e. whether it is sufficiently serious or grave), and whether the victim has

⁴ This is sometimes put in terms of Feinberg's principle of weak retributive justice, which sets up the idea that accidental losses must be allocated between the victim and the injurer, and which forms the basis of the requirement for such reciprocity. Jules Coleman summarises Feinberg by suggesting that 'there is a principle of weak retributive justice that holds that if a loss must fall on either of two parties, one of whom is at fault in causing it and the other of whom is faultless, [then] the party at fault ought to bear the loss, all other things being equal' (Coleman 1988b:181; Feinberg 1970:217-21). Strudler refers to it as 'the comparative innocence principle', Kraus calls it 'the two-prong causal link principle', and Perry calls it 'localized distributive justice', but all in fact use these terms to refer to the same basic idea as Feinberg and Coleman — i.e. the idea that losses should only be treated as being compensable when injurers should bear them but not otherwise (Strudler 1992:308; Kraus 1997:308; Perry 1992b:513). Others also appeal to principles such as corrective justice to explain this reciprocity, but it would seem that these are in fact the same principle. Please see §4.2.4 for a discussion of this topic.

⁵ The reason why I say that it is only a 'happy coincidence' is because no matter how severe the victim's loss turns out to be, unless their injurer was at fault then they will not be compensated for it under tort law. On the other hand, if the injurer was at fault then the victim will be *entitled* to sue them even if they do not want to be compensated by them (perhaps because they are independently wealthy or because their loss seems trivial to them).

sufficient wherewithal to bear it on their own. Victims' compensatory entitlements under no-fault systems are not primarily a matter of whether someone else should bear those losses — their entitlements to compensation do not arise mainly because others should be liable for those losses, and their compensatory entitlements are not extinguished just because there may be no independent positive reason to impose liability onto some specific other party. And although someone else (in this case society) will *end up* bearing the burden of providing the victim's compensation if their loss is seen as wrongful,⁶ the fact that they will (or will not) provide those funds will not be the reason why some victims will (and others will not) be compensated under no-fault systems.⁷ Hence, when people are compensated under no-fault systems, the reason why they are compensated is ultimately because those are the sorts of losses which people should not have to bear without some form of assistance.

Thus, while tort law systems focus on whether another person should make good their transgression and the victim's compensatory right is coincidental to- and derivative from this, in no-fault systems the victim's compensatory right is primary because the predominant focus is on whether that loss should be compensated rather than on whether someone else should pay for it. And although victims' compensatory claims are paid for by society in the end, the reason why this does not entail that no-fault systems *shift* losses from victims to society is because the *reason* for shifting those losses away from them is not that society has a duty to take responsibility for what it did, but rather it is that those are simply the sorts of losses for which people should be compensated. So the reason why it is more appropriate to view what no-fault systems do as an instance of loss distribution rather than as an instance of loss shifting is because while under tort law losses are shifted because injurers must discharge their duties,⁸ under no-fault losses are shifted primarily to compensate victims.

III. FURTHER REFLECTIONS ON THE POLICIES USED BY NO-FAULT SYSTEMS

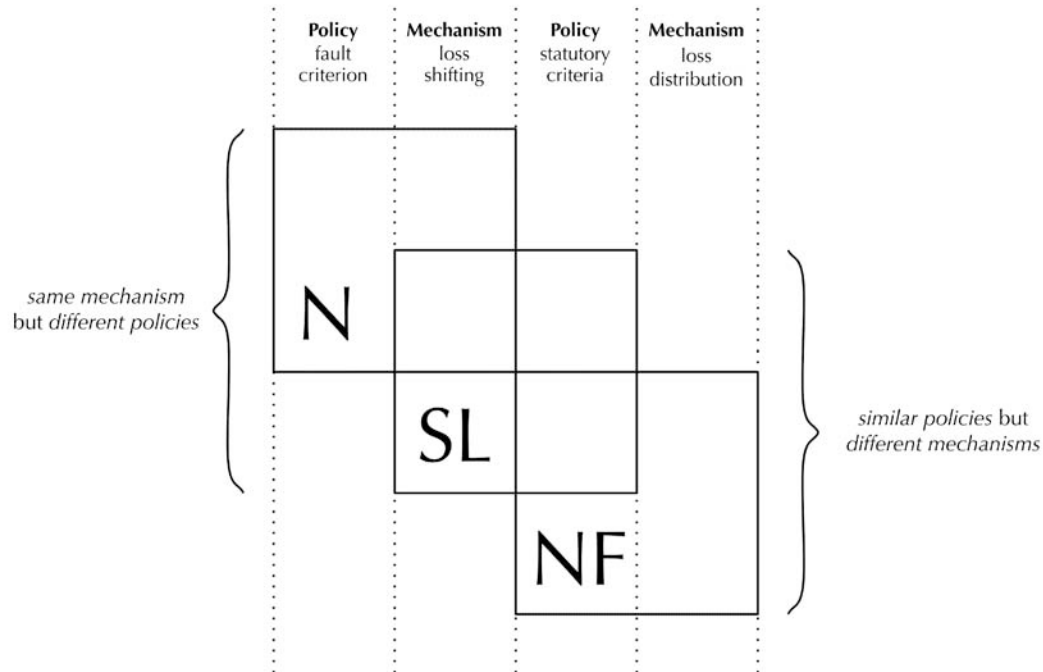
Towards the end of §2.1.1., I presented a graphical comparison of the strategic features of two types of tort law (i.e. negligence and strict liability) systems. Now consider the picture which

⁶ ... because unless someone else provides these funds then the victims can't be compensated ...

⁷ Presumably, if the victim's compensation could be magically obtained without having to impose a burden onto anyone else, then that would be how no-fault systems would often raise their compensation funds. However that happy option is only available to omnipotent beings but not to us — we can't just snap our fingers and make compensation materialize out of nowhere — and so instead society ends up bearing the burden of compensating victims for their losses under no-fault systems because that is the best of all available alternatives (the best, because some argue that when losses are spread thinly throughout society then this will generate the least amount of suffering).

⁸ ... or at least that is what ultimately determines whether they will have a right to be compensated ...

emerges when the strategic characterization of no-fault systems presented above is incorporated into that comparison:



One observation about the picture which emerges is that negligence systems seem to be transformed into strict liability systems when we abandon the fault criterion in preference for statutorily defined criteria; but then, once we also replace the loss-shifting mechanism with the loss distribution mechanism, strict liability systems cease to be tort law systems altogether and they become no-fault systems. This suggests that the reason why negligence and strict liability systems are grouped together as tort law systems is because they share a common mechanism,⁹ whereas no-fault systems are different because they use a different mechanism.

However what does the above diagram tell us about the policies which no-fault systems use? For instance, should the overlap in the above diagram between strict liability and no-fault systems be taken to suggest that the policies which no-fault systems use are the same (rather than just similar) as the policies used by strict liability systems? Although the above diagram may initially suggest this, it would in fact be a mistake to draw this conclusion. One

⁹ ... though they are distinguished from one another because each uses a different criterion to specify the policy which guides that mechanism's application ...

feature of tort law systems is that they tie the fates of injurers¹⁰ to the fates of their victims — that is, by agreeing to impose liability onto one party we tacitly commit ourselves to compensating someone else; by agreeing to compensate someone for their losses we tacitly commit ourselves to imposing liability onto another party; and by refusing to impose liability onto anyone we deny that a victim should be compensated for their losses. The reason why this tying of fates occurs under tort law systems is because the same criterion is used to specify the policies which apply in the context of both the compensatory inquiry as well as the inquiry into what should happen to the injurer — that is, the criterion which is used to specify the policy that identifies the victims whose losses should be compensated, is the same as the criterion which is used to specify the policy that identifies the parties who should be liable to pay for that compensation.¹¹ And the reason why tort law systems use the same criterion to specify the policies that are used in the context of both of these inquiries is because if different criteria were instead used to specify each of these policies then the loss shifting mechanism could on some occasions be dysfunctional.¹² Hence, their use of the loss shifting mechanism commits tort law systems to using just one criterion to specify both the policy which is used in the context of the victim-related (i.e. the compensatory) inquiry, as well as the policy which is used in the context of the injurer-related inquiry.¹³

¹⁰ I use the term ‘injurer’ here loosely to refer to whoever is deemed to have been responsible – or rather, to whoever is *held* responsible – for the victim’s losses. Chapter 4 explains the difference between *being* responsible and *taking* responsibility.

¹¹ For instance, under negligence systems victims are only compensated for those losses which were a consequence of another’s fault, and liability is imposed precisely onto those parties whose faulty actions brought those losses about. Similarly, under strict liability systems victims might be compensated for losses which were caused by another’s (possibly non-faulty) actions and liability is again imposed onto those very parties whose (possibly non-faulty) actions caused those losses.

¹² For instance, we would not want the policy which was used in the context of the inquiry into what should happen to the injurer to suggest that they should be liable, but for the policy which was used in the context of the compensatory inquiry to not identify any victim, since then there would be nobody to receive the proceeds of the former’s liability. Similarly, we would not want the policy which was used in the context of the compensatory inquiry to suggest that a victim should be compensated, but for the policy which is used in the context of the other inquiry to identify no party onto whom it would be appropriate to impose the liability, because then we would have no one from whom the funds for the victim’s compensation could be obtained.

¹³ This is arguably why tort law systems use fault and other causal-type criteria to specify the policies that guide the application of the loss-shifting mechanism — i.e. because policies specified by such criteria apply equally well in both of these contexts. Parsons’ comments, made in the context of fleshing out the justification for his own no-fault compensation system (see the Appendix), also mirror

On the other hand, under no-fault systems victims can be compensated without imposing the burden of providing that compensation onto their injurers, and conversely injurers can be fined or taxed (or whatever else) without the proceeds of their fines necessarily having to directly benefit their victims in any manner. The fates of victims and injurers are therefore not tied to one another under no-fault systems because the funds required to compensate victims are not expected to come from their injurers, and so by using the loss distribution mechanism no-fault systems can use one policy in the context of the compensatory inquiry, and a completely different policy in the context of the inquiry into what should happen to the injurer. Hence, the most that the above diagram should be taken to suggest about the policies which strict liability and no-fault systems use is that they are both specified through statutorily defined criteria, however the precise criteria which the statutes will define need not necessarily (and most probably *will not*) be the same.¹⁴

So, to sum up this strategic characterization, no-fault systems can be described as the coupling of a *loss distribution* mechanism together with a policy specified by a statutory *non-fault based criterion*.

3.1.2. FEATURE-WISE CHARACTERIZATION

No-fault systems are not a recent invention. Since at least as far back as 1928 there has been a steady stream of enquiries around the world into the feasibility of replacing whole or parts of tort law based accident law systems with no-fault alternatives,¹⁵ and over the years there have

this sentiment; Parsons suggests that once we recognize that there is no longer a place within accident law for the fault criterion, we should also recognize that there is no longer any place for the mechanism of liability (Parsons 1956). The sentiment referred to here is that the mechanism of liability and policies specified by the fault criterion tend to go hand-in-hand with one another. Also see my own comments on this matter at the end of §2.2.3.(iii)., towards the end of Chapter 2.

¹⁴ The policies of tort law and no-fault systems will usually be very different. Typically, negligence systems shift losses from victims to injurers in accordance with policies specified by fault-like criteria. On the other hand, no-fault systems might for instance use one criterion (e.g. need) to specify the policies that determine which victims should be compensated, another criterion (e.g. deep pocket criteria) to specify the policies that pick out the people onto whom the burden of compensating the victims for those losses should be distributed, and a yet further criterion (e.g. fault) to determine whether the injurer should be punished.

¹⁵ (Szakats 1968b) In fact, the roots of no-fault can be traced back even earlier, to the changing British Worker's Compensation legislation of the 1880s, which saw the abolition of the Common Employment Rule that previously barred employees from recovering compensation from their employers for injuries suffered in the workplace. Without the abolition of this rule, vicarious liability legislation that sits behind Worker's Compensation legislation (which is a form of no-fault compensation because it

been numerous attempts around the world to reform accident law which have included no-fault components, and even more proposals have been developed but never implemented.¹⁶ Consequently, due to this relatively long history, there is much variety among no-fault systems (Cane 1999f:417-8). However, despite this variety, certain distinct and undeniable trends can still be discerned,¹⁷ and so just as we did in the previous chapter, these trends will now be described – yet again in terms of the eight general features of accident law systems – to further hone our characterization of no-fault systems.

enables employees to recover damages from their employers without having to establish their fault, and even if the accident was a result of their own fault) could not have been introduced. Davies (1989:72-6) explains the historic and philosophical significance of this change in British legislation. Another reason to see this change as part of a more general interest in no-fault systems is provided by Oliver Wendell Holmes who comments that '[t]he state might conceivably make itself a mutual insurance company against accidents, and distribute the burden of its citizens' mishaps among all its members. There might be a pension for paralytics, and state aid for those who suffered in person or estate from tempest or wild beasts. As between individuals it might adopt the mutual insurance principle pro tanto, and divide damages when both were in fault, as in the *rusticum judicium* of the admiralty' (Holmes 2000:96).

¹⁶ This is due to the great hostility with which such proposals were often met. The findings of inquiries which recommended a shift away from tort systems and advocated replacing them with no-fault systems, were usually politically inexpedient. The upheaval, uncertainty and complexity that such changes would have created meant that many governments were reluctant to embark upon radical accident law reform. Furthermore, the organised campaigns of various politicised interest groups, which felt that their interests would have been compromised under no-fault, also swayed the views and inclinations of the general public and governments away from no-fault. Such groups have included professional organizations representing lawyers and the legal profession which gains substantially from the maintenance of the tort system, as well as consumer rights protection groups which felt that consumers' interests would be compromised because under no-fault consumers would lose their right to sue (e.g. Cane 1999f:399, 419; or Kinney 1995). Szakats' comments on the 'stringent criticism' in response to the release of *The Report of the Royal Commission of Inquiry on Workers' Compensation in New Zealand* (Szakats 1968a:158). Robinson argues that whether reform will take place 'depends very much on the attitudes of the interest groups ... that direct and control the [public] debate to a large extent', and he also includes the 'legal profession, the unions, [and] insurers' amongst these groups (Robinson 1987a:79). Finally, Atiyah has also argued that at a time when the ideologies of economic rationalism and Thatcherism have thrived, the political milieu has arguably shifted in the direction of placing greater emphasis on individualism and self-sufficiency, which means that greater government intervention would only be seen as a way of going backwards not forward (Atiyah 1997f; Cane 1999f).

¹⁷ To see how these trends emerge, please refer to the Appendix which describes several different no-fault systems. Throughout this section I will refer to the systems surveyed in the Appendix, and they will be referred to not by their names but by their respective section number in that Appendix.

Firstly, the scope of coverage of no-fault systems tends to be *limited*, and usually such systems are limited to the sphere of motor vehicle accidents.¹⁸ One reason for this specific focus is the sheer volume of cases which come about as a consequence of motor vehicle accidents, which has lead reformers to ask whether the courts could not perhaps be decongested by creating a separate accident compensation system to cater specifically just for these cases. Another reason for this specific limitation is that the fault which is encountered in motor vehicle accidents is not usually of the moral variety (see §2.2.1.(iii).), and so the suggestion that injurer fault could be disregarded in this particular context has not usually presented as much of an affront to conservatives as it would have in a different context. Thus, although some reformists have indeed also proposed systems which would cater for the victims of workplace injuries and/or medical mishaps,¹⁹ and others have even developed systems that could allegedly be extended to cover all accident victims irrespective of the context within which they sustained their losses (these would be more comprehensive systems),²⁰ by far the most common reform proposals have involved replacing or supplementing tort law in some circumscribed area.

Secondly, most no-fault systems tend to be *compulsory* – that is, one is not usually given the option to opt out of them²¹ – and the main reason for this appears to be related to the rationale for switching across to a no-fault system in the first place. Namely, since one important reason for abandoning tort law within some circumscribed area (e.g. motor vehicle accidents) and for replacing it with a no-fault system is that under tort law many victims receive no compensation at all, it would therefore be self-defeating to allow some people to opt out of the no-fault system²² because then, especially if the no-fault system was pure (see below), they would have nowhere else to turn to in the event of an accident.²³

Thirdly and fourthly, no-fault systems are almost invariably *publicly funded*,²⁴ and they are *administered by bureaucracies* that are set up for this specific purpose. Under tort law, the

¹⁸ Eleven out of the sixteen systems mentioned in the Appendix have this focus.

¹⁹ The later version of system B was designed to cater for the victims of medical mishaps as well as for the victims of motor vehicle accidents, and Work Cover schemes which form part of many Social Security systems (discussed at M in the Appendix) are an instance of the latter.

²⁰ The later version of F, as well as I, L, and M, all fall into this category. In §6.2.2.(i). I will argue that the choice to only cover *accident* victims is itself an objectionable kind of limitation. But since my current aim is only to *characterize* no-fault systems, for now I defer this discussion.

²¹ The three exceptions to this are the earlier version of B, as well as K and L.

²² One reason to opt out may be to avoid having to contribute to the no-fault compensation fund.

²³ ... other than perhaps to become reliant on the social welfare system.

²⁴ Of the systems surveyed in the Appendix, system L is the one exception.

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funds used to compensate victims are obtained from defendants, and since courts determine whether a particular defendant will be liable or not, it also makes sense that courts should determine whether the plaintiff will be compensated or not. On the other hand, the funds used to compensate victims under no-fault systems are obtained either by the state (through general taxation, by imposing levies on certain goods and services, by collecting registration fees and state-operated insurance premiums, and by imposing fines on certain activities)²⁵ in which case some state bureaucracy will also be responsible for administering the distribution of these funds to victims, or else they are obtained by private insurers (who collect the compulsory insurance premiums on the state's behalf in accordance with the relevant state-drafted legislation)²⁶ in which case it also makes sense that they should then be responsible for distributing these funds to those who satisfy the criteria outlined in the relevant legislation. Hence, although these systems may indeed be operated by private insurers, the reason why their source of funding should still be classified as *public* is because everyone is equally compelled to contribute to the insurance fund, and because this is really only an instance of the state 'out-sourcing' the operation of an insurance fund to a private corporation rather than setting up and operating its own state insurance office.

Fifthly, no-fault accident law systems are often *pure*,²⁷ and as with their voluntariness (see the second point above), this is again a consequence of the sorts of rationale which are usually offered when arguing in favour of replacing (some component of) a tort law based accident law system with a no-fault system — some of these rationale have to do with efficiency, and others draw on intuitions about justice.²⁸ However sometimes the intuition that

²⁵ The following systems fall into this category: A, C, E, F, G, I, J and M.

²⁶ The following systems fall into this category: B, G, H, K & L.

²⁷ Half of the systems in the Appendix – C, D, E, G, I, both varieties of J, as well as L – are pure.

²⁸ Two reasons which are often cited in support of replacing tort law with no-fault are: (i) that tort law systems tend to be administratively expensive to operate whereas no-fault systems are relatively cheap (see §2.2.2.); and (ii) that while tort law systems tend to be (at least *prima facie*) unjust since two victims who suffer almost identical losses may be treated differently merely because one's injurer was at fault whereas the other's injurer was not (or was not *technically*) at fault, no-fault systems treat victims who suffered the same losses and who are in relevantly similar circumstances (in this regard) in an identical manner and so it is sometimes thought that they are therefore more just (see §2.2.1.(i)-(iii).) (e.g. see Feinberg 1973 on comparative justice). But if the initial reason for switching to no-fault was that it would be cheaper to operate than an incumbent tort law system, then it would be self-defeating to implement a no-fault system while still retaining tort law. Similarly, if the initial reason for switching across to no-fault is that people in relevantly similar situations will receive similar treatment, then it would be self-defeating to allow those who were injured by a faulty party to sue their injurers

it is unjust to treat victims differentially on the basis of whether they were injured by a faulty party or not, may not be seen as sufficiently important to disallow those who were injured by a faulty party from suing them,²⁹ and this may accordingly lead reformers to strike a compromise (perhaps to appease conservatives, or simply because they are in two minds about this) by proposing that the incoming no-fault system should function either as a dual or as a mixed system, and that the incumbent tort law system should therefore be retained so that it can supplement the no-fault system.³⁰ Similarly, it may also be thought that if administrative efficiency and justice come into conflict with one another, then justice should surely win out, and if one is already inclined to think that justice requires tort law's one hundred percent compensation principle (as tort law supporters usually do), then one will similarly be inclined to insist that this is why those who were injured through another's fault should still be allowed to sue their injurers. This accounts for why a sizeable portion of the systems discussed in the Appendix are either *dual* or *mixed*.³¹

Sixthly and seventhly, just over half of the no-fault systems surveyed in the Appendix aim to offer *corrective* compensation,³² and some even offer both *equivalent* as well as *substitute* and *solace* compensation. However, often caps are imposed on the total amount of compensation that can be recovered, and so it may perhaps be less misleading to re-classify these as *redistributive* compensation systems.³³

Finally, although five of the systems surveyed did not specify whether the amount of compensation that a victim was entitled to receive would be calculated just once or whether

since then people in similar situations (i.e. with similar injuries or losses) would not necessarily be treated alike. Both of these considerations favour pure over mixed and dual no-fault systems.

²⁹ This is felt especially by those who already feel that no-fault systems do not fully compensate. Since the amount of compensation that victims receive under no-fault is usually lower than the maximum amount of compensation that they could theoretically recover under tort law (the next two paragraphs explain this), it may be thought that if a victim would have been entitled to sue their injurer had the tort law system been retained, then they should also retain the right to sue for top-up compensation under a no-fault system to ensure that they will receive their full entitlement rather than being short-changed.

³⁰ System A and both varieties of B are dual, whereas both varieties of F, as well as H, K and M are mixed systems.

³¹ In §6.2.2.(i). I will come back to this point and argue that this compromise on no-fault supporters' part is indeed a serious mistake which renders such systems internally incoherent, but for the time being my aim in discussing these rationale is purely expository and so I shall not delve further into a critical analysis of this point at present.

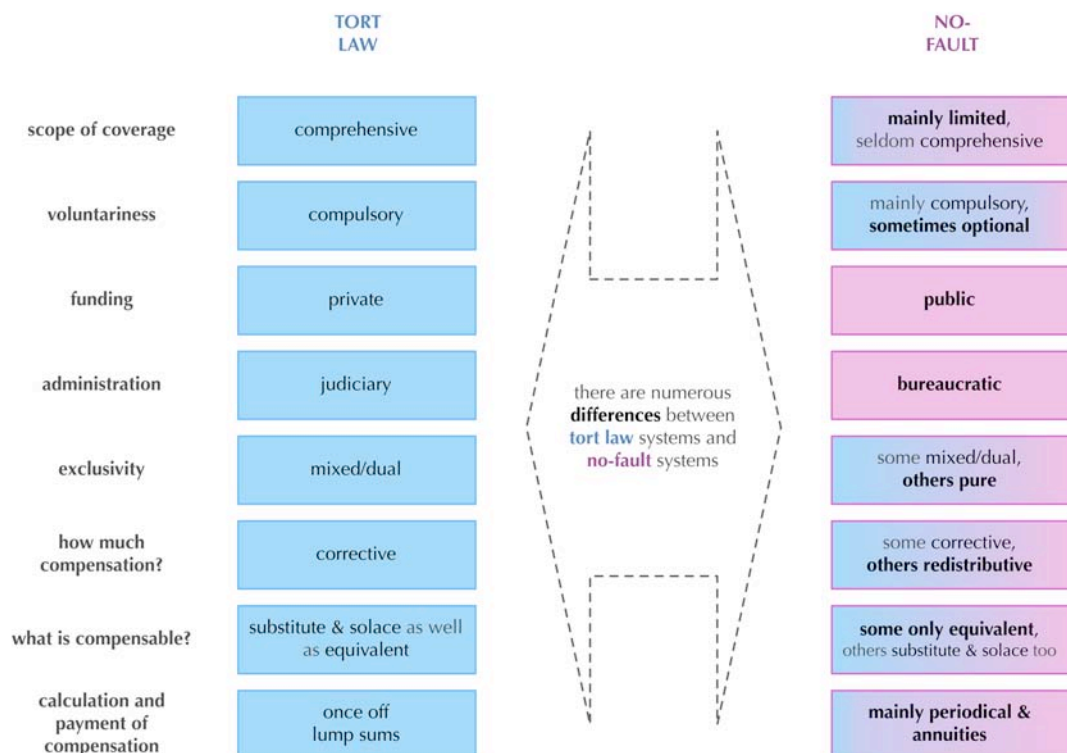
³² These include the early version of B, G, H, I, one version of J, K and L.

³³ I will come back to this point as well in §6.2.2.(i)., and argue that it is a mistake for no-fault systems to offer anything other than redistributive and only equivalent 'compensation'.

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their eligibility for it would be reassessed on a periodic basis, nor whether their compensation would be paid in a lump sum or in the form of an annuity, the predominant trend in those systems which did specify this was to pay victims an *annuity* and to reassess their eligibility for this annuity on a *periodic basis*.

No-fault systems are therefore mainly *limited* and *compulsory*, although sometimes they are also *optional*; they are usually *publicly funded* and administered through a *bureaucracy* rather than through the judicial system; many are *pure*, though some also operate alongside tort law as *mixed* or *dual* systems; finally, while some offer only *redistributive equivalent* benefits, others also offer *corrective* as well as *substitute* and *solace* compensation, and this is typically paid in the form of an *annuity*, and the eligibility for- and extent of such is usually reassessed on a *periodic* basis in redistributive systems. When no-fault systems are described in these terms – i.e. in terms of the eight general features which were previously used in §2.1.2. to characterize tort law systems – this highlights the following differences between tort law and no-fault systems, the significance of which will be discussed below in §3.3.:



3.2. CRITIQUES RELATED TO STRATEGIC DIFFERENCES BETWEEN NO-FAULT AND TORT LAW SYSTEMS

This section explains why conservatives worry about the *strategic* differences between no-fault and tort law systems (see §3.1.1.above). Firstly, no-fault’s abandonment of the loss shifting *mechanism* leads conservatives to worry that *responsibility* will not be taken by the

right people under no-fault systems. Secondly, no-fault's use of criteria other than fault to specify their compensatory *policies* leads conservatives to worry that no-fault systems will both under- and over-compensate. In what follows, these two worries are respectively referred to as the *responsibility allegation* and the *compensation allegation*.

3.2.1. RESPONSIBILITY ALLEGATION

Conservatives believe that the loss-shifting mechanism plays an indispensable role in ensuring that everyone takes due responsibility for their actions, but since no-fault systems replace the loss-shifting *mechanism* with the loss-distribution mechanism, conservatives therefore worry that no-fault systems will allow some people to get away without taking due responsibility for their actions, and that they will also force others who should not be expected to take this responsibility to do so anyway. To see why conservatives have this worry, consider the following example: Bob and Hazel are both motorists driving on a stretch of road – Hazel ahead of Bob – and Bob, who is inebriated, passes out behind his steering wheel and crashes into the rear of Hazel's car which had just come to a stop at a red traffic light, causing them both to suffer economic losses (e.g. damage to the cars, medical expenses and lost income) as well as non-economic losses (e.g. bodily injury, loss of amenities, and the associated pain and suffering). Few people would deny that Bob was responsible for this accident, and since he *was responsible* for the accident, it may also seem proper that he should now *take responsibility* for his actions by compensating Hazel for the losses which he inflicted.³⁴ But no-fault systems do not charge injurers with the task of compensating their victims since instead they distribute the costs of those losses throughout society. Hence, conservatives therefore worry that not only would Bob not have to take responsibility for his actions under a no-fault system, but that instead all of society would have to take this responsibility for him. The responsibility allegation therefore rests on the conservatives' belief in the indispensability of the loss-shifting mechanism.³⁵

³⁴ For instance, David Miller suggests that such considerations will at least sometimes be decisive in requiring the responsible person to compensate their victim (2001:466-8, 471). Notably, Hart also believes that people should take responsibility, in the sense of accepting liability for their victims' losses, 'on account of being responsible for various disasters' (1968a:214).

³⁵ For a typical example of this sort of criticism, see §5 of Foley's paper (Foley 1973). More recently, Thomas Koenig and Michael Rustad have also pursued a similar line of argument (Koenig and Rustad 2001). An example of a public interest group which has recently raised this objection is 'The Coalition Against No-Fault in Saskatchewan' (C.A.N.F.S. 1999). A similar objection is also levelled against 'at-fault pool' schemes (which are a type of incremental reform that was discussed briefly in §2.2.3., and which are relevantly similar to no-fault systems) by Thomson who argues that the 'market share liability rule[']s' abandonment of the causation requirement is problematic because it allows people to

I. *TAKING RESPONSIBILITY MEANS COMPENSATING OUR VICTIMS*

One reason to accept the claim about liability's indispensability, is that liability may be seen as a lot more than just another mechanism for gathering the funds required to compensate victims for their losses — as more than a mere means to the end of compensating victims. Rather, compensating our victims for their losses may be seen as an essential component of what it means to take responsibility for our actions. For example, Phillip Montague has argued that a victim's right to be compensated could be based upon the injurer's correlative compensatory duty that 'falls within W. D. Ross's category of duties of reparation — "[t]hose resting on a previous wrongful act"' (Montague 1984:79).³⁶ On this account, although victims do indeed gain compensatory rights when we impose liability upon their injurers, in an important sense these rights are not primary but only derivative, because the primary reason why liability is imposed is not to compensate victims for their losses but it is rather to ensure that injurers discharge their duties — to ensure that they take due responsibility for their actions.³⁷ If liability is simply part of what it means to take responsibility for our actions, then injurers should bear the burden of compensating their victims for their losses, and victims

get away without taking due responsibility for the consequences of their actions (Thomson 1984:108-16). What all of these people share is the common belief that what is required for people to properly take responsibility for their actions is that they should bear the burden of the unwelcome consequences that their actions have imposed onto others — i.e. that injurers should take responsibility for the losses which they are responsible for bringing about by compensating their victims for those losses.

³⁶ In the context of cataloguing different *prima facie* duties, Ross suggests that '[s]ome duties rest on previous acts of my own' and hence that injurers owe a 'duty of reparation' to their victims for losses which they brought about through their own 'previous wrongful act' (Ross 1930:21-3).

³⁷ On this account, victims' compensatory entitlements are legitimised or underwritten by the fact that their injurers have a duty to take responsibility for their actions — a duty which just happens to be capable of underwriting victims' correlative compensatory rights. After all, if the primary reason for imposing liability onto injurers was simply *to compensate victims*, then there would be no special reason to impose liability for a given victim's losses onto their respective injurer. The aim of compensating victims could be achieved just as effectively by imposing liability onto any injurer – or even better, liability could be imposed onto a group of injurers, as might for instance be done in an at-fault pool scheme – rather than by imposing it onto the particular injurer who was responsible for that victim's losses. The fact that tort law systems impose liability for a given victim's losses onto their respective injurers can be explained by appeal to the fact that although injurers do indeed have compensatory duties, these duties are owed only to *their* victims because they are after all instances of a duty to take responsibility for *their own* actions, and not just general-purpose compensatory duties. A very closely related point was originally raised above in §3.1.1.(ii), in the context of distinguishing the loss shifting mechanism from the loss distribution mechanism.

who were responsible for their own losses should not be entitled to receive any compensation (i.e. they should be liable for their own losses).³⁸ Hence, one reason why conservatives may worry that people might get away without taking due responsibility for their actions under no-fault systems (and that others will instead be required to take this responsibility for them) is precisely because under no-fault systems injurers (and victims who were responsible for their own losses) do not seem to be expected to accept responsibility for their own actions.

II. OTHER THINGS THAT MUST BE DONE TO TAKE RESPONSIBILITY

Another way to support the claim about liability's indispensability, is if we also suppose that to properly take responsibility for their actions responsible parties should do a number of other things,³⁹ and that those other things will only be done if liability accepted by them. For instance, returning yet again to our example, conservatives may feel that to properly take responsibility for his actions, in addition to compensating Hazel for her losses, Bob should also: (i) openly accept that his actions caused the accident; (ii) apologize to Hazel; and (iii) if his actions were particularly culpable then perhaps he should even be punished.

One reason why they might think that Bob should acknowledge his role as a causal agent is because to deny this he would also have to deny his own status as a person. Admittedly, it is sometimes tempting to suppose (as no-fault supporters often do)⁴⁰ that since the consequences of our actions are tainted by influences from the physical world which are often beyond the limits of our control, and since we can only be responsible for those things over which we *do* have control,⁴¹ that it would therefore be inappropriate to hold us responsible for the actual consequences of our actions. In this manner we could 'pare down each act to its [supposed] morally essential core, an inner act of pure will assessed by motive and intention' alone, and so attempt to weasel out of accepting responsibility for the consequences of our choices under the guise of trying to avoid letting luck decide the moral features of our actions (Nagel 1976:143-4, 1979:31). But as Nagel points out – and as some prominent tort law supporters have warned⁴² – if we take this route then although we may indeed escape having to accept responsibility for consequences which are not completely

³⁸ Greg Pynt has made the latter part of this point. In response to the seemingly boundless expansion of the scope of the duty of care in tort law during the late 1990s, Pynt argued in favour of a return to more traditional conceptions of fault, to ensure that accident victims whose losses were in some part due to their own fault could not avoid taking due responsibility for their actions (Pynt 1999:43-5).

³⁹ ... in addition to *compensating* their victims ...

⁴⁰ Please refer to the discussion (and respective citations) presented in §2.2.1., where many of the moral objections to tort law are underwritten by precisely this kind of worry.

⁴¹ I say a lot more about this in §4.1. which provides an analysis of the concept of responsibility.

⁴² Please see the footnote at the end of this paragraph for relevant citations.

attributable to our own volition, we will now also have to accept that everything (including our very selves) is only a small component of an impersonal causal chain of events, and even our very selves (along with the actions that those selves apparently perform) will be swallowed up into the category of mere events. We too will become extensionless consequences of prior events with no actions to call our own, because our actions will have been squeezed out of the sphere of what can legitimately be referred to as ‘our own’ by the antecedents to our choices on one side, and by the consequences of those choices on the other side, and re-absorbed into the impersonal category of mere events. Hence, although the consequences of our actions are indeed not completely within our control, tort law supporters might still never the less insist that it is surely better to accept responsibility for even the unintended consequences of our actions, rather than to hold onto a position which, if endorsed, would entail that we are nothing more than extensionless events lost in an impersonal causal chain that lies completely beyond our control.⁴³ Thus, retaining the loss shifting mechanism seems to be necessary if we wish to accept our causal role in the world.

⁴³ Williams argues that it is surely ‘a large falsehood ... that we might ... entirely detach ourselves from the unintentional aspects of our actions ... and yet still retain our identity and character as agents’ (Williams 1976:125-6). Thomas Nagel’s and Bernard Williams’ discussions of this topic in their articles about ‘moral luck’ are usually seen as providing the foundations for this type of argument, which is surprisingly prominent within this part of the literature (Nagel 1979; Williams 1976). This sort of argument often crops up in the context of discussing the principle of corrective justice — a principle which on some tort law supporters’ account is supposed to justify tort law, and oppose no-fault, accident law systems. For example, Tony Honoré cautions that ‘[o]ur identity and integrity depend on taking responsibility for ... even [the] unintended aspects’ of our actions, and the reason he cites in support of this claim is precisely that if we reject ‘outcome responsibility’ then our actions will become nothing more than mere events in an impersonal causal chain (Honoré 1999d:132, 125, 130-4, 1999a:7-10). He also argues that ‘many tort actions give effect to personal responsibility’ and that ‘replacing tort liability by a state compensation scheme ... would tend to undermine the sense of personal responsibility’ (Honoré 1999c:81, 91). The same concept of ‘outcome responsibility’ plays an almost identical role in Stephen Perry’s and in Jules Coleman’s work, despite the fact that they view each other’s accounts of corrective justice as being significantly different from their own accounts, and Richard Wright confirms that I have not misunderstood the function that the concepts of outcome responsibility and personal identity play in Honoré’s, Perry’s and Coleman’s arguments (Perry 2000a; Coleman 1992e; Wright 1992:682). Graham Haydon also argues that one ‘would not ... have the concept of [oneself] if [one] did not see [oneself] as bringing about certain changes in the world’, the basic structure of his argument here being that a conception of the self requires that we see ourselves as causal agents, and hence that responsibility for outcomes is an essential component of personal identity (Haydon 1978:56). Ernest Weinrib also argues that one would have to presume a very unrealistic and contradictory conception of agency to initially accept that we are indeed agents, but then to deny that

Conservatives might also suppose that Bob should apologize to Hazel because this is required to treat her as someone who is worthy of respect in her own right — to treat her as inviolable and to recognize her status as a person. For example, Strudler insists that a genuine expression of regret is required to ‘restore a person’s status as inviolable’, and that injurers who do not feel a need to do this should be compelled to do so by society to ensure that a further ‘undeserved insult’ is not inflicted onto the victim. But, Strudler insists, ‘often mere words will be lame,’ empty, or shallow, and one who feels genuine regret may only be able to express it properly by offering compensation to their victims.⁴⁴ Thus he suggests that tort law’s requirement that injurers must pay compensation to their victims should not just be understood solely in terms of classic compensatory concerns and aims, but that it should also be understood as society’s attempt to demonstrate that it cares that its constituents treat each other respectfully. Hence, on Strudler’s account, the loss shifting mechanism helps injurers express their genuinely felt regret and re-establish (or maintain) a good moral relationship with their victims.⁴⁵

Finally, conservatives may also believe that if justice is to be served then at least some injurers should be punished. Accidents sometimes occur when people do not pay sufficient attention or when they recklessly gamble with another’s welfare. But paying insufficient attention when the stakes for others are high and recklessly gambling with others’ welfare are

we are actually responsible for the untoward or accidental outcomes of our exercise of agency, and this argument is again arguably a variation on the same theme (Weinrib 1991:303). Finally, Umari argues that an analysis of actual courtroom decisions shows that tort law is indifferent to considerations of moral luck, and he takes this as indicative of a general commitment in our society to the belief that people are responsible for the outcomes of their actions and hence that they ought to take responsibility for the causal upshots of their actions (Umari 1999-2000). Walter Glannon (1998) also argues that not holding people responsible for things that they are responsible constitutes a denial of their personhood.⁴⁴ Williams also argues that an expression of ‘agent-regret’, and perhaps even a symbolic payment of recompense, are both justifiably expected even of those injurers who were not at fault, because (he asserts) we would have good grounds for being suspicious about a person who all too readily dismissed their need to apologize merely on grounds that they were not to blame (Williams 1976:124).

Regrettably, he does not state what those ‘good grounds’ might be.

⁴⁵ (Strudler 1992:317-20, 1997) Strudler’s discussion aims to characterize and to justify tort law in terms of an ‘expressive’ conception of corrective justice. Klepper (1990:229, 35) also sees the requirement that injurers should compensate their victims as being ‘based on a [Kantian] respect for persons’, but unlike Strudler he does not see this as an argument in support of the claim that tort law is ultimately justified by something like the principle corrective justice, but instead he believes that this respect for persons supports a principle which he calls the ‘weak wrongful loss’ principle — a principle which I discuss briefly below and at greater length in §4.2.4..

both ways of being *morally* at fault and the presence of moral fault may be thought to necessitate punishment. Thus, although we would be ill-advised to claim that all injurers should be punished (because some may after all only be at fault in a non-moral sense), there is still never the less something to be said for the claim that specifically moral varieties of fault require a fitting degree of punishment to be inflicted upon the wrongdoer, and that the loss shifting mechanism can perform this function too.⁴⁶

However, since no-fault systems do not impose liability onto responsible parties – after all, they distribute victims’ losses throughout society rather than shifting them onto injurers – to whatever extent it is true that these other things⁴⁷ would only be done if liability was imposed, to that same extent it may also be thought that no-fault systems would be incapable of ensuring that Bob would do any of these things either, and hence that they could not ensure that Bob would take due responsibility for his actions.

III. BETTER TO IMPOSE LIABILITY ONTO INJURERS RATHER THAN VICTIMS

Conservatives may also feel that it is only fitting that Bob should compensate Hazel for her losses because (at least *prima facie*) it seems a lot more appropriate that if wrongful losses are to be borne by anyone, then they should be borne by a guilty injurer rather than by an innocent victim, and this may also be thought to support the claim about the indispensability of the loss shifting mechanism. For instance, Joel Feinberg has suggested that it could be argued that ‘if a loss must fall on either of two parties, one of whom is at fault in causing it and the other of whom is faultless, [then] the party at fault ought to bear the loss, all other things being equal.’⁴⁸ This principle of ‘weak retributive justice’ states (roughly) that if the victim’s own conduct was not unduly dangerous and someone else was in fact responsible and blameworthy for their loss, then the victim should not have to suffer this burden, and hence that if a choice must be made between the victim and the injurer then it should surely

⁴⁶ In this intentionally brief paragraph I draw on the retributive theory of punishment, however other (e.g. deterrence) theories could also support the claim that injurers should be punished for their faulty actions. Interestingly, Cottingham (1979) identifies nine separate accounts of theories of punishment which can be referred to as retributivist theories, and although retributivist theories of punishment are often compared and contrasted with deterrence-based theories, Hill argues that a careful reading of Kant reveals that (contrary to popular belief) Kant’s variety of retributivism was not in fact incompatible with punishing wrongdoers for the purpose of deterring undesirable conduct (Hill 1999). However I shall dwell on the topic of punishment no more, because it is no longer common to see punishment as a primary (or even as an important) aim of accident law.

⁴⁷ ... i.e. accepting their true causal role, genuinely apologizing to their victims, and suffering an appropriate level of punishment ...

⁴⁸ This is actually Coleman’s (1988b:181) characterization of Feinberg’s (1970:217-21) principle.

favour the victim.⁴⁹ No-fault systems' abandonment of the loss shifting mechanism may therefore be seen by conservatives as a regrettable mistake, because the principle of weak retributive justice seems to require injurers to be liable for their victims' losses.

IV. BETTER TO IMPOSE LIABILITY ONTO INJURERS RATHER THAN SOCIETY

In the above example, Bob probably also suffered substantial losses, and so in one sense he too was a victim. However not all victims are injured *by others* — after all, accidents can also be caused by the very same people who suffered from them the most. But when victims are responsible for their own losses (as Bob would have been in the above example), it seems appropriate that at least to some extent they should take responsibility for their own accidental losses by putting up with their sorry lot rather than expecting others to come to their rescue, and this too may be thought to support the claim about liability's indispensability.⁵⁰

One reason for supposing this is that it might seem wrong to impose these losses onto others since nobody else was after all responsible for them.⁵¹ As the argument from weak retributive justice just claimed, if a choice has to be made between imposing the burden on a faulty or an innocent party – i.e. onto a guilty injurer or onto the many innocent people who comprise society – then we should surely choose the former and not the latter. The point is not just that guilty victims and guilty injurers should be required to take responsibility for their actions because that is what responsible individuals ought to do, but it is also that the innocents who comprise society should not be forced to take this responsibility for them

⁴⁹ A similar argument is also used by Williams, and Perry similarly appeals to a principle of 'localized distributive justice' which bears a striking resemblance to the principle of weak retributive justice (Williams 1976:124; Perry 2000a).

⁵⁰ For example, in discussing the expansion of tort law into an ever-increasing number of 'failure to warn' cases, Greg Pynt has argued that victims 'should, on occasion, accept some responsibility for accidental injury, rather than automatically respond to a personally averse event by looking for someone [else] to blame and pay', because this is simply what it means to take responsibility (Pynt 1999:44-5). 'Failure to warn' cases – exemplified graphically in Pynt's summaries of *Nagle v Rottnest Island Board* and *Franklins Selfserve Pty Ltd v Bozinovska* – are characterised by the plaintiff's assertion that their injury was a result of the defendant's failure to erect a sign warning them of the dangers inherent in engaging in the activity that subsequently caused their loss.

⁵¹ Another (though admittedly less convincing) reason for claiming that victims who suffer losses as a consequence of their own (possibly faulty) actions should not be compensated, might be that since they brought their own misery upon themselves, they now positively deserve to bear these burdens – that it 'serves them right' for being so careless.

because they were not responsible for those losses.⁵² Hence, one reason why conservatives might think that it would be wrong to impose these losses onto anybody else is that irrespective of how regrettable those losses might be, if others were not responsible for them then they should not be forced to take responsibility for them either.

But since no-fault systems are publicly funded, whenever anyone is compensated under a no-fault system, this money comes not from a guilty party but from the many innocent individuals that comprise society — faulty parties are not required to do anything more than the average faultless individual to see to it that the victim is compensated (Foley 1973:§7.3). Hence, returning once more to our example, conservatives may suppose that since Bob was responsible for the above accident, he should therefore now take responsibility for it rather than expecting others to do so. On this account, the only person who should take responsibility for Bob's losses is Bob, and nobody else owes him anything by way of taking responsibility. However since no-fault systems provide compensation irrespective of where the fault lay and irrespective of who caused the losses, victims who are responsible for their own losses would not have to take responsibility for their own actions, but instead they would be allowed to insist that they should be compensated by the state, and treated as if they had not in actual fact been responsible for their own misfortune.

⁵² It might even be argued that expecting innocents to compensate guilty parties would constitute a double serving of evil, because those who should take responsibility would not do so, and those who should not take it would be forced into doing so anyway. For instance, Judith Jarvis Thomson has argued that shifting losses onto faultless individuals impinges unjustifiably on people's freedom. She suggests that it is unjust to call upon a person for help – or rather, to insist that they must assist a victim – unless there is some feature of specifically that person which makes their pockets especially open to our claims upon them. This is one particularly important reason why incremental and radical accident law reform proposals are often heavily criticised for abandoning the causality requirement as a precondition for recovery — i.e. because it is thought that causality surely matters since it protects people's freedom of action. They believe that freedom of action requires that we not shift losses onto those who were not responsible for causing them, and so the causality requirement must not be abandoned because it protects people's freedom of action (Thomson 1984:108-16). Strudler also suggests that the reason why the causality requirement is so important to us is because it protects freedom of action, when he argues that 'Liberal society endorses the idea that people should, other things being equal, be able to control the course of their own lives' (Strudler 1997:325).

V. CORRECTIVE JUSTICE REQUIRES INJURERS TO PAY

Finally, no discussion of no-fault systems' alleged failings would be complete without at least touching on the topic of corrective justice.⁵³ However, the literature on this topic is surprisingly un-homogenous since once the general features of corrective justice are agreed upon, there is usually very little other agreement about precisely what else corrective justice is supposed to be, or from where it is supposed to derive its own normative appeal. For instance, there is a considerable history of controversy about precisely what corrective justice is supposed to involve — e.g. whether it involves the rectification of *wrongs* (e.g. Weinrib 1983, 1991) or of *wrongful gains and losses* (Coleman 1988a); or whether it necessarily requires a *one-to-one relationship* between injurer and victim (Aristotle 1976:177, 201); whether it is a *principle* of justice (Alexander 1987:2-11; Coleman 1992f; Perry 1992a, b, 2001; Honoré 1999e) as opposed to a *form* that practical rationality might take (Benson 1991-2; Weinrib 1992, 1993, 2001); and whether it is *autonomous* or only a *component of a larger integrated theory* of justice or practical rationality that includes corrective, distributive and perhaps even retributive justice (Alexander 1987). Furthermore, while some corrective justice theorists believe that the normative appeal of corrective justice is derived from the fact that accidents involve *transactional injustice* (e.g. Weinrib 1983, 1991), others claim that its normative appeal stems from the fact that accidents involve a certain form of *inequality* (Aristotle 1976:177, 201), *economic inefficiency* (Landes and Posner 1987), *causal agency* (Epstein 1973), or *unjustified non-reciprocal risk-takings* (Fletcher 1971-2:545). Others still insist that the normative foundations of corrective justice can be found in the fact that accidents involve the occurrence of *wrongful losses* (Coleman 1988a), *suffering* (Robinson 1991), *outcome responsibility* (Coleman 1992f:442-3; Perry 1992a, b, 2001; Honoré 1999e), or *unjust transactions* (Wright 1992). Hence, given the controversy and lack of homogeneity in this literature, in these brief comments I will intentionally curb my own discussion by only attempting to convey the general flavour of the sort of worries which conservatives have in mind when they raise this objection to radical accident law reform proposals.⁵⁴

It has been argued that the principle of corrective justice imposes agent-specific compensatory duties onto those who were responsible for others' losses, and that *qua* agent-specific these duties can only be discharged by the encumbered parties and not by anybody else. As is the case with punishment, which it only makes sense to inflict onto those who

⁵³ References to corrective justice crop up in most of the work that has been cited so far throughout this section (i.e. §3.2.1.) – for instance, corrective justice is the focus of the cited work by Coleman, Perry, Honoré, Wright, Weinrib and Strudler – and so instead of repeating these citations here, I direct the reader to the foregoing footnotes.

⁵⁴ I will however return to this topic in §4.2.4..

committed the punishable offence and never onto others (even if they should be willing to suffer it on the former's behalf), so too agent-specific duties are duties which can only be discharged by those who are encumbered by them, and so others could not possibly discharge these duties on our behalf.⁵⁵

But since the duties which corrective justice imposes can only be discharged by the encumbered parties, conservatives may therefore object because a society which would not compel those parties who were responsible for others' losses to compensate their victims and which instead compensated them through a no-fault fund, would fail to ensure that corrective justice was observed. This, on their account, would be due to the fact that once victims would be compensated from the no-fault fund, the responsible parties would not need to compensate them any longer since otherwise the victims would be over-compensated (because they would have received compensation from two sources for overlapping portions of their losses). But unfortunately this would also have the consequence that those who were responsible for the accidents would get away without having to discharge the duties which were allegedly only theirs and not anybody else's to discharge as a matter of corrective justice, and yet again that responsible parties would not take due personal responsibility for their actions.⁵⁶

⁵⁵ Agent-specific duties arise out of agent-relative reasons for action – i.e. considerations which although they may provide *us* with reasons to act in a particular manner (e.g. to compensate someone for their losses), need not necessarily also provide *others* with reasons to act in that manner – and they are usually contrasted with agent-general duties which arise out of agent-neutral reasons for action. Coleman illustrates the relationship between agent-specific and agent-general duties on the one hand, and agent-relative and agent-neutral reasons for action (respectively) on the other hand, by using the following example: 'If Josephine takes Ronald's radio, then ... Josephine [has] a reason for acting that no one else has. She has a[n agent-specific] *duty* to return it or repair the damage, a duty that no one else has', precisely because she is the one who has the [agent-relative] *reason* to do these things (1992b:318, emphasis added). The basic idea here is supposed to be that even if someone were to purchase an identical radio and give it to Ronald, Josephine's duty would still remain un-discharged because only *she* can discharge *her* duty to give the radio back to Ronald. The original discussion of agent-relative and agent-neutral reasons for action (and hence the basis for the distinction between agent-specific and agent-general duties) is due to Thomas Nagel (1986). On the other hand, Christine Korsgaard (1993) mounts an attack on this distinction.

⁵⁶ Coleman characterizes this objection by suggesting that '[i]f the faulty injurer's duty to repair is a matter of corrective justice, [then i]f someone else discharges the duty on his behalf, that is, compensates his victim, an injustice [still] remains, since [c]ertain debts of repayment, like the criminal's debt to society, cannot, consistent with principles of justice, be discharged by others' (Coleman 1988a:201).

VI. RESPONSIBILITY ALLEGATION SUMMARIZED

This section has tried to explain why the fact that no-fault systems do not use the loss-shifting mechanism may lead conservatives to worry that people would not take due personal responsibility for their actions under no-fault systems. Put simply, if it is true that injurers can only take due responsibility for their actions *by compensating their victims for their losses* – five arguments were offered to support this claim, which we might call the ‘indispensable liability’ claim – then the law should indeed impose compensatory duties onto responsible parties in order to ensure that they do take this due responsibility. However, since no-fault systems do not hold injurers *liable* for the consequences of their actions because they do not use the loss-shifting mechanism, conservatives may therefore worry that under no-fault systems injurers may not take due personal responsibility for their actions.

3.2.2. COMPENSATION ALLEGATION

The *other* strategic difference between no-fault and tort law systems – i.e. the fact that no-fault systems use non-fault-based criteria to specify their compensatory *policies* – also worries conservatives. However, on this occasion their worries relate to compensatory issues rather than to responsibility — specifically, they worry that since no-fault systems use criteria other than fault to specify their compensatory policies, that they may therefore both under- and over-compensate.

On the conservatives’ account, the compensability of a loss – that is, the question of whether that loss should be treated as *wrongful* for the purpose of the compensatory inquiry and hence as compensable, or whether it should only be treated as *merely unfortunate* and hence as not compensable – is a matter of *how* that loss came about,⁵⁷ and concerns related to the importance-, the significance- or the value of *what* was lost by the victim⁵⁸ are seen by conservatives as largely irrelevant to its compensability.⁵⁹ Put another way, only *process-*

⁵⁷ e.g. whether it was a consequence of another’s faulty actions, one’s own actions, or a consequence of natural causes.

⁵⁸ e.g. whether it was the loss of an arm or a leg, a little finger, the loss of one’s income earning capacity, a scratch to the duco of our brand new sports car, a five dollar bill, a bruised ego, or something else.

⁵⁹ This was first suggested as the rationale for offering compensation under no-fault systems in §3.1.1.(ii)., in the context of distinguishing between loss *distribution* and loss *shifting* mechanisms. For instance, Feinberg suggests that ‘[w]e could, in principle, begin with the notion of a “compensable harm” as one *caused by fault*’ (1970:215, my emphasis). Even Coleman, a long time proponent of no-fault systems, has on occasion suggested that perhaps wrongfulness has to do with *how* that loss came about – i.e. whether it was a result of another’s wrongdoing or not – and not just with *what* was lost (Coleman 1992f:442-3). The concept of *wrongful* (as opposed to *merely unfortunate*) losses also crops

oriented considerations are relevant to compensability on their account but *outcome-oriented* considerations are not. But, under no-fault systems quite the opposite seems to occur — process-oriented considerations (such as facts about whether a loss came about as a consequence of another person's faulty actions) are treated as largely irrelevant, and instead outcome-oriented considerations (i.e. the very ones which conservatives feel should be ignored in the compensatory inquiry) are treated as the determinants of compensability.¹

This difference leads conservatives to worry that no-fault systems' compensatory policies will generate the wrong compensatory decisions — i.e. the wrong decisions about *who* should be compensated, *for what* they should be compensated, and about *how much* compensation they should receive. However, before this *difference* can be seen as a cause for concern — i.e. before it can be imbued with significance, rather than being a 'mere' difference — we must first find reasons to suppose that tort law's compensatory decisions set some kind of a norm. After all, the fact that no-fault systems' compensatory decisions may not line up with tort law's compensatory decisions will only be a cause for concern if we have prior reasons to suppose that the compensatory decisions of tort law systems are a legitimate norm and that departures from this norm attract due criticism. Thus, in what follows I present two arguments which conservatives may use to support their claim that process-oriented criteria should be used to specify compensatory policies, and hence to support their claim that the compensatory policies of no-fault systems (specified, as they are, through non fault based criteria) may lead those systems to both under- and over-compensate.

I. RESPONSIBILITY ARGUMENT

The first argument in favour of using process- rather than outcome-oriented criteria to specify an accident law system's compensatory policies stems out of considerations related to responsibility. Conservatives may argue that the reason why compensatory policies should only be specified through process-oriented criteria such as fault and causation is because by identifying those losses which were a consequence of another's (possibly faulty) actions, we identify those losses *for which others were responsible*, and hence that we would thus identify

up in Coleman's work in the context of discussing corrective justice (see §3.2.1.(v). above), where he argues that '[t]he concern of corrective justice is *wrongful* gains and losses' (Coleman 1983:11, emphasis added). The basis of this conception of wrongfulness in losses seems to be Aristotle's claim that justice must involve interactions between people — i.e. more than one person must be involved before we can start to talk about justice — and hence that although a loss which one inflicts on oneself can indeed be a misfortune, it can not on this account ever be an unjust or a wrongful loss (Aristotle 1976). For relevant discussion, also see Wright's commentary on Aristotle (Wright 1992:689, 91). In what follows, 'compensable loss' and 'wrongful loss' refer to equivalent ideas, as do 'non-compensable loss' and 'merely unfortunate loss'.

those losses *for which somebody other than the victim should take responsibility*. The basic idea here is meant to be that when your losses are a consequence of your own (possibly faulty) actions, then nobody else is responsible for them, and so nobody else has a duty to take responsibility for them. But when your losses are a consequence of my (possibly faulty) actions, then somebody else – i.e. me – is responsible for them, and so somebody else does after all have a duty to take responsibility for them.⁶⁰

A distinct advantage of this argument is that the losses which would be identified as wrongful through *these* compensatory policies would apparently always be ones for which another party had a duty to take responsibility. Consequently, conservatives could argue that the reason why victims should be compensated for those losses is because those losses are ones in relation to which victims would always have a right to be compensated, precisely because somebody else – i.e. their injurer – would have the duty to compensate them.⁶¹ On the other hand, if we attempt to distinguish losses from one another as no-fault systems do – i.e. by using policies specified through outcome-oriented criteria – then the losses which will be identified through *those* compensatory policies may not always be ones for which another party was responsible, and hence it may not necessarily be true that another party will have a duty to take responsibility for them.

Since judgments about compensability are really just judgments about entitlements or rights to compensation, and rights must in the end be underwritten by duties if they are to be anything other than “‘right[s] in the air”, good against no one’, conservatives may therefore suppose that we can only determine whether a particular victim should be compensated by looking at whether someone else should take responsibility for compensating them — otherwise we run the risk of bringing into existence rights which are no more useful than

⁶⁰ While the *former* argument in favour of drawing the distinction between wrongful and merely unfortunate losses by resort to compensatory policies specified by the fault criterion is suggested by Coleman and Ripstein, Christopher Kutz suggests that others (e.g. Stephen Perry) prefer this *latter* argument. Kutz argues that Coleman and Ripstein’s ‘allocative’ approach and Perry’s ‘attributive’ approach can be seen as starting from opposite points and working up to the other’s point by deriving it from what they take to be the foundations; namely, he argues that while Coleman and Ripstein take *political* (i.e. outcome-oriented) considerations about which losses victims should be compensated for to be the foundations and from this they derive conclusions about whom to allocate the burdens of those losses to, Perry starts out with premises about who was responsible for that loss and from this he derives conclusions about to whom its burdens should be allocated (Kutz 2004:580-7).

⁶¹ After all, rights can not exist without correlative duties to underwrite them, but since compensatory duties would exist whenever another person was responsible for a victim’s losses (the injurer’s duty to take responsibility would be expressed through their compensatory duty), victims could therefore claim to have a compensatory right for losses identified through that particular process.

cheques that bounce on presentation by the payee due to insufficient funds being present in the drawer's bank account.⁶² On this account, rights only exist when correlative duties also exist, but compensatory duties only exist when somebody other than the victim should take responsibility for the victim's losses. But the people who would bear the burden of compensating victims under no-fault systems (i.e. the many innocent constituents of society) are not usually responsible for those losses, and so conservatives may argue (see §3.2.1. above) that they should not be expected to take responsibility for those losses either. Conservatives may therefore argue that any compensatory rights which no-fault systems bestow upon victims may in the end turn out to be completely groundless because nobody may actually have a duty to take responsibility for those losses.

Hence, one reason why conservatives may worry that people would be under- and over-compensated under no-fault systems is because on their account victims who receive compensation in a no-fault system may not really have even had a right to be compensated by anyone⁶³ – or at least, not a right that was properly founded upon another's correlative duty to take responsibility for their actions and for the losses which those actions occasioned – and because others who may have had a right to be compensated for their losses by another⁶⁴ would not necessarily receive the compensation to which they were entitled.

II. IMPARTIALITY ARGUMENT

The second argument in favour of using process- rather than outcome-oriented criteria to specify an accident law system's compensatory policies is a bit more complicated, and it stems out of a consideration of the value of state impartiality. Coleman and Ripstein (1995) suggest that another reason why conservatives may believe that process-oriented criteria offer

⁶² For instance, Richard Wright criticized Jules Coleman's original 'annulment' conception of corrective justice for precisely this reason (Wright 1992:665, 673). It might admittedly be thought that one way to side-step this objection is to adopt the Razian interest theory of rights, in which rights have conceptual priority over duties, rather than assuming that duties have conceptual priority over rights (Raz 1986). The idea here could be that if we found someone's interest to be sufficiently important, then we would first grant them the right to compensation, and only later would we look around for someone else to underwrite this right. However since Raz's framework still requires that the benefits of granting a right to the former be weighed up against the burdens of imposing the underwriting duties onto others, I do not believe that making rights conceptually prior to duties could in itself resolve this problem since the same issues would still have to be dealt with eventually anyway.

⁶³ ... because nobody may have been responsible for their losses, and hence nobody should have been expected to take responsibility for those losses ...

⁶⁴ ... because someone else may have been responsible for their losses, and hence they should have been expected to take responsibility for those losses ...

a better basis for underpinning compensatory decisions than outcome-oriented criteria – and hence why the compensatory decisions of tort law systems can allegedly be treated as legitimate norms, and why the compensatory decisions of no-fault systems can be treated as departures from legitimate norms and thus as instances of under- and over-compensation – is because by specifying their compensatory policies through outcome-oriented criteria no-fault systems allegedly compromise the ideal of *state impartiality*, which is something that would not occur if they instead used process-oriented criteria to specify their compensatory policies. The remainder of this section will discuss this argument – one which Coleman and Ripstein attribute to conservatives – so as to clarify one of the bases for the allegation that no-fault’s use of outcome-oriented criteria leads them to under- and over-compensate.

The law’s protection of legitimate interests: People have interests in various items. It could be said that our interests in some items are *legitimate* when nobody else has an interest in those same items, and hence when others have a correlative duty to respect our interests in those items; in line with Hohfeld’s taxonomy of rights, we might think of these interests as the bases of ‘entitlements’ or as ‘claims’ to getting what it is in our interests to have. Our interests in other items might however be *illegitimate*, because others might already have the legitimate claim to those particular items, and so we could not possibly have a legitimate claim (in the sense of ‘claim’ just stipulated) to them as well — rather, we would have a duty to respect their legitimate interests. Finally, our interests in yet other items might be *neither legitimate nor illegitimate*, because nobody may have an exclusive claim to them; and so, again in line with Hohfeld’s taxonomy of rights, we might want to think of such interests as ‘liberties’ or as ‘privileges’.⁶⁵

Although we are entitled to protect our legitimate interests,⁶⁶ for various reasons legal institutions are set up to perform this task.⁶⁷ However since these institutions are administered

⁶⁵ My use Hohfeld’s taxonomy of rights here is intended purely as an illustrative device, in the hope that this will help clarify what I mean when I talk about ‘legitimate interests’ (Hohfeld 1975; see also Almond 1999). My aim is only to provide some (reasonably) plausible basis for distinguishing those interests which one *might* be justified in protecting from infringements by others (see next paragraph), from those interests which it would *not be legitimate* to protect from others’ infringements. Also see Coleman’s discussion of legitimate interests (Coleman 1992a:278).

⁶⁶ In suggesting that it is morally permissible to protect our legitimate interests, I should not be taken to imply that it would be permissible to do *anything whatsoever* to protect them since, as Thomson points out, the protection of some legitimate interests (e.g. my interest to not have my concrete garden gnome smashed by you for trivial reasons) might come at too high a price to warrant their protection (e.g. if I would have to kill you to prevent you from breaking it) (Thomson 1980).

by people, an impartial mechanism is required to guide these people in distinguishing legitimate (and thus protected) interests from non-legitimate (and thus not protected) interests, to ensure that only the legitimate ones are protected by the law's coercive machinery.⁶⁸

No-fault's use of outcome-oriented criteria: One way in which the law could attempt to distinguish legitimate (and thus protected) and non-legitimate (and thus non-protected) interests is by compiling something akin to a list of items which are allegedly so valuable that an interest in them should always be protected.⁶⁹ Some of the items that might conceivably find their way onto this list would almost definitely include our interests in health and bodily integrity, but some people may also be prepared to allow that our interest in certain basic material and political goods⁷⁰ which are necessary to carry on a decent life also find their way onto this list. The idea behind compiling this list would be that if an item was found on it, then everyone's interest in that particular item would be protected by the law. The legal system's administrators could then consult this list whenever anyone claimed that one of their protected interests had been infringed, to determine if the item in question was indeed protected by the law (i.e. to determine if it was sufficiently valuable to compensate the victim for having incurred that loss), and if the item was indeed found on this list then their interest in it would be protected, whereas if it was not on this list then it would not be protected.

This is essentially how no-fault systems distinguish wrongful and merely unfortunate losses from one another, because whether a victim is compensated for a particular loss under a no-fault system is determined by the value, significance or importance of that loss, and in

⁶⁷ Nozick, for example, suggests two reasons why rational self-interested individuals might be prepared to put the state in charge of protecting their interests. One reason might be that individuals may not have sufficient resources to protect their own legitimate interests from bullies. Secondly, it might also be thought that impartiality is needed to make accurate decisions about which interests are legitimate and which ones are not (Nozick 1974a). Honoré also suggests that this might be required to reduce disruptive conduct which threatens the fabric of society, but he also acknowledges that since the state's enforcement of rights imposes costs onto all taxpayers, some might refuse to subsidize the state in doing so if others benefited more from this protection than they did, and so he concludes that the state's involvement in the protection of rights might need to be justified by such things as (e.g.) considerations of justice (Honoré 1999c:70-3).

⁶⁸ Stephen Perry (2001:57) also begins his discussion by expressing the idea that the law only protects *some* interests — he calls these 'the core protected interests'.

⁶⁹ I say 'something akin to a list' because this need not literally be a physical list. Rather, the idea is that if we were to compile such a list then we would need to have some criteria for deciding which items were important and which ones were not — for instance, our criterion might be that if an item is necessary for sustaining a basic level of welfare, then that item should find its way onto the list.

⁷⁰ It might for instance be thought that Rawls' *primary goods* should be on this list (Rawls 1973b:90).

simple cases that involve the loss of such items as health and bodily integrity which arguably have the same value across all persons,⁷¹ this model functions perfectly adequately.

The alleged failure of outcome-oriented criteria: The problem though is that when we move away from protecting interests in these basic, fundamental or necessary items, and once we begin to consider what might be involved in the protection of more sophisticated and diverse interests, it would appear that this model would no longer function adequately because the state, acting through the legal infrastructure, could not possibly give *equal* protection to the diverse range of its citizens' interests without unjustifiably impinging on some of their *liberty* to live life according to their own conception of what constitutes the good for them — i.e. the state could not remain impartial.

To clarify what is at stake here, suppose for example that both of us have half a million dollars, and also suppose that we both have an equally legitimate interest in our money — perhaps we both worked very hard for many years and we diligently saved up our pennies so that one day we could fulfil our lives' ambitions. But while you spend all of your money on purchasing a Rolls Royce Silver Seraph, I spend my money on building and running an orphanage. As these examples go however, tragedy strikes one stormy night when we were both out celebrating the realization of our dreams — lightning bolts strike my orphanage and your garage, which causes them both to ignite in flames, and they both burn down to the ground, tragically reducing our dreams and lives' ambitions to ashes and scrap metal. A question that now arises is whether both, either one, or neither of us should be entitled to claim compensation for our losses under a no-fault system.⁷² Perhaps more importantly though, how could we justify our compensatory decision in a system that used this list-based model — i.e. how could we justify our compensatory decisions in a no-fault system?

Under such a system, if neither of these losses should be compensated, then neither Rolls Royce Silver Seraphs nor orphanages should appear on the list of protected items; if only one of us should be compensated, then only that item should appear on the list; and if both of us should be compensated, then both items should appear on that list. Hence, given the argument so far, if our original interests in the half a million dollars were legitimate, and there was nothing illegitimate about us spending our money as described above, then it also

⁷¹ My suggestion here is simply that my health is *prima facie* no more or less valuable than your health.

⁷² Since these losses were caused by a bolt of lightning, let us assume *ex hypothesi* that nobody is responsible for bringing them about, and let us also assume that neither of us had the foresight to purchase accident insurance. Finally, I will assume that the garage and the orphanage were both well-built, such that it can't be argued that the builders (or perhaps someone else) were at fault for constructing fire-prone buildings.

seems reasonable for each of us to insist that *whatever items we had spent our money on* should now also make their way onto this list. Accordingly, to ensure that the law gives equal protection to both of our legitimate interests under this model, both Rolls Royce Silver Seraphs and orphanages should find their way onto the law's list of protected interests.⁷³

If this were the end of the story then perhaps we could live with this outcome. The problem though is that not only would *these* items have to find their way onto this list, but every other item on which someone might conceivably spend their legitimately held resources would also have to find its way onto this list, and this would mean that *every* kind of loss would have to be treated as a wrongful or compensable loss. However if all losses were treated as compensable under this systems then compensation would have to be paid to anyone who suffered *any* kind of loss: for instance, a person who carelessly backed their car into a wall could claim to have just as much a right to receive compensation as a person whose car was damaged through another's negligence; similarly, business operators who went bankrupt and lost their livelihood and private property due to being outdone by their competition could also claim that they should be compensated for their losses (i.e. that society should indemnify them against the possibility of business failure) (Coleman 1982:§3, 1988a:§2, 1992a:273-5). Furthermore, such an accident compensation system would be thoroughly conservative of the prevailing material inequalities, since the wealthy would always be compensated for all of their losses and so their privileged position in society would be protected and reinforced by such a system.⁷⁴ Finally, and perhaps most worryingly for no-fault supporters, going down this route would also require no-fault supporters to abandon any hope of ever being able to draw a principled distinction between compensable and non-compensable losses because, as I just suggested, *ex hypothesi* all losses would be compensable in such a system. Consequently, there would be no logical space for under- or over-compensation to ever occur since all interests acquired with legitimately held resources would have to be protected, and so this is *not* really a model which no-fault supporters can even endorse since it would ultimately undermine their very basis for objecting to tort law systems on grounds that these systems under- and over-compensate (this objection to tort law systems was raised in §2.2.1.(i-iii)).

⁷³ I am essentially drawing on the same sorts of intuitions as Robert Nozick draws upon in his Wilt Chamberlain example, which is supposed to establish that patterned principles of distribution must in some way be flawed, because if we started out with an initial just distribution of resources, and we only engaged in just transactions, then it seems plausible (at least *prima facie*) that the resulting distribution of resources could not possibly be considered unjust and hence as a legitimate target for further re-distribution by the state (Nozick 1974d).

⁷⁴ This point is explained in somewhat greater detail in §3.3.6. below.

To avoid these problems, our generosity would therefore have to be curbed, and restrictions would inevitably have to be placed onto the sorts of items that could find their way onto this list. But if, in retrospect, all items could not after all find their way onto this list, then how should we decide which items are sufficiently important or valuable to be placed onto this list, and which ones are too trivial to have a place on it? After all, if *I* compiled this list then although I would presumably reserve a special place on it for orphanages, I may deny that Rolls Royce Silver Seraphs have any place on it because I may consider them to be a terribly frivolous and self indulgent way of spending valuable resources that could otherwise be used to build more orphanages. On the other hand, if *you* compiled this list then you might reserve a special place on it for Rolls Royce Silver Seraphs but not for orphanages because you may not agree that orphanages are really that valuable. So how should we decide which items are sufficiently valuable to warrant always protecting them from infringements, and which ones are not sufficiently valuable to secure a place on this privileged list?

The diversity of answers that one might encounter to the question of what is valuable and what is not is conceivably as large as the number of people to whom one might pose this question. This is a consequence of the fact that everyone tends to have their own distinctive conception of what constitutes *the good* for them, and although there may indeed exist certain notable overlaps between our separate conceptions of the good, these overlaps mostly tend to converge on the sorts of interests that were mentioned earlier — i.e. on interests in health, bodily integrity, and perhaps in securing some basic resources that are required to live a decent life. But these items are not the sources of our problems, because they are usually valued equally by everyone. The source of our problems is that once we attempt to move beyond these basic necessities and once we consider the question of what *else* might be valuable and hence worthy of protection, this is where our answers will diverge. People's individual preferences are irreconcilably diverse, and so no matter which scale of value we ultimately use to rank interests in terms of their value (to determine which interests should be protected and which ones should not), some people's interests would still fail to be protected by the law if this list-based model was used because they would be judged as not being sufficiently important to secure a place on this list, and so under this model the law would not provide equal protection to everyone's interests.⁷⁵

The above discussion has tried to explain why (on Coleman and Ripstein's account) conservatives believe that outcome-oriented criteria should not be used to distinguish

⁷⁵ Elizabeth Anderson makes what seems to me as essentially the same point in the context of criticizing 'luck-egalitarian' (or what I refer to as 'responsibility-tracking') theories of justice, and (at footnote 67 of her paper) she attributes the original observation of this point to Friedrich August von Hayek (Anderson 1999:310; von Hayek 1960:95-7).

wrongful and merely unfortunate losses from one another — i.e. because they believe that if this were done then either some people's interests would not receive the same amount of protection under the law as other people's interests (i.e. the law would not treat everyone as an *equal*), or else to get equal protection some people would have to abandon their own preferred individual conception of what constitutes the good for them in favour of the state's endorsed conception of the good (i.e. *liberty* would be compromised).⁷⁶ Hence, tort law supporters maintain that if freedom and equality are both too important, then wrongful and merely unfortunate losses should not be distinguished from one another on the basis of compensatory policies specified by outcome-oriented criteria.

The appeal of the fault criterion: However this still tells us little about why (on Coleman and Ripstein's account) conservatives may think that process-oriented criteria offer a good basis for specifying compensatory policies, and so let us now address this issue. On the account just presented, if the state attempts to protect people's interests by using the list-based model which no-fault systems use, then it will itself end up impinging on some of its citizens most crucially important interests — i.e. it will impinge on their interests in equality and liberty. But if the state can not protect people's interests directly — i.e. by listing the interests which are legitimate and hence worthy of protection, and leaving off those which are not legitimate and hence which ought not to be protected by the law's coercive machinery — without itself impinging on its citizens' interests in freedom and equality, then how else can it protect their interests? Put another way, how can the state protect only the legitimate interests, if it is not allowed to list those interests which are allegedly legitimate?

To see how it might still be possible to accomplish this task, it is crucial to first realize that in response to the suggestion that the state should protect people's interests there are at least two distinct questions that might be asked, and that only when the first of these questions is asked will it seem necessary to come up with such a list. Firstly, one might ask the question 'Which interests should the state protect?' This is apparently the sort of question which no-fault supporters ask, but as the previous section just argued, serious problems are encountered when this question is addressed directly. However, one could also instead ask the question 'From what should the state protect people's interests?', and this is apparently the sort of question which tort law supporters ask because they believe that these problems will not be encountered when *this* question is asked, but yet people's interests will still be protected by the law.

⁷⁶ If people chose this latter option then the interests which they pursued *would* be equally protected by the law. However now they would no longer be pursuing the interests which they would have preferred to pursue, which is why I suggest that their *liberty* would now be compromised.

Tort law supporters believe that *prima facie* everyone should be allowed to pursue whatever interests are valuable to them, and as long as their pursuit of those interests does not impinge on others' similar freedom, then they believe that their pursuit of those interests should be protected by the law. So, for instance, if what gives my life meaning is spending my time and resources on building orphanages, whereas what gives your life meaning is owning a Rolls Royce Silver Seraph, then as long as we do not impinge on each other's projects, both of us should respectively be left alone so that we can pursue our own individual conceptions of the good. However almost any pursuit in life requires some extent of cooperation with others, and so the significance of the above *prima facie* qualification is that we should all take into consideration how we might best go about pursuing our projects in such a way as to treat others with a level of respect which is equal to the level of respect that we ourselves would expect if we were rational.⁷⁷

Now, although there are definite limits to just how much care others can reasonably expect us to take when we pursue our own projects,⁷⁸ it seems reasonable that everyone should treat each other with at least a certain basic level of respect. Treating others as less equal than ourselves (without any relevant reasons or justification for doing so) clearly impinges on their rights as moral agents. For example, when people act *negligently* they do not treat others as equals – they take fewer precautions than what they themselves could have reasonably expected another person to take if they were the ones on the receiving end of being exposed to the risk of harm – and so they act in a manner that is morally objectionable. Similarly, when people act *recklessly* or *maliciously*, they also fail to treat others as equals.⁷⁹ In all of these cases what makes prospective injurers' actions objectionable is that they treat their prospective victims' welfare, projects or interests as less important than their own welfare, projects or interests, and so it is reasonable for victims to request the state to intervene so as to ensure that they are treated as equals.⁸⁰ Hence, tort law supporters believe that on those occasions when one person treats another without due care – for example, when

⁷⁷ I include the rationality constraint here to rule out cases of people who might not care about how others would treat them.

⁷⁸ ... because if too high a standard of care is imposed on everyone then nobody will ever be able to step out their front door without fear of imposing some very remote risks on others ...

⁷⁹ In cases of *recklessness*, prospective injurers treat others' welfare or interests as being less important than their own welfare or interests — they under-value others' welfare, projects or interests (i.e. they evaluate their victims' interests in terms of their own subjective judgments). And in cases where *malice* is involved, injurers show an outright contempt for others' welfare or interests even though they would be perfectly justified in objecting if somebody else showed that level of contempt towards them.

⁸⁰ For instance, John Stuart Mill runs a similar argument which claims that the state should protect our legitimate interests from being illegitimately interfered with by others (Mill 1989:205, 226-7).

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they are negligent, reckless or malicious – the state should be permitted to use the law’s coercive machinery to protect the latter’s interests from being impinged upon by the former.

Consider also the following two examples. If, for instance, I felt a great desire to torture you – just for fun, perhaps because I was bored and because I believed that this would relieve my boredom – then the state would surely be justified in stepping in and curtailing my freedom to pursue *this* project. But, importantly, the reason why the state would be justified in stepping in and curtailing my freedom is because if it did not step in then, then I would end up impinging on your freedom and equality. Since I would not be treating you as an equal, the state should be allowed to step in and protect your equal status. Similarly, if you wanted to swing your baseball bat around while standing in my glassware shop – simply because you liked the feeling of your muscles flexing and your arms moving about, and you just happened to be standing in my shop when the compulsion to do this overcame you and you simply did not feel like stepping outside before beginning your exercises – then the state would again be justified in stepping in and curtailing your freedom, because the exercise of your freedom would involve treating me and my projects, welfare and interests as less deserving of respect than your projects, welfare and interests. In both of these cases, the state would be justified in curtailing the injurer’s freedom for the sake of protecting the victims’ interests from being wrongfully infringed, precisely because the state is charged with protecting people from illegitimately interfering with one another — i.e. it is charged with protecting people from causing losses to one another *through certain processes*. Hence, when people act in a manner that can rightfully be considered as being faulty – i.e. when they are negligent, or when they are reckless, or when they act with malice – that is when the state should step in and protect the victims’ interests, because if it does not step in on *those* occasions then it will simply fail to ensure that freedom and equality are protected. If, however, the state only stepped in to protect those interests which *it* thought were sufficiently important then it would itself violate everyone’ s freedom and equality, and so it should refrain from doing the latter.

Thus, the error which no-fault supporters therefore seem to make on the above account is that when the state tries to protect people’s interests directly, by specifying those supposedly valuable items in which people’s interests should always be protected, then it *itself* will impinge on people’s interests in freedom and equality. On the other hand, the fault criterion apparently allows the state to protect the cardinal interests in freedom (to choose and to pursue their own conception of the good) and equality (in the eyes of the law) from infringements by other parties, without itself impinging on everyone’s freedom and equality in the process of providing this protection. The attraction of the fault criterion on this account

is therefore that the state can still protect people's interests indirectly⁸¹ – i.e. without directly having to specify those interests which are legitimate and hence worthy of protection – while at the same time not violating anyone's freedom and/or equality.⁸²

On the account just presented, the only way for state to effectively protect people's interests without itself impinging on everyone's freedom and equality, is for it to remain impartial with respect to the question of what is important or valuable and hence worthy of protection by the law — i.e. to protect people's interests in conceivably any items *from being injured by others' faulty actions*, rather than to protect interests *in a list of specific items*. Admittedly, this will still allow some valuable interests to be impinged upon every now and again without giving the victims any access to compensation — i.e. when others injure them through their *non-faulty* actions. However at this point conservatives would undoubtedly point out that this is not something which anyone can have a legitimate ground for complaint about, because that is simply the most that anyone can ever request from others and from the state — the most that we can really ever expect of others is that they treat us with the sort of respect that we ourselves would like them to give us if they were the ones engaging in some potentially risky pursuit, and if we were on the receiving end of these risks and being rational (i.e. not indifferent to our own welfare).⁸³ Furthermore, the most that we can really ever expect of the state, if we wish to retain the freedom to pursue our own conception of the good, is for it to protect us when others fail to show adequate respect towards us. But we should not expect the state to step in and protect our interests on other occasions because the state should not be asked to make the sorts of contestable value judgments about which items are important or valuable and which ones are not that would need to be made in order to trigger its intervention on these other occasions.

So, in summary, the conservatives' second reason for supposing that process-oriented criteria offer a better basis for underpinning compensatory decisions than outcome-oriented criteria – and hence the other reason for supposing that compensatory decisions of tort law systems are legitimate norms, and that compensatory decisions of no-fault systems are departures from legitimate norms and thus instances of under- and over-compensation – is

⁸¹ ... as long as those interests are not illegitimate in the sense that their pursuit would involve impinging on others' freedom and/or equality ...

⁸² ... other than the faulty party's freedom to act in a faulty manner, but that is simply not a freedom that they are entitled to exercise.

⁸³ Proponents of strict liability systems might alter their arguments accordingly since *causation* rather than *fault* is their preferred criterion of choice. But rather than explaining their position here, I will instead only gesture at it and direct the reader to Epstein's and Holmes' comments on this matter, cited in an endnote in §3.2.2..

because they believe that by specifying their compensatory policies through outcome-oriented criteria no-fault systems allegedly compromise the ideal of *state impartiality*, and they believe that this is something that would not occur if they instead used process-oriented criteria to specify their compensatory policies. On this account, while criteria such as *fault* are process-oriented because an assessment that someone was at fault does not on the surface seem to rely upon contestable claims about the value of the victims' losses, the sorts of criteria which no-fault systems use to specify their compensatory policies are outcome-oriented because to determine whether a victim's loss was wrongful we must consult our intuitions about how important or valuable the item which they lost happened to be. But since a pre-condition of state impartiality is that the state must take no stance on the question of which interests are valuable, or on the related question of how valuable those interests might be (either relative to one another or in absolute terms), and conservatives believe that only criteria such as *fault* avoid the need for the state to make such contentious evaluations of people's interests, they therefore insist that compensatory policies should only ever be specified through process-oriented criteria such as *fault*.

3.2.3. SUMMARY OF ALLEGATIONS DUE TO *STRATEGIC DIFFERENCES*

The *loss-shifting mechanism* plays a crucial role in tort law systems, because conservatives believe that to take due personal responsibility for our actions we must compensate our victims for their losses. However under no-fault systems victims would be compensated out of a no-fault fund (which is publicly funded), and often the injurer would not be required to do anything in particular despite the fact that they were responsible for the victim's losses. Consequently, this leads conservatives to worry that under no-fault systems the right people (i.e. injurers) would not be expected to take responsibility for their actions, and that the wrong people (i.e. all of the individuals who comprise society and who fund the operation of the no-fault system) would instead have to take this responsibility for them.

The *fault criterion* also plays a crucial role in tort law systems. Conservatives believe that losses are only wrongful (and thus compensable) when they came about in the right manner – i.e. that losses are only wrongful when they were a consequence of another party's (possibly faulty) actions – and that losses which came about as a consequence of nobody else's- or as a consequence of the victim's own (possibly faulty) actions are only merely unfortunate (and hence that victims do not necessarily have a right to be compensated for them). But since no-fault systems use outcome-oriented rather than process-oriented criteria to specify the policies which determine whether victims should be compensated or not, conservatives therefore worry that the compensatory decisions which no-fault systems make may be incorrect, and hence they complain that under no-fault systems victims may sometimes be under-compensated and that at other times they may be over-compensated.

This concludes my explanation of why the *strategic* differences between no-fault and tort law systems lead conservatives to level these two allegations at no-fault systems.

3.3. CRITIQUES RELATED TO *FEATURE-WISE* DIFFERENCES BETWEEN NO-FAULT AND TORT LAW SYSTEMS

The same worries which were just shown to stem out of the *strategic* differences between no-fault and tort law systems – i.e. the worry that no-fault systems would under- and over-compensate, and the worry that people would not take due personal responsibility for their actions under no-fault systems – also arise when these systems are compared to one another along the lines of their *eight features*.⁸⁴

3.3.1. SCOPE OF COVERAGE⁸⁵

The difference between tort law and no-fault systems' scope of coverage may trouble conservatives because it is not immediately obvious how no-fault supporters can justify giving differential treatment to two victims who suffer identical losses,⁸⁶ merely because (e.g.) one's loss was sustained in the context of a motor vehicle accident (which might be covered by a no-fault system) while the other's loss came about while they were off on vacation or relaxing at home (i.e. in a context which might not be covered by the no-fault system).⁸⁷ Conservatives might therefore object that if no-fault supporters' commitment to the claim that like cases should be treated alike is to be taken seriously – and this is after all a claim which they rely upon when they criticize tort law systems on account of the fact that victims who suffer materially identical losses do not necessarily receive identical treatment under tort law (see §2.2.1.) – then they should recognize that it would be equally problematic for them to advocate a no-fault accident compensation system which has a *limited* scope of applicability, since then victims who suffered identical losses would not necessarily get the same treatment either.⁸⁸ Admittedly, no-fault supporters may attempt to defend their

⁸⁴ Please note that several of the objections listed below – namely, the ones discussed in sub-sections 1, 4, 5 and 6 – have much wider implications for the accident law reform debate than what I allude to here. However, my present aim is only to *relate* the conservatives' allegations rather than to *develop* them. Never the less, I will return to fully address the issues which these points raise in §6.2..

⁸⁵ This objection has much wider implications which are discussed in §6.2.

⁸⁶ ... both of which were perhaps even inflicted through another party's faulty actions, though this need not necessarily be the case for the present criticism to be effective ...

⁸⁷ This is, for instance, Jane Stapleton's main criticism of those no-fault systems in which the scope of coverage is limited by the cause of the victim's loss (Stapleton 1986c, b).

⁸⁸ This criticism draws on a *comparative* conception of justice as equal treatment — that all like cases should be treated alike, and that different cases should equally be treated differently (Feinberg 1973).

preference for limited systems by arguing that since the sorts of accidents which those schemes would cover would usually involve injurer fault – this might for instance be thought to always be the case with motor vehicle accidents and with workplace injuries – that losses suffered in those contexts would therefore usually be wrongful and not just merely unfortunate, and hence that *this* would make it reasonable to limit the scope of these systems' coverage to just those contexts.⁸⁹ However conservatives could now respond by pointing out that this is not a defence which is available to no-fault system supporters because it attempts to ground victims' grounds of recovery in process-oriented considerations – in claims about whether the loss was a consequence of another's fault⁹⁰ – and this is something which no-fault systems are not supposed to do. The fact that limited no-fault systems tend to be the rule rather than the exception to the rule may therefore give conservatives a reason to complain that one of the main reasons which reformers cite in support of engaging in radical reform of accident law – i.e. that tort law systems do not treat victims who suffered identical losses in an identical fashion – is undermined by the fact that things are not really any different in this regard under limited no-fault systems.⁹¹

Bovbjerg and Sloan also point out that limited medical accident no-fault compensation schemes fall foul of practical problems. They point out that:

[w]orkplace and automobile no-fault [systems] normally cover injuries characterized by a sudden and clear change in health status[, and o]ne simplifying

⁸⁹ Stapleton suggests that this sort of reasoning underpinned the Pearson Report's limited accident law reform proposals (1986b:111).

⁹⁰ If the ground for offering no-fault compensation to one category of accident cases but not to another was that when losses occurred in the former context then they *would* usually be caused by another person (or by another person's fault, or perhaps that another person would be responsible for them) whereas in the other context they would not, then compensation would not really be offered on a no-fault basis since the way that the loss came about (i.e. process-oriented considerations) would after all be treated as relevant to the compensatory inquiry.

⁹¹ This is also a reason to doubt that Criminal Injuries Compensation Schemes are true no-fault systems. Although no-fault supporters might argue that society should take care of victims of criminal misconduct on a no-fault basis, such schemes can hardly be described as true no-fault schemes because victims are still expected to show that their losses were a result of *criminal* (i.e. faulty) conduct. This probably explains Cane's uneasiness about referring to such schemes as true no-fault schemes, and it is plausibly also why he seems to be generally inclined to argue that true no-fault schemes should not merely disregard considerations of fault, but that in the context of the compensatory inquiry they should more generally disregard all causal (i.e. process-oriented) considerations (Cane 1999f:399). This objection has much wider implications which are discussed in §6.2..

aspect of traumatic causation is that there is not usually any visible causative agent other than the automobile or workplace accident to confuse application of no-fault's eligibility determination. In contrast, medical patients, almost by definition, have an existing ailment — or they would not be seeking treatment. Thus it is difficult to distinguish medically-induced harm from the natural progression of the illness or injury which was under medical care.

(Bovbjerg and Sloan 1998-9)

Solutions to such messy problems of causation (aimed at resolving whether the victim's loss was suffered within a context that is catered for by the no-fault system and hence whether they might be entitled to claim no-fault compensation) inevitably take place in courtrooms, which ultimately means that some tertiary accident cost reduction savings (see §2.2.2.) are squandered on courtroom debates aimed at settling the question of whether the victim should have access to no-fault compensation or whether they are only entitled to attempt to sue their injurers under tort law.⁹² This further complication means that in addition to any theoretical barriers that should make limited systems unpalatable to no-fault supporters, there are also practical problems that would need to be tackled in limited no-fault accident law systems — problems that yet again undermine the original arguments which accident law reform advocates use to support their case in favour of replacing tort law based accident law systems with no-fault systems.

Hence, irrespective of how attractive limited no-fault schemes might seem to accident law reform advocates, conservatives could rightfully point out that limited no-fault systems are in fact inconsistent with the principles which no-fault systems are meant to uphold, and so

⁹² The legislation behind the New Zealand Accident Compensation Scheme has now undergone a number of iterative changes, precisely due to encountering practical problems of this sort — that is, problems related to insufficient clarity within the legislation which governs whether some type of accident should be classified as falling within the scope of that scheme or as falling outside the scope of its applicability. On the other hand, Klar has pointed out that '[i]t was surprising ... when the New Zealand Accident Compensation scheme was instituted, abolishing all causes of action in tort for personal injuries caused by 'accident', based upon a report which focused exclusively on the defects of 'negligence' law primarily within the context of motor vehicle accident litigation' (Klar 1989:302-3). Although Klar does not explicitly outline the sort of problems that generalising the conclusions derived from a study of one area of accidents might have when applied to another area of accidents, it seems likely that some problems would indeed be encountered. Jane Stapleton also points out that 'in a limited no-fault system comparable problems ... arise because it is still necessary to assess who is to ... contribute to the fund and what injuries are covered by that fund' (1986b:95), and that the need to resort to 'case by case assessment [to determine whether a particular case is covered by a given scheme] has been a major and costly problem under' such schemes' (1986b:107).

they could therefore allege that by proposing such systems accident law reform advocates undermine the very arguments which they originally used in support of engaging in radical reform of accident law.

3.3.2. VOLUNTARINESS

The reason why the difference between these systems' voluntariness may trouble conservatives is because they may feel that nobody should ever be allowed to opt out of a system which requires them to take personal responsibility for their actions — i.e. that nobody should be allowed to opt out of the tort law system. Since (as I argued above) conservatives believe that the strategies employed by tort law systems promote the taking of responsibility, they may therefore insist that people should not be permitted to opt out of taking responsibility for their actions just because they are prepared to let others get away without taking responsibility for their actions too.

3.3.3. SOURCES OF FUNDING AND ADMINISTRATION

The third difference may trouble conservatives because they may simply fail to see why everyone should have to contribute funds to a system which compensates accident victims, when everyone is not usually responsible for any given victim's losses! On this account, only those who were responsible for a victims' losses should be required to take responsibility for them (see §3.2.1.), and so conservatives may feel that it would be wrong to expect everyone to take responsibility for a given victim's losses (as no-fault systems arguably do when they raise the funds used to compensate victims through taxation and through other public means) while letting injurers off scot free and not imposing liability onto them.

Fourthly, conservatives may also be troubled by the fact that no-fault systems are administered bureaucratically rather than through the judiciary, because they may worry that the rule-following mentality of no-fault system administrators (as well as their relative lack of skill and discretionary powers) will blind them to considerations of justice (e.g. Stapleton 1986b:107). On this account, while courtrooms are administered by well educated, experienced and highly skilled judges, bureaucracies (by their very design)⁹³ tend to be populated by significantly less skilled administrators who may neither have a well-developed sense of justice, nor the skills required to discriminate when it is inappropriate to rigidly apply rules, nor even the authority to make such discretionary decisions. Consequently,

⁹³ Taylorist principles suggest that to achieve the greatest efficiency, a process should be broken down into a series of simple steps which could be performed even by an unskilled labourer (Taylor 1911).

conservatives may worry that justice would be forgone in no-fault systems because of those systems' administrators' mechanical and indiscriminate application of rules.⁹⁴

Furthermore – a point which relates to both of these differences – conservatives may also worry that due to being state-funded and state-administered, no responsibility would be taken by the general public for securing their own future welfare under no-fault systems. For instance, Atiyah has argued that if we want to rid ourselves of the current 'blame culture', where many people seem to think that it is somebody else's responsibility to provide for them in the event of an accident, then there will have to be a shift away from state-funded and state-administered compensation schemes (Atiyah 1997f:177-85). But given that no-fault systems are publicly funded and administered, conservatives may therefore worry that these systems promote the wrong sort of attitude within society — i.e. that instead of promoting an ethic of responsibility according to which everyone would be encouraged to plan ahead for possible future contingencies, they would instead promote an ethic of irresponsibility where people will blindly expect the state to plan for such contingencies.

3.3.4. EXCLUSIVITY⁹⁵

Fifthly, conservatives may also object to mixed and dual no-fault systems (half of the systems surveyed in Appendix A were either dual or mixed) because these systems are not really consistent with the original arguments cited in support of engaging in radical accident law reform. One of these arguments states that since *luck* (rather than anyone's choice) is what determines the actual extent of accidental losses (e.g. consider the Rolls Royce Silver Seraph case), nobody should therefore be expected to bear the actual extent of accidental losses. However, if nobody should have to bear the actual extent of accidental losses, then conservatives could now be perfectly justified in feeling puzzled about why some victims would still never the less be allowed to sue their injurers for top-up compensation in mixed no-fault systems, since this *would* after all involve imposing a portion of the luck-determined extent of accidental losses onto their accidental injurers. This is undoubtedly how things would appear to the injurers who would be forced to pay top-up compensation to their victims — they would be justified in complaining that if we originally accepted the luck-based argument in favour of engaging in radical accident law reform, then it would be inconsistent for us to now allow their victims to sue them for any overflow extent of losses that were not compensated for by the no-fault system.

Conservatives could also argue that such top-up tort rights would be unfair from the perspective of those victims who would not be able to obtain top-up compensation, because if

⁹⁴ Atiyah puts this same point in terms of the inflexibility of no-fault systems (Atiyah 1997f:177-85).

⁹⁵ This objection has much wider implications which are discussed in §6.2.

we accept the foregoing luck-based arguments then the precise extent of compensation that a victim is entitled to claim should not depend on whether they were ‘lucky’ enough to be injured by somebody who was at fault. If no-fault systems aim to overcome the moral problems caused by luck (or lack thereof), then conservatives are justified in pointing out that it would be inconsistent to implement a no-fault scheme which gave *some* victims top-up tort rights to ensure that they received full compensation, while others have to put up with the no-fault system’s paltry compensatory entitlements. Conservatives might also conjecture that the popularity of dual and mixed no-fault schemes suggests that tort law’s conception of what constitutes full compensation is also secretly shared by no-fault supporters, and that this is also a tacit admission that pure no-fault systems would indeed result in under-compensation.

Furthermore, since another one of the main arguments in favour of replacing tort law based accident law systems with no-fault systems is that no-fault systems are supposed to be administratively thrifty, conservatives may therefore again be justified in wondering why no-fault supporters think that efficiency would be improved by switching across from the current accident law system which only offers one source of compensation, to a mixed or a dual system in which two systems (rather than just one) have to be operated side-by-side with one another. The fact that so many no-fault systems are mixed and dual may therefore be taken by them to entail one thing, and to suggest another: it may be taken to *entail* that the economic arguments which are so often used by no-fault supporters when they argue the case in favour of engaging in radical reform of accident law are rendered useless, since those cost savings would not after all be made in dual or mixed systems; and it may be taken to *suggest* that perhaps no-fault supporters may themselves be distressed by the fact that people would not receive full compensation under no-fault systems which is why so many of them endorse mixed and dual no-fault systems.

3.3.5. HOW MUCH COMPENSATION?⁹⁶

Sixthly, conservatives may also be puzzled by the question of whether the thing which so many no-fault systems offer can really even be referred to in good faith as ‘compensation’, when the amount of money which victims would be entitled to receive under redistributive no-fault systems would often bear little relation to the value of what they lost. For instance, conservatives might argue that if private property rights mean anything at all, then in the least such rights should surely give owners a claim to be *fully* compensated when they are infringed.⁹⁷ After all (they might point out), if someone sustains a loss of such-and-such an

⁹⁶ This objection has much wider implications which are discussed in §6.2.

⁹⁷ For example, the accounts of compensatory rights given by Thomson and Feinberg in the previously discussed torts of necessity cases were both put in terms of property right infringements; on their

extent, and if that loss was deemed wrongful for the purpose of a compensatory inquiry (see discussion in §3.2.2.), then it would surely be disingenuous to now suggest that the victim had been *fully* compensated unless the compensation received by them actually covered the *full* extent of what they had lost.

Another reason to doubt that what no-fault systems offer can in good faith be referred to as ‘compensation’ is revealed when we consider the question of just how much compensation should be offered by a redistributive no-fault system to the driver of the other car in the Rolls Royce Silver Seraph example — i.e. to the driver of the cheap ‘rust bucket’ which ploughed into the back of the Rolls Royce Silver Seraph. For instance, should they be offered only sufficient compensation to cover the cost of their (possibly un-roadworthy) rust-bucket? This is certainly not a conclusion which redistributive no-fault system proponents should endorse since on their own account compensation should not be backwards-looking — i.e. it should not treat people’s original holdings as if they provided some legitimate norm that ought now, after the accident, to be re-instated. What they should probably endorse is to offer them whatever amount of compensation would be offered to someone who drove an average-priced motor vehicle and who suffered similar sort of damage.⁹⁸ However if only *this* amount of compensation was offered in a redistributive no-fault system, then would it really be appropriate to say that such a system offered compensation *per se*?

Since the extent of compensation offered to victims under no-fault systems would often bear little relation to the extent of losses which the victims suffered, conservatives could therefore worry that in offering only redistributive compensation, no-fault systems would not in fact really offer compensation at all, but rather that they would be a covert, clandestine and opportunist effort at wealth re-distribution — i.e. some sort of a social welfare scheme.

accounts, compensatory duties (and hence compensatory rights) arise out of an injurer’s breach of the victim’s property rights (Thomson 1980:14; Feinberg 1978:102). More recently, Richard Wright has also argued that infringements of primary rights (i.e. rights *to not be injured*) create compensatory duties which ground secondary rights (i.e. rights *to be compensated for the infringement*) (Wright 1992:677-8). The same sort of criticism is derived by Coleman and Ripstein (1995) and by Foley (1973:§5) from libertarian premises. On their accounts, libertarians would probably argue that since everybody owns themselves, and by extension they also own their labour and the fruit of their labour, that liability should therefore be imposed onto people for the unwelcome consequences that their actions might have for others, to ensure that no boundary-crossing or breach of rights remains unrectified. Hence, on their account, by compensating people for the full extent of their losses we ensure that no boundary crossing remains unrectified.

⁹⁸ In an earlier endnote I suggest a similar point but in relation to how much compensation the Rolls Royce Silver Seraph driver could expect to receive for their losses under a no-fault system.

3.3.6. WHAT IS COMPENSABLE?⁹⁹

Seventhly, conservatives may also object that the state has no right to proclaim that losses such as pain and suffering will not be treated as compensable (or perhaps that the extra extent of losses suffered by the owner of the Rolls Royce Silver Seraph will not be treated as compensable), because as I have already argued above (see §3.2.2.(ii).), they may point out that doing this allows the state to lord its own conception of the good over everyone and hence to either impinge on everyone's freedom or to trample all over the ideal of equality. Although the discussion in Chapter 2 claimed that it is unfair to expect injurers to compensate their victim for the full extent of their losses, on this account it is equally (if not more) misplaced to point the accusative finger at victims and to deny them access to full compensation, when their losses would never even have occurred had it not been for the injurers' careless conduct which unfairly impinged upon them. Consequently, conservatives could therefore insist that if the state really wants to take it upon itself to protect people's interests by paying compensation on a no-fault basis, then it should offer corrective compensation, as well as substitute and solace compensation, and not just redistributive equivalent compensation.

However, quite apart from the fact that the total cost of a system which offered corrective equivalent as well as substitute and solace compensation to every accident victim would most likely be astronomical, what would make this system even worse (from the reformers' own perspective) is that in effect the average person would now end up insuring the interests of the wealthy. Under tort law based accident law systems, if you suffer a loss as a result of another's fault, then you are entitled to full compensation at the other's expense. However if the loss is suffered as a result of chance (e.g. due to a cyclone) and nobody is at fault, then you will not be compensated. This means that inegalitarian holdings are never totally safe under tort law systems because there is always the possibility that holdings may be equalized by (e.g.) the forces of nature. On the other hand, under a corrective uncapped no-fault regime, society would pay to protect the interests of the wealthy and the privileged, despite the fact that their holdings are already larger than the average person's holdings — i.e. society would insure them against the accidental loss of their privileges! Hence, since this kind of no-fault system would protect inegalitarian distributions of resources, it is hardly the sort of system which no-fault supporters should rush to endorse.¹⁰⁰

⁹⁹ This objection has much wider implications which are discussed in §6.2.

¹⁰⁰ (e.g. see Stapleton 1986c) Cane also discusses this issue but in the context of examining the tort system's 'earnings-related principle' which dictates that compensation for lost earnings ought to be related to one's prior earnings — in other words that it ought to be corrective compensation. The

In reality though, many of the schemes that were outlined earlier would only provide redistributive equivalent compensation, and in a number of these schemes minimum claim thresholds would be imposed below which victims could not recover anything, and caps would often reduce the total amount of compensation that could be recovered as well, and conservatives could object to these systems because on their account what these systems would offer can not in good faith even be referred to as compensation.

3.3.7. CALCULATION AND PAYMENT OF COMPENSATION

Finally, the differences between tort law and no-fault systems as regards the calculation and payment of compensation, could also lead conservatives to complain for the following two reasons. Firstly, they may allege that if I suffered a particular amount of losses as a result of an accident, then that should forever remain the amount that I am entitled to receive by way of compensation. They could support this allegation by insisting that the fact that my circumstances may change in the future – that I may miraculously recover from the accident, or that my condition may unfortunately turn for the worse and that I may become a lot more needy – is neither here nor there as far as compensation is concerned, because it does not change the facts about the losses for which my injurer should take responsibility (and hence, the losses for which I am entitled to compensation). Hence, they may insist that the amount of compensation to which I am entitled should be calculated just once rather than being periodically recalculated as usually happens under no-fault systems. Secondly, they may also allege that victims gain independence from being paid compensation in a lump sum because they are forced to learn to use their money wisely. On the other hand, under no-fault systems victims are instead encouraged to become dependent on the state because they realize that if they spend all of their money today, then tomorrow they will again receive more when their situation is re-assessed (e.g. Stapleton 1986b:107).

problem of providing earnings-related compensation however seems a lot worse under no-fault than under TL since there the state really could underwrite the wealthy minority's welfare, whereas it could be argued that although plaintiffs do theoretically have rights to full compensation under the tort system, at least some of the time those rights will not be exercised because the defendants don't always have the means to fulfil their duty to fully compensate their victims, and so in fact it is not necessarily true that the wealthy are always favoured under tort law systems. Stapleton also discusses this problem (1986c:155-7). Even Mark Robinson, a strong proponent of no-fault systems, acknowledges this point when he insists that it would be unjust for no-fault systems to offer corrective compensation for lost income. Please refer to §J of the Appendix for specific citations.

3.3.8. SUMMARY OF ALLEGATIONS DUE TO *FEATURE-WISE DIFFERENCES*

Although this section encountered a few novel objections to no-fault systems,¹⁰¹ most of the feature-wise differences between no-fault and tort law systems related yet again to the same two allegations which were already encountered in the previous section in the context of discussing the objections that surface out of the strategic differences between no-fault and tort law systems — namely, that people may fail to take due personal responsibility for their actions, and that people may be under- and over-compensated under no-fault systems.

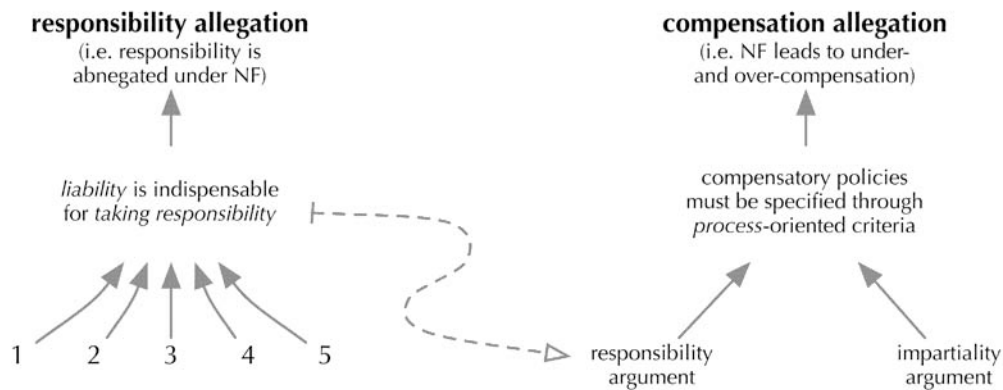
3.4. CHAPTER SUMMARY

It seems plausible that everyone should take responsibility for their actions, and that nobody should ever be forced to take responsibility for others' actions. Likewise, it also seems plausible that to be properly compensated, the amount of compensation that someone receives should be equivalent to the value of what they lost. However, conservatives allege that those who should take responsibility for their actions (i.e. faulty injurers and victims who were responsible for their own losses) would not have to do so under no-fault systems, and they point out that instead others (i.e. all of society) would be forced to take this responsibility for them despite the fact that they were not responsible for the victims' losses. Furthermore, they also allege that people would not receive the correct amount of compensation under no-fault systems, and that instead they would sometimes get too much, while at other times they would get too little. For these two reasons conservatives insist that radical accident law reform proposals should be rejected.

This completes my exposition of the conservatives' reasons for objecting to radical accident law reform proposals – i.e. my summary of their two allegations – and the time has now come to assess those reasons. But before this assessment can proceed, we should first briefly pause and note that although the conservatives' two allegations seem as if they were completely *separate*, they are in fact intimately *related* – the claim which underpins the

¹⁰¹ Namely: (i) that two of the main arguments in favour of radical accident law reform are undermined by the fact that victims who suffer identical losses would not necessarily get identical treatment under no-fault systems either since the scope of no-fault systems is usually limited and not comprehensive; (ii) that due to the fact that bureaucrats would administer these systems mechanically, no-fault systems would not be as sensitive to considerations of justice; (iii) that yet another one of the main arguments in favour of radical accident law reform is undermined by the fact that a sizeable portion of no-fault systems are not pure but mixed or dual; and (iv) that victims gain independence (and a sense of independence) by being assessed for compensation on just one occasion and by having this compensation paid to them in a single lump sum, rather than having their eligibility for it constantly re-assessed and by being paid an annuity.

responsibility allegation also bears a close relationship to one of the two arguments which supports the claim that underpins the *compensation* allegation – and this relationship affects the order in which these two allegations will be addressed in the subsequent two chapters:



The first argument in favour of the conservatives’ claim that only process-oriented criteria should be used to specify compensatory policies – i.e. what in §3.2.2.(i). I called the ‘responsibility argument’ – only functions as intended if we accept the conservatives’ claim that to properly take responsibility for our actions we must compensate our victims for their losses. After all, if this claim is rejected – i.e. if we instead suppose that liability is not indispensable for taking responsibility – then the conservatives’ claim that the *only* way to ensure that victims’ compensatory rights are properly founded (i.e. that they are not like cheques that bounce on presentation because of insufficient funds in the drawer’s bank account) is by specifying compensatory policies through the fault criterion (and imposing liability into injurers for their victims’ compensation) will no longer be plausible. Thus, in order to assess *both* arguments which underpin the compensation allegation, we should first tackle the responsibility allegation to settle the question of whether one thing which causally responsible parties would have to do to take due responsibility for their actions is indeed that they would have to bear tort liability for their victims’ losses.

Accordingly, in what follows Chapter 4 will first assess the responsibility allegation, and only once this is done will Chapter 5 then assess the arguments which are offered in support of the claim that underpins the compensation allegation.

4. RESPONSIBILITY

This chapter's purpose is to rebut the first of the two allegations which conservatives level at no-fault systems — i.e. to rebut the responsibility allegation. This allegation is supported by the claim that the loss shifting mechanism plays an indispensable role in ensuring that everyone takes due responsibility for their actions, and that claim is in turn supported by the five arguments which were cited in §3.2.1.. Thus, to rebut the responsibility allegation, this chapter will aim to rebut those five arguments.

However, in debates about responsibility people frequently, rapidly and fluidly switch between different senses of the term 'responsibility', often without signalling or even acknowledging that these switches take place, and the distinctions and relationships between these responsibility concepts are also seldom made explicit despite their important roles within their arguments. This imprecision creates ambiguity, and in turn the ambiguity makes it difficult to discern the precise source of particular disputes about responsibility.

Hence, to overcome this ambiguity, §4.1. will distinguish several responsibility concepts from one another, and it will explore how those concepts relate to each other. Having disambiguated this concept, and thus having identified several potential sources of disputes about responsibility, §4.2. will then argue that the five cited arguments – arguments which relate to one particular source of such disputes – all fail to sustain the claim about liability's indispensability, and hence that they fail to support the responsibility allegation.

4.1. THE CONCEPT OF RESPONSIBILITY

Responsibility is important to both conservatives and reformers. For instance, a commitment to the ideal of 'taking responsibility' is explicit in much of the *conservatives'* justification for their own-, and in their critique of the reformers', preferred accident law systems (see §3.2.1.), and though admittedly more implicit, the *reformers'* commitment to this ideal is no less intense or genuine — after all, they also think it unjust to *hold* people responsible for things that they (on their account) *were* not responsible, and to allow others to *get away* without taking due responsibility for whatever they *were* responsible (see §2.2.). Hence, at least on the surface, the protagonists both agree that people should take responsibility for the things that they are responsible, but they also both believe that due responsibility would not be taken by the right people under their opposition's preferred accident law system.

However, although on the surface both sides seem to agree that responsibility is important, just beneath this surface is an alarming amount of disagreement. Firstly, there is often clear disagreement about *who*, if anyone, was responsible — for instance, while conservatives attribute responsibility to those whom they call ‘injurers’, reformers claim that (for reasons cited in the moral luck debate) often nobody was responsible. Secondly, there is often clear disagreement about *for what* the relevant parties were responsible — for instance, while conservatives claim that injurers are responsible for the actual losses which their victims suffered, reformers tend to play down the significance of losses and instead they draw attention to the negligent action itself and claim that what the injurer was responsible for was for having acted negligently (or recklessly, or maliciously, or whatever else). Finally, there is often also clear disagreement about *how* the relevant parties should now take responsibility — for instance, while conservatives insist that to properly take responsibility for their actions injurers should compensate their victims, reformers often query whether a more appropriate way for them to take that responsibility might not perhaps be by apologising for what they did, by re-educating themselves so that they do not repeat their mistakes in the future, by paying a fine, or maybe even by being submitted to a fitting degree of punishment (if such is indeed appropriate). So despite the initial surface appearance of agreement, there is actually a significant amount of disagreement in this part of the debate.

This disagreement is a cause for concern because it creates ambiguity about the true source of both sides’ objections to each other’s preferred accident law system – i.e. whether the reason why they object is because they disagree with each other’s claims about *who* was responsible, or because they disagree about *for what* those parties were responsible, or because they disagree about *how* responsibility should now be taken – and the presence of such ambiguity makes it difficult to discern whether the right thing to say in response to the accusation that people would not take due responsibility under one’s preferred accident law system is to address the objectors’ concerns about *who* was responsible, *for what* they were responsible, or about *how* they should now take responsibility.

As I will shortly explain, in making their often contrary claims about responsibility, both sides often make use of several *different* responsibility concepts, but yet superficially it sounds as if they only used *one* such concept — i.e. some *generic* notion of responsibility. This makes their claims full of imprecision, and consequently those claims are pregnant with the potential to generate misunderstanding. Hence, before proceeding, we should first disambiguate the concept of responsibility, and identify any issues around which disagreement might be prone to develop, so that future efforts may focus on debating *those* issues, rather than getting mired in the ambiguity which is born of the imprecision that has beset this part of the debate.

4.1.1. DISAMBIGUATING RESPONSIBILITY

Christopher Kutz begins his recent discussion of responsibility by quoting an adapted version of Hart's parable about the drunken captain (Hart 1968b), which lucidly demonstrates the complexity of this cluster concept. Hence, I too will begin my own discussion by quoting a further-adapted version of this parable (as well as Kutz's commentary on it), to see if Hart's taxonomy of responsibility concepts can help us disambiguate the concept of responsibility.

(1) As captain of the ship, Smith was responsible for the safety of his passengers and crew. (2) But he drank himself into a stupor on his last voyage and was responsible for the loss of the ship and many of its passengers. (3) The doctors initially suspected that his drinking was the product of a paralytic depression, but later concluded that he had, in fact, been fully responsible at the time he became drunk. (4) Although at trial Smith was sentenced to ten years imprisonment, (5) he remorsefully maintained that no legal penalty could alleviate his guilt. (6) The cruise line however was not liable for the loss of life and property since Smith fraudulently concealed his earlier alcohol-related employment problems, and their alcohol screens turned up no evidence of his drinking.

(adapted from Kutz 2004:549; adapted from Hart 1968a:211)

Kutz identifies four¹ ways in which the term 'responsibility' is used in the above parable, one of which has three distinct scenarios of application.

First is a claim of *role* responsibility: Smith, in virtue of his position as captain, had specific obligations to safeguard his ship and his passengers. A claim of role responsibility states the expectations of an agent's conduct towards some charge. Second is a claim of *causal* responsibility: [initially, the captain cited exceptional winter storms as the cause of the accident, but eventually] the captain's insobriety is cited as the cause of the vessel's loss. Causal responsibility might be better thought of as a species of explanatory responsibility, causation being typically the best explanation of an event. Third is a claim of *capacity* responsibility: the captain's decision to drink was not the product of a pathology [which would have diminished or annulled his capacity as an agent], or some other non-deliberative causal process, but rather reflected his exercise of a power of rational self-determination. Being responsible, in this sense, simply is a matter of having the competency of self-government. Four, five [and] six relate to claims of different

¹ Kutz and Hart actually distinguish *five* different senses of responsibility – the fifth being *collective* responsibility – but here I will only discuss these four concepts.

kinds of individual *liability* responsibility[—]respectively accountability to the demands of the criminal law, ... morality ... and ... tort law.

(Kutz 2004:549, original emphasis)

These four senses of responsibility – *role*, *causal*, *capacity* and *liability* responsibility (the last, especially as it appears in *tort law* and in *morality*) – seem relevant to the present discussion, however Peter Cane cautions against using Hart’s responsibility concepts to inject clarity and precision into this part of the debate for two reasons (Cane 2002a:29-30). Firstly, although the *elements* of Hart’s taxonomy are indeed relevant to the present discussion, Cane points out that this taxonomy was originally developed to address issues within the criminal law, and this should provide at least *some* reason to exercise caution before re-deploying these concepts ‘as is’ to address questions that arise in the context of accident law. Secondly, Cane also point out that Hart did not adequately explain how these concepts are meant to *relate* to one another, but yet these relations must surely be understood if we wish to properly assess claims about responsibility.

I. BEING RESPONSIBLE — ‘WHO DUNNIT’, AND PRECISELY WHAT DID THEY DO?

Given the structure of the conservatives’ allegation – i.e. their claim that those who *were* responsible would not *take* responsibility under no-fault systems, and that those who *were not* responsible would still never the less have this responsibility *thrust* upon them – and the fact that reformers also see this as an important issue, conservatives and reformers would both probably endorse the claim that at least some of the time² we can reach conclusions about *how people should be treated* on account of facts about *what they have done*. Put another way, both of them seem committed to the belief that at least sometimes conclusions about Hart’s *liability responsibility* can be derived from (they depend in some justificatory way upon) conceptually prior premises about those parties’ *causal responsibility* — i.e. that causal responsibility is at least sometimes a legitimate pre-condition for the justifiable imposition of liability responsibility. This justificatory relationship can be expressed as follows:

² The qualification ‘at least some of the time’ is important since I do not claim that the *only* reason why we are ever expected to do certain things is because of our prior causal responsibility. For instance, few people would deny that we have a responsibility to stop and render assistance, if, while driving along a stretch of road covered with black ice, we happened upon someone whose car was overturned by the side of the road, *despite the fact that we were not causally responsible* for this state of affairs. Hence, my claim is only that sometimes conservatives and reformers will both agree that causal responsibility is a necessary condition for the justifiability of imposing liability responsibility. Hart speaks of this relationship when he says that when ‘it is said of a living person ... that he is responsible for [a disaster], this is not ... merely an example of causal responsibility, but of what I term liability-responsibility; it asserts his liability ... *because he caused*’ it (Hart 1968a:214, original emphasis).



Causal responsibility is located above liability responsibility to signify that conclusions about how people ought to be treated (about their liability responsibility) can presumably at least sometimes be justified by premises about what those people have done (by their causal responsibility) — i.e. liability responsibility is imposed *on account of* their causal responsibility. But given that conservatives and reformers often disagree about *who* if anyone was causally responsible for something, or about precisely *what* it is that they are meant to have been responsible for – issues which both pertain to causal responsibility – it seems relevant to ask what the conditions of causal responsibility might be, since perhaps by examining these conditions we might discover why they disagree about responsibility.

Actions, outcomes and the problem of indeterminacy: In what follows, I will gradually develop a four conditional account of causal responsibility – i.e. an account which lists four conditions that must be satisfied before an attribution of causal responsibility to someone for something will be justified – and this account will eventually help us identify a number of different reasons why conservatives and reformers often reach different conclusions about causal responsibility.³ Initially though, a first rough attempt at constructing an intuitively plausible conditional account of causal responsibility might look like this (assuming that ‘*P*’ refers to a person, that ‘*A*’ refers to their action, and that ‘*O*’ refers to an outcome):

P is causally responsible for *O* iff:

1. *P* did *A*, and
2. *A* caused *O*.

The virtues of this account are its simplicity, and the fact that it seems to faithfully capture the intuition that the outcomes for which people are causally responsible must surely be those which came about as a consequence of their exercise of agency. However despite its simplicity and intuitive appeal, unfortunately this bi-conditional account is inadequate because it runs up hard against the well-known problem of *indeterminacy*.⁴

³ My conditional account of causal responsibility draws liberally on Joel Feinberg’s ‘conditional analysis’ of ‘at fault’ statements (summary in Feinberg 1970:207).

⁴ For instance, see Hart and Honoré (1959:67-8) or Feinberg (1970:201-7), as well as §5.1.2..

Claims about causation can strike insurmountable difficulties because an agent's actions are usually only one of a number of distinct causal contributors to the chain of events that eventually culminated in the said outcome. Almost any outcome is brought about by multiple events working in harmony with one another – a fire needs oxygen to be present, just as much as it needs a match or an arsonist; and a car pile-up needs the victim's car to be there on the road, just as much as it needs the car and the driver that failed to stop in time – and so we need non-arbitrary reasons to single out just one of those events as deserving the special status of being called '*the cause*', and to raise it above the status of all the other events which it is otherwise only legitimate to describe as 'conditions'. A causal contribution may indeed often have been made by those whom conservatives wish to pick out as *the* injurers, but there must surely be more reason to treat *their* contribution as being significant when so many other factors (including the victim's own choice to walk out their front door on that day) also contributed to bringing about the accident. What faces us in any accident scenario is a plurality of events, all of which can at first blush only be classified as mere conditions – all of which are initially 'on par' with one another as regards which of them was *the cause* of the accident – and so until further reasons are offered to break this stalemate, it would be arbitrary to choose any one of them and to refer to *it* as the cause without some further justification. Hence, one reason why the above bi-conditional account of causal responsibility is inadequate is because as it stands indeterminacy prevents us from being able to non-arbitrarily pick out any specific party's causal contribution as being *the cause* of that accident.

Purely procedural methods can not overcome indeterminacy: Two purely procedural methods which have typically been used to help isolate the allegedly significant causal conditions, are the so-called 'but-for' and 'NESS' tests. However, as various authors have pointed out, strictly speaking both of these tests fail to overcome the problem of indeterminacy.

For instance, when the 'but-for' test is used, a causal connection will be established between defendant's conduct and plaintiff's loss if the loss would not have occurred *but for* the defendant's conduct (Stuhmcke 2001:48; Perry 2001:67). By contrast, when the 'NESS' test is used, a causal connection will be established when defendant's conduct was a Necessary Element of some sub-Set of the actual set of conditions which was jointly Sufficient to produce the loss (e.g. see Cane 2002c:120-1; Wright 1985; Hart and Honoré 1985:112-4). Both of these tests derive their intuitive appeal from the plausible idea that in order for some event to be a cause of another event, the former must in some sense have been necessary for the production of the latter. However, where they differ is in the precise sense of necessity which is appealed to — while the *but for* test is a simple test for *necessity*, the *NESS* test tries to capture an idea of *necessity* which is qualified by- or placed within the

context of the idea of *sufficiency*.⁵ The justification behind testing for *sufficiency* as well as *necessity* is that in certain types of cases⁶ the *but-for* test will generate intuitively implausible results.⁷ However, despite the *NESS* test's superiority over the *but for* test, in the end both tests fail to adequately deal with the problem of indeterminacy because both lack the resources to distinguish victims from injurers (e.g. see Cane 2002c:133). After all, had the victim stayed at home on the day when their accident occurred, then they would undoubtedly have avoided that accident, and hence their venturing out the front door that day must also (alongside the injurer's actions) be picked out as a necessary condition of that accident.

The problem of omissions: The second reason why this bi-conditional account of causal responsibility is inadequate is because it is too simple to uniformly explain how *P* can be causally responsible for *O*, when *O* was brought about by their 'omission' rather than by their so-called 'positive act'. While positive acts are those things which *were* actually done, omissions are by definition things that *were not* done — they are actions that were never as a matter of fact performed. For instance, when I watch the midday show on television rather than taking care of my nephew who consequently drowns in the swimming pool, citing my failure to properly look after him as the reason for the tragedy involves a tacit recognition of the fact that 'me looking after my nephew' is not something that was ever done. However, it seems plausible that only actual events, and not non-events, can have causal powers, because for something to have causal powers it must surely at the very least first exist. But given that omissions are things which were never done – given that they are essentially *non-events* which for metaphysical reasons⁸ can have no causal powers – it is difficult to see how *they* could possibly ever have caused anything else to come about either.

⁵ Wright argues that 'a particular condition was a cause of (condition contributing to) a specific consequence if and only if it was a necessary element of a set of antecedent actual conditions that was sufficient for the occurrence of the consequence' (1985:1793). Application of the *NESS* test is a two stage process: first, we find any minimal sub-set of conditions (present within the actual scenario and which includes the element in question) that would have been jointly *sufficient* (as a set) to produce the said outcome; second, if we find that the element in question is *necessary* for the set's sufficiency in producing the said outcome, then that element is indeed a cause of that outcome.

⁶ ... namely, in *over-determined causation* cases (e.g. see Hart and Honoré 1985:122-8; or pollution cases discussed by Wright 1985:1792-3; or the case *Summers v Tice* discussed by McCarthy 1996) ...

⁷ ... namely, *nobody's* actions will be picked out as a cause of the outcome, and if these procedural methods are meant to *capture* our intuitive judgments then *departures* from those judgments should be treated as failures (rather than, for instance, as evidence that our intuitions are mistaken).

⁸ For recent discussion see either Philip Dowe (2001) or Judith Jarvis Thomson (2003).

Naturally, in omitting to do one thing, there *is* still something else (some positive act) that we did actually perform. For instance, when I fail to take care of my nephew, my positive act is the ‘television watching’ that I did, and so a proponent of the bi-conditional account might attempt to defend this account by replying that as long as we can establish a causal connection between the things that *were* actually done (in this instance the ‘television watching’) and the said outcome, then this account could after all provide a foundation for ascriptions of causal responsibility in omissions cases, since no non-existent event would need to be cited to provide a causal account of the outcome’s occurrence.

However, in response to this attempt to defend the bi-conditional account, it should be noted that although it might indeed be true that no non-existent entities would need to be cited to account for what happened, unfortunately we would no longer be providing a truly causal account of the outcome’s occurrence, because often there will be no discernible positive causal connection between a person’s positive act and the outcome that eventuated in an omissions case. Returning again to our example, although it does indeed seem reasonable to say that my nephew drowned because I failed to watch over him – that my omission was the reason for his drowning – what seems to be offered here is not a causal account as such but only the statement of a *reason*. What is offered here is not a genuine causal account, but only a counterfactual statement something to the effect that if I had done what I was meant to do then the tragedy would not have occurred, but the counterfactual sense of ‘caused’ which would now be used to make sense of causal claims in omission cases seems a lot more *value-added* than the rather *mechanistic* sense of causation that would be used to make sense of causal statements in positive acts cases (e.g. see Dowe 2001). Counterfactual interpretations of causal statements seem to be more statements of reasons than they are genuinely causal accounts, since it seems at least as appropriate (if not more so) to say something like ‘I sat there watching television *while/and* my nephew drowned’ as it does to say ‘I sat there watching television *which caused* my nephew to drown’. After all, my nephew would have drowned irrespective of whether I watched television, took a midday nap after lunch, or died of food poisoning. My nephew’s drowning and my television watching happen, as it were, on parallel tracks of causation, because as long as I did not intervene in the causal track that witnessed his drowning – as long as what I did remained an instance of me *not intervening* in that causal track – then the tragedy would still have occurred.⁹

⁹ A proponent of the bi-conditional account might retort that if the positive act in question was taken to be *my prior agreement* to look after my nephew rather than the ‘television watching’, then that would resolve our problem since *that* event was surely on the same causal track as my nephew’s drowning. However, although this positive event is indeed on the same causal track as my nephew’s drowning, unfortunately our explanation of what happened would now be impoverished because we would no

Furthermore, although it is common to interpret causal statements in this counterfactual manner to avoid the objection that omissions can't be causes,¹⁰ I am uneasy about doing this for reasons indicated above — i.e. because the sense of 'causation' which we would use to account for what happened in omissions would be rather different from the sense of 'causation' employed in explaining what happened in positive acts. I worry that we would no longer have just one but two accounts of causal responsibility — one to cater for causal responsibility in positive acts cases where the mechanistic sense of 'caused' would be employed, and another to cater for causal responsibility in omissions cases where 'caused' would be interpreted in this value-added sense. Hence, unless we are prepared to equivocate on the precise meaning of the word 'caused' and/or to offer two separate accounts of causal responsibility, then we should not be satisfied with the above bi-conditional account of causal responsibility.¹¹

Moral criteria and terminology: However, I should not be misinterpreted here as arguing that no one is ever causally responsible for an outcome which is brought about by their omission rather than by their positive act, since that is not at all my point. Rather, my point is simply that if attributions of causal responsibility for outcomes in omission cases are to be properly founded, then we will need a more sophisticated conditional account — and indeed such an account duly emerges when we consider some standard replies to these two critiques (i.e. replies to the problems posed by indeterminacy and omissions).

Firstly, in response to the challenge posed by indeterminacy, it could be argued that although most accidents do indeed require the satisfaction of a plurality of conditions, what makes an injurer's actions conspicuous in this crowd of conditions is that their actions were faulty — they were contrary to some accepted standard which expresses our reasonable expectations of people — whereas other people's actions (and any further conditions) were not. For instance, although it might indeed be true that the Rolls Royce Silver Seraph would not have been damaged if its owner had instead caught the tram to work that day and left their Rolls parked in the garage, the Rolls driver was never the less entitled to drive his car rather than being obliged to ride the tram in to work that day — there is no reason to suppose that he should have done anything other than what he actually did¹² — and so there is no special reason to view *their* actions as the cause of the accident. On the other hand, the other driver

longer cite an event which occurred in the time frame of interest to us but instead we would now cite some prior event — i.e. this new claim would depart from our original claim in that my 'television watching' would no longer be cited as the cause of the accident.

¹⁰ Please refer to Dowe's discussion for references to the relevant literature (Dowe 2001).

¹¹ David Miller (2001:456) also claims that omissions are problematic for these sorts of reasons.

¹² Please see §4.1.2.(i-ii). for discussion of how one might argue for a contrary position.

was not entitled to let their mind wander and to lose concentration while driving, precisely because this can have catastrophic consequences. But given that one of them did something morally unremarkable whereas the other did something that they ought not to have done, it seems that what permits us to single out the latter's actions as *the* cause of the accident and hence to overcome the indeterminacy stalemate is precisely that the other driver acted contrary to reasonable expectations – or as Hart might have put it, that the other driver acted contrary to their *role responsibility* – whereas the Rolls driver did not.¹³

Secondly, although it may indeed be true that only things which exist – that is, that only things which *were* actually done – have causal powers, and hence that an omission could never literally have caused anything else, and although it might even be conceded that at least sometimes an injurer's positive act may indeed seem to be on a parallel causal track to the one which witnessed the victim's loss, saying this largely misses the point of what is being gotten at in 'causation by omission' statements, because even if omissions can not literally be causes, they can still never the less be *conditions* of the said outcomes (Cane 2002c:132). Put straight forwardly, had the injurer acted as they ought to have acted – had they not departed from their role responsibilities – then this crucial condition would not have been satisfied, and so the outcome could have been avoided. Thus, irrespective of whether we can talk about the injurer's omission as literally being a *cause* of the outcome, we can still talk about it as a *condition* of that outcome without losing any of the intended meaning and (importantly) without saying anything metaphysically problematic by implying that non-existent entities have mechanistically causal powers.

Naturally, once the terminology that we use to describe what occurs in omissions cases is sorted out – i.e. once we use the word 'condition' rather than 'cause' in stating the second condition of the bi-conditional account of causal responsibility – the residue problem of indeterminacy will still remain, since an omission might still be just one of a number of conditions whose satisfaction was necessary for the accident to occur. However this problem can be tackled exactly as it would be in cases of positive acts — i.e. by checking whether the party in question conformed to their role responsibilities. For instance, although it might be true that my nephew would not have drowned if my brother had not dropped him off at my

¹³ (e.g. see Duff 1998:290-1) Stapleton also argues that 'to ask which party had the strongest causal link with the disease is to pose a complex question about responsibility and expectations of behaviour' (1986b:94). Hart & Honoré's discussion of indeterminacy – and especially their claim that only the occurrence of *unusual* conditions breaks chains of causation, whereas *normal* conditions do not (e.g. such as the evening breeze which picked up just at the right time and thus contributed to the start of a bush fire) – also backs up my claim that it is the *unusualness* of certain conditions which justifies us in picking *them* out as *the* causes (Hart and Honoré 1959).

place that day, or if my neighbour had stood guard around my swimming pool, or simply if my nephew had stayed by my side – after all, all of these conditions (and an endless list of other conditions) *also* had to be met for the accident to occur¹⁴ – there is no reason to suppose that either my brother, my neighbour or my nephew can reasonably be expected have acted any differently than how they actually did. After all, my brother would not have left his son with me if I had not led him to believe that I would take care of him, my neighbours are certainly not required to stand guard ready to come to the rescue just in case I fail to do what I should have done in the first place, and my nephew is too young to have known any better (that is, after all, why my brother left him in my care). But it was surely reasonable to expect me to take proper care of my nephew since I did after all promise that I would do so, and the fact that I violated reasonable expectations in acting as I did – that I failed to discharge the role responsibility which I took upon myself – highlights my contribution to that accident as being particularly significant, and this is why we can legitimately pick out my omission from all of the other conditions and refer to it as ‘*the cause*’¹⁵ of that accident.¹⁶

The metaphysical problem that omissions can not be causes can therefore be bypassed by asking (at the second condition) whether something was a *condition* of some outcome rather than whether it was a *cause* of that outcome, and the problem of indeterminacy can be avoided by adding a third condition which checks whether in acting as they did the accused failed to do what they ought to have done — i.e. whether they acted contrary to reasonable expectations, or in Hart’s terms, whether they conformed to their role responsibilities. Learning from these two standard replies to the two objections, we now get the following much-improved *tri*-conditional account of causal responsibility:

P is causally responsible for *O* iff:

1. *P* did *A*,
2. *A* was a condition of *O*, and
3. *P* ought not to have *A’d*.

Here is how this account would function in positive acts cases. To determine whether the first condition was met we would ask if *P* really did act as alleged. Next, something like the *NESS* test could determine if the second condition was met. This would leave a ‘short list’

¹⁴ Miller also points out that ‘there are an infinite number of such counterfactuals’ (2001:457).

¹⁵ Having already argued against the terminology of *causation*, I have placed this in quotation marks to signify that what we really mean here by ‘*the cause*’ is *the salient condition*.

¹⁶ Stapleton suggestion that the law’s distinction between acts and omissions ‘springs from ... how and by whom the law expects the hazard to be controlled’ supports my account (1986a:43-4).

of viable causal candidates, and finally, for each causal candidate we would ask *if P had a duty to not do that* (either because they took that duty upon themselves, because society imposed it onto them, or for some other good reason). On the other hand, this account would apply to omission cases as follows. Satisfaction of the first two conditions would be checked for in the same way as in positive acts cases, however the third condition would only be met *when P had a duty to do something else* which was violated by them doing whatever it was that they actually did (again, this duty could either have been one that they took upon themselves, that society had imposed onto them, or which they had for other reasons).

Catering for the notions of ‘ordinary cause’, ‘proximate cause’, ‘intervening act’ and ‘foreseeable outcome’: But although this account is now nearly complete, it is still deficient in one regard, and so it requires the addition of the following ‘relevance condition’:

4. the reason why *P* ought not to have *A’d* was to avoid that kind of *O*.¹⁷

To see why the tri-conditional account of causal responsibility requires the addition of this further criterion, consider the sorts of conclusions which it would have to endorse in the following two examples. Example 1: *V*, a pedestrian, crosses the street at a green traffic light; but *I*, a taxi driver, fails to stop at the crossing even though his lights were red; and consequently *V* is run over by *I*'s taxi. In this scenario and others like it, it seems right that causal responsibility should be attributed to *I* because he acted contrary to how he should have acted — he should have stopped at a red traffic light but he did not, whereas *V* was entitled to act as she did. The moral features of *I*'s actions make them stand out from the rest of the conditions (including *V*'s actions in crossing the street) as being significant, and this is why *I* should be picked out as being causally responsible for the accident. But although the tri-conditional account does indeed recommend the correct conclusion on *this* occasion, consider what conclusion it would endorse in Example 2 (which adds the following information): *V* was on her way to the cinema to see a movie, even though she had promised to meet a friend for dinner somewhere else. Now it would also be true that *V* should not have been crossing the street, because in fact what she should have been doing is keeping her promise and meeting her friend for dinner. But given that she too should not have done what she did, the *tri*-conditional account would now require us to also pick her out as being causally responsible. However, despite the fact that all three conditions of this account would be satisfied, the reason why it would be a mistake to say that *V* was causally responsible is

¹⁷ I add this condition for similar reasons to why Feinberg (1970:195-7) adds a relevance condition to his conditional analysis of ‘at fault’ statements (also see Keeton 1963, cited by Feinberg, *op. cit.*, 199).

because as regards that accident, her way of being at fault (breaking a promise to a friend) is irrelevant to the kind of outcome that eventuated.¹⁸

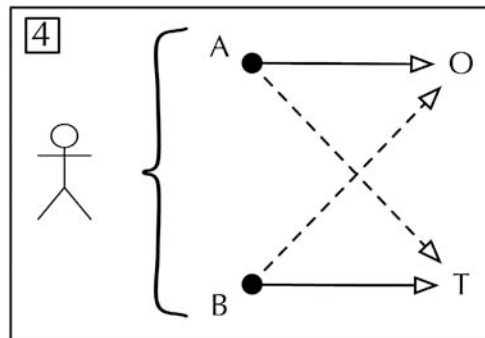
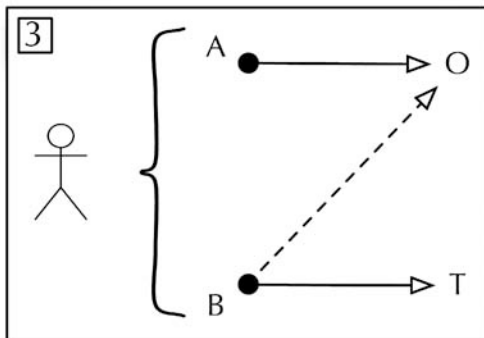
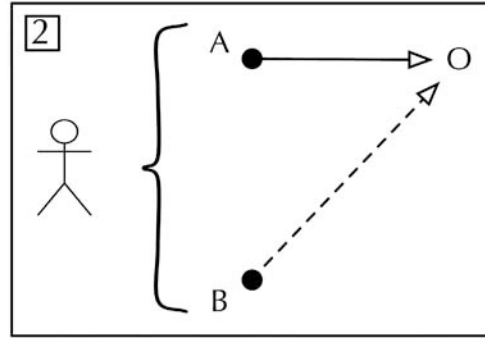
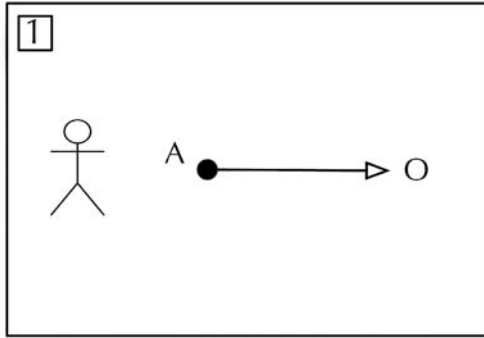
In saying this though, we do not suppose that it is irrelevant because it is inconceivable that by breaking a promise and doing something else we may inadvertently get involved in an accident — after all, such things are always possible. Rather, what we mean is that *this* is not a likely outcome of promise-breaking — *this* is not the (or a) reason why we should keep our promises. And so, should it ever happen that by breaking our promise something like this occurs, then we should not be seen as being causally responsible for it solely because we broke our promise.¹⁹ Hence, to say that this is not a relevant way of being at fault is simply to note that since there are no reasons for abstaining from engaging in this action *for the purpose of trying to avoid this kind of outcome*, should this kind of outcome occur anyway consequent to this action – i.e. should that action *on this occasion* turn out to be a *but-for* or a *NESS* condition of that outcome – irrespective of whether there were any other *independent* reasons to refrain from acting in that manner or not, we should not be seen as being causally responsible for that outcome.²⁰

The importance of this relevance condition can be further observed by considering our causal responsibility judgments in the following four scenarios (where *A* and *B* are alternative actions that the person could perform, *O* and *T* are both alternative unwelcome outcomes, *solid lines* represent likely outcomes or unreasonable risks, and *dashed lines* represent unlikely outcomes or reasonable risks):

¹⁸ Joel Feinberg (1970:196) refers to another example – originally developed by Robert Keeton (1963:3), from the actual case *Larrimore v. American Nat. Ins. Co.* – which could easily be substituted for my own pedestrian example without detracting from my point.

¹⁹ Immanuel Kant notoriously argued to the contrary, that if we lied to a murderer who knocked on our door, enquiring about the location of their next victim, then if this lie somehow led to them finding their victim, by violating the categorical proscription against lying we would have made ourselves responsible for the victim's death (Kant 1889:362-3). I suspect that Kant's contention, that once we do a morally forbidden thing (e.g. telling a lie) we open ourselves up to being responsible for whatever consequences come about, rests on his failure to notice that something similar to the suggested fourth 'relevance condition' is also a condition of causal responsibility.

²⁰ Feinberg also stresses the importance of talking about *kinds* of outcomes (and of the relevance condition) when he argues that 'the ... "faulty aspect" of an act is a cause of subsequent harm when the risk or certainty of harm in virtue of which the act was at fault was a risk or certainty of "just the *sort* of harm that was in fact caused" and not harm of some other *sort*' (1970:199, my emphasis).



In the first scenario, since *O* is a likely outcome of *A-ing*, if *O* occurs due to *P*'s *A-ing*, then since it would have been reasonable to expect *P* to refrain from *A-ing* for the purpose of avoiding *O* precisely because *A-ing* is too likely to result in *O*, their *A-ing* was not an irrelevant way of *P*'s being at fault on this occasion, and so it would be appropriate to deem *P* as being causally responsible for *O*.

In the second scenario, *P* would again be causally responsible for *O* when *O* was a consequence of their *A-ing*, for precisely the same reasons as were cited in the first scenario. However if *O* occurred due to *P*'s *B-ing*, then since it would not have been reasonable to expect *P* to refrain from *B-ing* for the purpose of avoiding *O* – *O* was not after all a likely outcome of *B-ing* – *P* ought not to be seen as being causally responsible for *O*.

In the third scenario, just because *P* would be causally responsible for *O* when *O* was a consequence of their *A-ing*, as well as for *T* when *T* was a consequence of their *B-ing*, *P* would not be causally responsible for *O* if *O* occurred because of their *B-ing*. *B-ing* is an irrelevant way of being at fault as far as bringing about *O* is concerned because we would not expect anyone to refrain from *B-ing* for the purpose of avoiding *O* since *O* is not likely to come about as a consequence of *B-ing*.

Finally, although both *A-ing* and *B-ing* are faulty in the fourth scenario, since *A-ing* is faulty as regards *O* (but not *T*), whereas *B-ing* is faulty as regards *T* (but not *O*), *P* would only be causally responsible for *O* if *O* came about as a consequence of their *A-ing* (but not if it

was a consequence of their *B-ing*), and *P* would only be causally responsible for *T* if *T* came about as a consequence of their *B-ing* (but not if it was a consequence of their *A-ing*). *A-ing* would be independently faulty (or faulty in an irrelevant way) as regards *T*, and *B-ing* would be independently faulty (or faulty in an irrelevant way) as regards *O*, which is why *P* should not be seen as causally responsible in these other two cases.

What we hopefully get from considering these cases is a clear sense of why the fourth condition is needed — namely, because without it, when this account is applied to the above pedestrian example and others like it, our account will fail to capture the important intuition that unless *V*'s inattention was a *proximate* cause of the accident-, or unless it was an *intervening* act-, or perhaps even that unless *V*'s losses were a *foreseeable* or *ordinary* outcome of promise breaking (e.g. see Cane 2002c:119, 130 & 134-6), then *V* should not be seen as causally responsible for her own mischief. Essentially, these are all different ways of getting at the same point — namely, that our attributions of causal responsibility should only ever be swayed by the addition of *relevant* fault, but that the addition of irrelevant fault should not alter whom causal responsibility is attributed to.²¹ Peter Cane puts this same point (i.e. that the subject matter of a duty violation must be relevant to the outcome for which one is to be deemed as being causally responsible) in the following manner:

If a person agrees to close and lock a door when leaving a building, but fails to do so, a break-in through the door would not be treated as an extraordinary outcome ... Similarly, if prison authorities negligently allow inmates to escape, a court would be unlikely to relieve them of liability for car theft committed by the escapees in the vicinity of the prison on the ground that this was not to be expected. On the other hand, the prison authorities might not be held liable if an escapee went to ground for two years and only then 'resumed a life of crime'. Such a sequence of events might not be thought extraordinary[, b]ut we might [still never the less] think that in such a case, the harm caused by the escapee should be treated as a cost of living in society, or as the responsibility of the criminal, but not [as the causal responsibility] of the prison authorities.

(2002c:135)

Although Cane appears to be discussing impositions of *liability* responsibility, what concerns him here are only *responsibility-based* liability impositions, and so his point is indeed the same as my own. But once we accept that something like the relevance condition

²¹ In commenting on Keeton's previously-mentioned example, Feinberg says that '[t]he defendant's conduct was negligent because it created a risk of *poisoning*, but the harm [which] it [actually] caused was not within the ambit of *that* risk' (1970:196).

must be included in an adequate conditional account of causal responsibility, then what we will have to say about the pedestrian example and other cases like it is that although *both V's* and *I's* actions may indeed satisfy all three conditions once the additional piece of information is added, the reason why we should not see *V's* actions as *the* cause of her own misfortune is because her faultiness was irrelevant to the outcome, whereas *I's* faultiness was not irrelevant.²² Unless our account of causal responsibility contains a relevance condition like this one, then in some cases it will suggest patently implausible conclusions regarding whom causal responsibility should be attributed to, and so to avoid this outcome we should endorse the following *four*-conditional account:

P is causally responsible for *O* iff:

1. *P* did *A*,
2. *A* was a condition of *O*,
3. *P* ought not to have *A'd*, and
4. the reason why *P* ought not to have *A'd* was to avoid that kind of *O*.²³

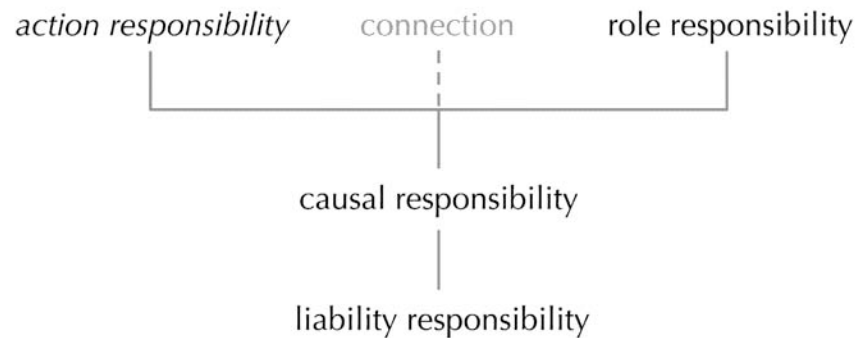
Uncovering some sources of disagreements about responsibility: The discussion so far has employed three of Hart's four responsibility concepts — namely, *liability* responsibility, *causal* responsibility and *role* responsibility. Furthermore, something else which has been implicit in the above discussion is that a distinction can be drawn between responsibility *for actions* and responsibility *for outcomes*,²⁴ and so for the sake of completeness we should add

²² Note that this conclusion is not merely a consequence of the difference between *V's* and *I's* relative degree of fault, because even if the pedestrian was a courier carrying vital medicine which was needed to save a hundred lives (but instead they were off to watch a flick at the cinema), it is still unlikely that we would be prepared to let this sway our attribution of retrospective responsibility, and the reason for this is precisely that this way of being at fault would not be relevant to that sort of outcome.

²³ Please note the similarity between my own four-conditional account of causal responsibility, and Feinberg's conditional analysis of 'at fault' ascriptions; Feinberg writes '[t]he best ... account of blame-finding citations ... require[s] that the blamed *action* be ... a genuine *causal factor* ... and then to add *fault* and *relevance* conditions' (1970:207, my emphasis).

²⁴ That *P acted* is taken as given when we grant that the first condition is satisfied — to say that the first condition is satisfied is equivalent to conceding that that action can legitimately be attributed to *P*, or put another way, that *P* is responsible *for having acted* in that manner. However, whether it is also right to say that *P* was responsible *for the outcome* is another issue — it is something which can only be settled once we know if the other three conditions were also satisfied. The distinction between responsibility for actions and responsibility for outcomes is also employed by Feinberg who puts it in terms of a distinction between *someone being at fault* and *something being his fault* (1970:187-92).

a further responsibility concept which Hart did not mention in his own taxonomy to this list — I will refer to this concept as ‘action responsibility’. Finally, this discussion also suggests that the following justificatory and dependency relationships obtain between these responsibility concepts:



The link between causal responsibility and liability responsibility was explained above. On the other hand, the preceding discussion which developed the four-conditional account explains why causal responsibility depends upon the three concepts depicted above it — namely, because these are the conditions which must be satisfied before an ascription of causal responsibility to someone for some state of affairs will be justified.²⁵

This account of these relationships leaves plenty of room for disagreements to arise about *whether* someone was causally responsible and *for what* they were causally responsible, however it is also an account which both conservatives and reformers should endorse,²⁶ and so it provides a good common ground from which to begin identifying some sources of disputes about responsibility. For instance, the most obvious way in which disputes of these sorts may arise is in the event of a *factual* disagreement — that is, if the disputing parties disagree about whether the accused *acted* as they are alleged to have acted,²⁷ or if they

²⁵ Three points must be noted. Firstly, action responsibility is italicised to indicate that this is not one of Hart’s concepts. Secondly, the word ‘connection’ is greyed out because I am not sure that what the second condition of the four-conditional account of causal responsibility states is really a responsibility concept *per se*. Thirdly, role responsibility encompasses both the third and the fourth conditions of the four conditional account of causal responsibility — i.e. the *duty* and its *relevance*.

²⁶ As I previously noted, both parties agree that at least sometimes outcome responsibility is a precondition of liability responsibility. Furthermore, it is not clear how else they could overcome the problems posed by indeterminacy and omissions if not precisely (respectively) by viewing role responsibility as a precondition of causal responsibility, and by interpreting the causal requirement not in terms of mechanistic ideas but in terms of the looser notion of ‘conditions’.

²⁷ For instance, suppose that *A* alleges that *B* side-swiped (and consequently scratched) their (i.e. *A*’s) car when *B* attempted to manoeuvre their car into a tight parking spot adjacent to where *A*’s car was

disagree about whether their action really was a *condition* of the said outcome.²⁸ Such disagreements are factual *per se* because presumably there exists a fact of the matter about each of these issues – it either is- or it is not true that the person acted as alleged; and it either is- or it is not true that the act was a condition of that outcome – and it is only because of epistemic difficulties that these facts remain obscured. Such factual disagreements may lead to different attributions of causal responsibility, and these may in turn lead to disputes about liability responsibility.

But disputes about causal responsibility may persist even in the face of complete factual agreement, since conservatives and reformers may disagree in their assignments of *role* responsibilities. Firstly, they might disagree about *what* role responsibilities the various parties had, and hence about whether the accused party violated their role responsibilities in acting as they did — after all, in order to *violate* a role responsibility, one must first be subject to its demands. For instance, returning yet again to the drowning nephew example, if it was a well-known fact that I am a hopeless delinquent who can not be entrusted with anything important, then that might impact on whether my brother was originally entitled to even *ask* me to look after his son or whether in asking me to do this he violated his role responsibility as a father.²⁹ Secondly, they could also disagree about the *scope* of the various parties' role responsibilities – for instance, presumably part of the reason why we expect parents to be thoughtful about whom they ask to care for their children is precisely because of the dangers associated with entrusting our children to the wrong sorts of people – and that sort of

parked. However, *A* was not actually in their car when this happened – all that they saw was *B*'s car seemingly backing away from that spot – and *B* denies that they ever tried to manoeuvre their car into that parking spot. That is the sort of dispute which I have in mind, and the source of this dispute would be *A* and *B*'s factual disagreement about *action* responsibility.

²⁸ Building on the above example, suppose that although after further questioning *B* admits to having *attempted* to park their car in that parking spot, they still emphatically deny that their car created that scratch — for instance, suppose they claim that although they initially tried to park their car there, they soon realized that it would not fit into that tight parking space, and hence that they subsequently backed out *without* ever having scratched *A*'s car. The causal responsibility dispute in this sort of case could be traced to a factual disagreement about whether the *connection* requirement was satisfied.

²⁹ Even if we suppose that this only bears on whether he was entitled to *trust* me, the consequence of this supposition would still be the same — namely, he would still have violated his role responsibility as a father since he should have known better. Asking a known delinquent to care for one's child is arguably a violation of one's parental role responsibilities, and so in this way a disagreement about who had which role responsibilities could translate into a dispute about *who* was causally responsible.

disagreement³⁰ could in turn translate into a dispute about *what* the accused parties were allegedly responsible for.³¹ Thus, even when all of the facts are agreed upon, disputes about causal responsibility can still arise if the disputants do not see eye-to-eye about *who had which* role responsibilities and about what was the *scope* of those role responsibilities.

A place for Hart's capacity responsibility: However, disputes about responsibility sometimes also surface for a different kind of reason — namely, because the disputing parties disagree about whether the accused person was *capacity* responsible or not. To see how disagreements about capacity responsibility might lead to wider disputes about responsibility, notice that we sometimes let children ‘off the hook’ when they do something reprehensible – something that would have otherwise attracted serious criticism and perhaps even disciplinary consequences if it had been done by an adult – and the reason why we let them off the hook is precisely because we sometimes suppose that the child lacked the general capacity to appreciate the full gravity of what they were doing.³² It is, however, by no means always a forgone conclusion that an accused child will be excused, because sometimes there is ample evidence that they were perfectly well aware of what they were doing – perhaps their actions clearly displayed the awareness, planning and forethought characteristic of someone who is capacity responsible, rather than displaying the lack of such a capacity – and when it is indeed clear that a child was aware of the gravity of what they were doing but that this did not deter them from proceeding with their plans, then on such occasions it is reasonable to attribute responsibility to them.³³

These sorts of disputes are not limited to cases only involving children either, since ‘[m]entally ill people are [also] often not in a position to reflect, to grasp connections, or to control and justify their actions and impulses. Of such people we say that they “are not *fully* responsible for their deeds”’ (Bovens 1998:25, emphasis added). Thomas Scanlon’s comment

³⁰ ... a disagreement which would concern itself not with settling the *content* of people’s role responsibilities, but rather with the *scope* or *relevance* of that content to particular situations ...

³¹ On the other hand, if that sort of consideration was not part of the reason why we expect parents to be mindful of whom they entrust their children to, then the relevance condition would not be satisfied and so they would not be causally responsible for any resulting mischief. Also see my discussion of impartiality in §5.1.2. where I cite the Learned Hand formula to support my assertion that another important determinant of role responsibilities is the relative value of the interests which are at stake.

³² That is precisely why I said earlier, in the context of discussing the drowning nephew example, that ‘my nephew is too young to have known any better’.

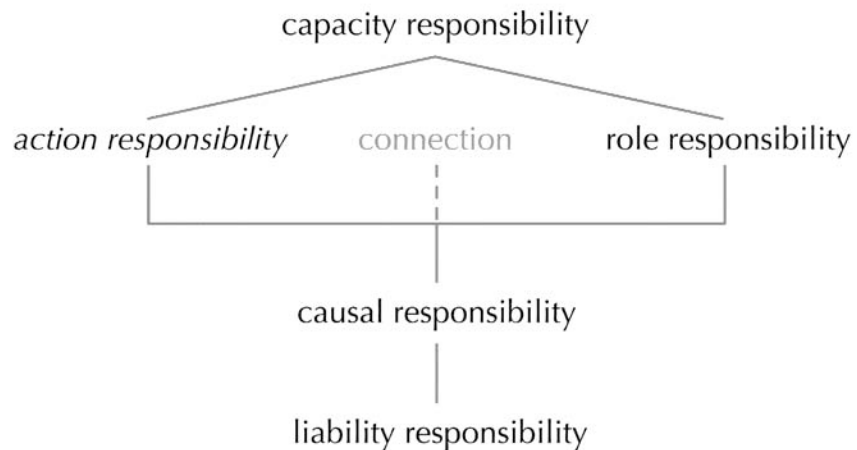
³³ This was, for instance, the reason why the two ten year olds – Jon Venables and Robert Thompson – who ruthlessly murdered the two and a half year old James Bulger on the 12th February 1993 in England near Liverpool, were punished and sent off to a correctional facility (Guardian 2000).

that although ‘coercion and duress ... do not block attribution of an action to an agent[, that they do never the less] change the character of what can be attributed’ to them, explains why Bovens feels that such people are not *fully* responsible for their deeds — namely, it yet again suggests our uneasiness about blaming- and attributing responsibility to those who lack the general capacity to guide their actions by the light of their reason (Scanlon 1998:279).

This uneasiness is not however a regrettable irrational bias in favour of children and of the mentally ill, but rather it is a logical consequence of the fact that capacity responsibility is itself a condition of both action responsibility and role responsibility, but this is something which can only be appreciated fully when we pay close attention to how Hart characterized the concept of capacity responsibility. Hart suggested that ‘[t]he capacities in question are those of understanding, reasoning, and control of conduct: the ability to understand what conduct legal rules or morality require, to deliberate and reach decisions concerning these requirements, and to conform to decisions when made’ (1968a:227). Elsewhere, Hart also insists that ‘the person [responsible] should ... have had the capacity to understand what he is required ... to do or not to do, to deliberate and to decide what to do, and to control his conduct in the light of such decisions’ (1968a:218). Two separate ideas come across in these characterizations: firstly, there is the idea that what is important to capacity responsibility is the ability to understand, to reason and to control one’s conduct; and secondly, there is the idea that responsible parties must be capable of understanding *what* is required of them, and understand that those requirements apply *to them*. But, firstly, why else would it be important to emphasize the importance of understanding, reasoning and control of one’s conduct if not precisely because without such capacities people’s behaviour becomes more like involuntary bodily movements than like true human *actions* — i.e. like true expressions of our inner selves which can legitimately be attributed to us (e.g. see SEP 2002). Secondly, why else would Hart emphasize the need to understand what conduct legal rules or morality require of us, if not precisely because it is unreasonable (or at least unrealistic) to expect those who do not possess even the basic capacity to understand *what* is required of them, or that those things are required *of them*, to conform to such expectations.

Hart’s intent in the quoted passages is not just to characterize capacity responsibility, but rather he is arguably also explaining how capacity responsibility relates to other responsibility concepts — namely, that it is a condition of both action and role responsibility. These passages clearly demonstrate Hart’s distinct concern that agents should be able to understand what expectations apply to them (i.e. that agents should understand *what* role responsibilities they actually have, and *that* those expectations apply *to them*), and that they should also be able to take their role responsibilities into account when they engage in practical reasoning (i.e. in reasoning about how to act). Hence, there are two distinct and

perfectly legitimate reasons why we should not attribute responsibility to people when there are compelling reasons to suppose that those people lacked capacity responsibility: firstly, because in an important sense their actions were not truly their own since they issued from a mental faculty which had been compromised, undermined or which was defective in a respect that is important for bodily movements to count as actions *per se* (i.e. an absence of capacity responsibility can undermine *action* responsibility); and secondly, because unless they possess the general capacity to understand *what* norms apply to them and *that* these norms apply *to them*, then we can not in good faith claim that we are still entitled to expect those parties to conform to such norms (i.e. an absence of capacity responsibility sheds doubt over the *role* responsibilities to which a person can reasonably be expected to conform). This suggests that the following dependency relationships should be added to the top section of the previous diagram:



These observations, about the relationship between capacity responsibility on the one hand and action and role responsibility on the other, shed light on familiar features of debates about responsibility. For instance, we can now see that the relevance of the doctors' initial suspicion (in Hart's parable) that perhaps the ship captain's drinking was the product of a paralytic depression³⁴ is most probably precisely that under such circumstances the captain's actions would not really have issued from his true self but rather they would have issued from his medical condition (i.e. he was not really action responsible), and perhaps also that under such circumstances we might be justified in re-assessing whether it was reasonable to expect him to have conformed to those role responsibilities.³⁵ More generally, a common feature of

³⁴ ... relevance, that is, to the question of whether the captain was responsible for the loss of the ship ...

³⁵ ... perhaps – it might be argued – someone else should have noticed that he was deeply depressed and unfit for duty, and reported him to his superiors who could then have replaced him with another captain. Note however that whether we would be justified in expecting him to have conformed to those

debates about responsibility is that much effort is often devoted to establishing that due to (e.g.) their upbringing or some other aspect of their socialisation (or some similar factor) the accused simply could not have acted otherwise, and hence that on account of this they should now be excused for what they did (e.g. see Wolf 1987). On my account, the point of such efforts is precisely to establish that (i) the accused was not capacity responsible, and (ii) that on account of this (a) their action responsibility was undermined, and/or (b) that it was unreasonable for us to expect them to conform to those role responsibilities — role responsibilities which it would have been reasonable to expect a person who allegedly, unlike the accused, was capacity responsible to discharge.³⁶

What sort of control is a condition of responsibility? However, this common feature of debates about responsibility has also been characterized in terms of a very different sense of control — namely, a sense which is prominent within the free will and determinism debate. For instance, Neil Levy also says that control is a condition of responsibility,³⁷ but although initially it seems as if his idea of control might be identical to Hart’s capacity responsibility,³⁸ it soon turns out that what he and Hart are talking about are very different things.³⁹ Jim Evans also insists that the philosophical project is a ‘study of ... the conditions under which someone is blameable for his or her conduct’ — the philosophical project, he claims, aims to discover the conditions of what he calls ‘agency responsibility’. He reasons that ‘if one is investigating which moral or legal duties we have ... then one will [indeed] need to investigate what our ... responsibilities [happen to be]. However, if one is merely investigating the conditions of agency responsibility [then] one doesn’t need to investigate these further things’ (Evans 2004:167). Although Evans acknowledges that there might indeed be other projects – for instance, to identify the responsibilities which the law as a matter of fact imposes (e.g.

role responsibilities under these circumstances or not is itself presumably also determined by whether he was responsible for bringing this depressed condition upon himself.

³⁶ Similarly to myself and Hart, Wolf’s account also emphasizes the importance to responsibility of such things as the ability to alter one’s beliefs in light of relevant considerations (1987:57).

³⁷ Specifically, he thinks that control is *both* a necessary and a sufficient condition of responsibility — see footnotes below for an explanation of this point.

³⁸ He initially says ‘if I have lower self-control than most people due to my lower serotonin levels ... then I ought to be excused, whether or not I fall above some capacity threshold’ (Levy 2004:176).

³⁹ The way in which he justifies the above suggestion is by arguing that the corollary of ‘the dictum that ought implies can’ is that if as a matter of fact one *could* not have done something then one *should* not be expected to have done that thing either (Levy 2004:176). Incidentally, this is the reason why I said that he sees control as a *necessary* condition of responsibility; his claim that ‘[w]e can determine whether someone was responsible for an act *simply* by inquiring into whether they exercised control over the[ir] bodily movements’ (2004:177, emphasis added), commits him to the *sufficiency* claim.

liability, punishment, etc.) which he calls ‘responsibility at law’, or to identify what expectations the law might have of us (e.g. to drive safely, ‘to care for a child’, etc.) which he calls ‘duty responsibility’ (Evans 2004:164) – he insists that these other projects are distinct from the philosophical project of discovering the conditions of causal responsibility (which he calls ‘agency responsibility’) (Evans 2004:167).⁴⁰ But, if we accept the claim that this *other* sense of control is a condition of responsibility, then when we encounter arguments in which the accused’s regrettably bad upbringing, their bad socialisation or something else is cited in an effort to absolve them of responsibility, then these arguments will no longer (as per my earlier suggestion) be seen as attempts to cast doubt on whether the accused was capacity responsible, but rather they will be seen as attempts to establish that on account of these factors those parties simply could not have acted otherwise — ‘could not have’ in the sense that their actions were fully determined by these allegedly overbearing factors and that they therefore had no room for free choice and no other options.⁴¹ This approach therefore ties the *legal* debate about responsibility into the *free will and determinism* debate by claiming that control (in the ‘freedom from determinism’ sense) is a condition of responsibility. However, I find this to be an unhelpful way of interpreting such arguments for at least three reasons.

The first reason why I find it unhelpful is because as Harry Frankfurt has convincingly argued, there are good reasons to doubt that *this* sort of control – i.e. that freedom to do otherwise, or the possession of options other than the inevitable ones which are served up to us by the conjunction of the prior state of the world and the laws of physics – is a condition of responsibility.⁴² Moreover, philosophers such as Daniel Dennett and John Martin Fischer have convincingly argued that if we take Frankfurt’s arguments on board, then not only will we realise that control (in the ‘freedom from determinism’ sense) is not a condition of responsibility, but we will also see that what *is* a condition of responsibility is precisely the sort of capacity to guide our actions by the light of reason which Hart classified under the

⁴⁰ Peter Cane’s claim that certain ‘philosophical approaches to [the topic of] responsibility fail to capture, or are inconsistent with, important – and ... normatively attractive – elements of our social responsibility practices’ (2004b:189), also suggests that philosophers tend to view that *other* kind of control (other, that is, than *capacity* responsibility) as a condition of responsibility. Unlike Levy and Evans though, Cane disapproves of this approach to the topic of responsibility.

⁴¹ Note that on the surface this sounds like the same claim which I made earlier – namely, that the accused *could not have acted otherwise* – however while the significance of this inability to have done otherwise was *previously* said to bear on considerations related to capacity responsibility, *now* its significance is said to bear on considerations related to the free will and determinism debate.

⁴² Frankfurt’s ‘willing drug addict’ example shows that the freedom to have done otherwise is not a condition of causal responsibility (Frankfurt 2001). Fischer and Ravizza (1994:324-6) use the ‘assassin’ example to argue for the same conclusion.

heading of capacity responsibility. For instance, on Dennett's account something more like authorship or the capacity for rational self-governance (rather than the possession of genuine options) is a condition of responsibility (Dennett 1984, 1998, 2003). Similarly, Fischer (2001) has argued that responsibility requires 'reasons-responsiveness' — namely, on his account we are only responsible for those actions which issued from a cognitive mechanism that could have responded to (or been persuaded by) reasons. Hence, since current compatibilist solutions to the free will and determinism problem⁴³ endorse an account which fits in neatly with the rest of the story about responsibility which I have told so far, there is therefore no reason (from the perspective of free will and determinism stalwarts) to reject — and indeed, there is every reason to accept — my account of the conditions of responsibility, and specifically my account of what sort of control is a condition of responsibility.

Secondly, on Levy's and Evans' accounts, moral considerations need not be consulted to determine whether someone was causally responsible for some outcome or not. On Levy's account, we do not need to check whether the accused party violated their role responsibilities to determine if they were causally responsible for something or not, since for Levy control is already by itself a sufficient condition of responsibility. On the other hand, Evans states explicitly that the issue of causal responsibility (which he calls 'agency responsibility') is separate from — i.e. it can be settled without making reference to — the question of what role responsibilities (which he calls 'duty responsibility') that person had. However, as I have argued, unless we treat role responsibility (and its subsequent violation) as a condition of causal responsibility, then we will not be able to overcome the problem of indeterminacy. Hence, to whatever extent Levy's and Evans' accounts of the conditions of responsibility are characteristic of the accounts of others who are also engaged in the free will and determinism debate, to that same extent their accounts would also run afoul of the indeterminacy problem.

The final-, and perhaps the most important, reason why I find this way of interpreting such arguments unhelpful is because it does not shed any light on why we usually draw a distinction between those parties who lacked control and who on account of this lack of control *are* often excused,⁴⁴ and others who also lacked control but whom we *are not* inclined to excuse.⁴⁵ If we adopt the approach which I endorsed above, then there will be a perfectly good justification for drawing this distinction and for using it as a basis for differential attributions of responsibility — namely, because while the former's *incapacity* to practically

⁴³ For a discussion of these solutions, see Ekstrom's (2001) edited compilation of papers.

⁴⁴ e.g. children, the mentally ill, and others like them.

⁴⁵ In this category we would find people whose current lack of control was their own fault — for instance, the ship's captain who could no longer have made competent decisions once he had drunk himself into a stupor.

deliberate and/or to understand their role responsibilities *is not* something for which they can be blamed, the latter's *inability* to conform to their role responsibilities *is* something for which they can be blamed. Put another way, on my account responsibility is not a matter of whether people have control in the 'freedom from determinism' sense, but rather it is a matter of whether it is still never the less (i.e. despite the accused's current factual inability to conform the demands of their role responsibilities) reasonable to keep expecting that the accused party should have conformed to their role responsibilities. On my account, it would only be unreasonable to expect someone to conform to certain role responsibilities if they did not possess control in the capacity responsibility sense, but the mere fact that someone can now no longer discharge their role responsibilities (because of things which they did to themselves and for which they are blameworthy) *is not* sufficient to exculpate them.⁴⁶ On the other hand, if we adopt the approach which Levy and Evans endorse, then it will remain a mystery why this distinction is ever drawn — after all, if both groups of parties *could not* have as a matter of fact done otherwise than what they actually did, then why should one be treated differently to the other?⁴⁷ Hence, since we can only make good sense of why we (quite justifiably, in my opinion) normally distinguish these categories of people from one another when we adopt the account which I have endorsed, we should therefore reject the idea that control (in the 'freedom from determinism' sense) is a condition of responsibility.

II. TAKING RESPONSIBILITY — WHAT SHOULD THEY DO?

The above discussion has revealed several potential sources of dispute about ascriptions of *causal* responsibility. I have argued that such disputes may arise for one of three reasons: (i) because of *factual* disagreements concerning whether the accused *acted* as they are alleged to have acted or whether the *connection* requirement was satisfied; (ii) because of disagreements

⁴⁶ To see that this is so, notice that just because I spent all of my money on frivolous trinkets, and now I have too little left to service my debts, this is not a reason to conclude that the expectation that I should repay my debts is no longer legitimate; despite the fact that I *can* not as a matter of fact repay my debts, I still *should* repay them (pace Levy's contrary claim).

⁴⁷ Levy and Evans might attempt to rescue their account by arguing that they too are entitled to draw this distinction on account of the fact that while the latter group was to blame for their own *inability*, the former group was not to blame for their *incapacity*. However, this defence is not open to them because (as I argued above) a feature of their approaches is that they downplay the significance of moral considerations in reaching judgments about responsibility. When the significance of moral considerations is downplayed, the fact that those in the latter category are to blame (for their *inability* to conform to their role responsibilities) whereas those in the former category are not to blame (for their *lack of capacity* to practically deliberate and/or to understand their role responsibilities) will regrettably go by un-noticed.

concerned purely with ascriptions of *role* responsibilities (i.e. either *what* role responsibilities the various parties had, or about the *scope/relevance* of those role responsibilities); or (iii) because of disagreements about whether the accused was *capacity* responsible, which in turn impacts on whether they can be *action* responsible and on their suitability to bear *role* responsibilities. Thus, any disputes about *liability* responsibility which stem from differential prior attributions of causal responsibility can also be accounted for in one of these three ways. However, sometimes people might agree in their attributions of causal responsibility (i.e. about *who* was causally responsible and about *for what* they were causally responsible), but still disagree in their claims about liability responsibility (i.e. about *how* responsibility should now be taken), and I will now explain how such *independent* disagreements about liability responsibility⁴⁸ might also arise.

Backward- and forward-looking senses of responsibility: To see how such independent disagreements about liability responsibility might arise, it is important to note that responsibility is a concept which looks in two temporal directions — while some attributions of responsibility are *backward-looking* in the sense that they involve claims about what people allegedly did in the past, other attributions of responsibility are *forward-looking* in the sense that they involve claims about what people must allegedly do in the future. For instance, Thomas Scanlon argues that:

To say that a person is responsible, in th[e backward-looking] sense, for a given action is only to say that it is appropriate to take [that action] as a basis of moral appraisal of that person[, however n]othing is implied [yet] about what this appraisal should be — that is to say, about whether the action is praiseworthy, blameworthy, or morally indifferent. [On the other hand], judgments of responsibility [in the forward-looking sense] express substantive claims about what people are required ... to do for each other.

(Scanlon 1998:248)

Thus, when we inquire into how someone acted on a given occasion, or when we ask for an explanation of why a particular outcome came about, what we are concerned with is the backward-looking question of who was either action- or causally responsible — Scanlon calls this ‘responsibility as attributability’. On the other hand, when we inquire about a person’s role responsibilities or liability responsibility, we ask a forward-looking question — Scanlon’s name for this is ‘substantive responsibility’.⁴⁹

⁴⁸ Independent, that is, of whether there exists a prior agreement about causal responsibility or not.

⁴⁹ Christopher Kutz and Stephen Darwall interpret Scanlon as I have above (Kutz 2004:549; Darwall 2006:91-1, notes 5 & 7). Another interpretation emerges elsewhere (Scanlon 2002:526-7, note 12).

Transition from causal responsibility to liability responsibility: The reason why this distinction between forward- and backward-looking senses of responsibility is important in the current context is because it impacts on how the transition from ascriptions of causal responsibility to claims about liability responsibility is justified — i.e. it impacts on how the transition from the second-last- to the bottom element in the above diagram is made. Scanlon urges that it is crucially important to clearly distinguish these senses of responsibility from one another, because a failure to do so ‘leads to the view that if people are responsible ... for their actions [in the backwards-looking sense] then they can properly be left to suffer the consequences of these actions’, or even that nobody else has the responsibility to help them out. However, he argues that this conclusion ‘rests on the *mistaken* assumption that taking individuals to be responsible for their conduct [in the backwards-looking sense] ... *requires* one to also say that they are responsible for its results in the [forward-looking] sense’ (Scanlon 1998:293, my emphasis). But on his account these are in fact two quite separate issues — conclusions about a person’s forward-looking (i.e. liability) responsibility are not already contained within prior claims about their backward-looking (i.e. causal or action) responsibility, but rather they must be derived through normative argument.

Howard Klepper has also argued that since these are two very different responsibility concepts – i.e. one looks backward in time, while the other looks forward – the transition from claims about ‘causal responsibility’ to claims about ‘liability responsibility’ can not be an instance of *logical* implication, but rather it must be some form of *moral* implication (Klepper 1990:235-9). However, if Scanlon and Klepper are right, then somewhere between causal and liability responsibility must be a further normative premise that specifies what should be done to causally responsible parties. Hence, although liability responsibility is

Cane and Duff also note the inherent directionality of the concept of responsibility, although the way in which they carve up the domain of responsibility concepts is somewhat different. For instance, Cane draws a distinction between attributions of what he calls ‘historical responsibility’ which allocate responsibility ‘for past conduct’ and which resemble my liability responsibility, and claims about what ‘prospective responsibilities’ are imposed upon someone by the law which are similar to my role responsibilities (Cane 2004a:162). Cane argues that ‘[i]n a temporal sense, responsibility looks in two directions. Ideas such as accountability, answerability and liability look backwards to conduct and events in the past. ... By contrast, the ideas of roles and tasks look to the future, and establish obligations and duties’ (Cane 2002a:31). On the other hand, Duff distinguishes ‘*prospective* responsibilities [which] are those I have before the event, those matters that it is up to me to attend to or take care of’ which resemble my role responsibilities, from ‘*retrospective* responsibilities [which] are those I have after the event, for events or outcomes which can be ascribed to me as an agent’ and which resemble my causal responsibility (1998:290-1, original emphasis). Duff elaborates on this in a later article (2004-5).

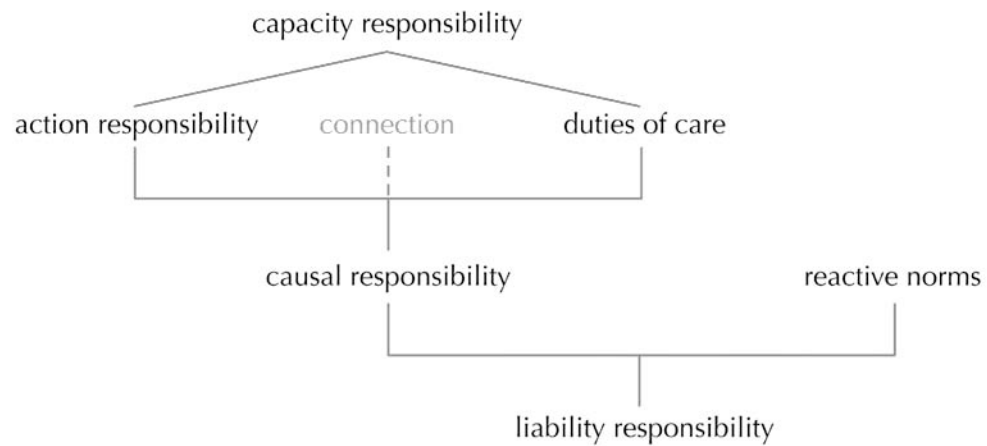
indeed often derived from causal responsibility,⁵⁰ to justify this derivation we need further normative premises over and above claims about these parties' causal responsibility.

Putting this point another way, if liability and causal responsibility both looked in the same temporal direction then claims like 'since *P* was responsible for *O*, therefore *P* should take responsibility for *O*' (where *P* is a person, and *O* is an outcome) could be justified relatively easily because they would have the logical form 'since *A* therefore *A*'. However, since these are in fact two very different senses of responsibility – i.e. one is forward-looking while the other is backward-looking – the form of the above claim is much more like 'since *A* therefore *B*'. But if that is the nature of the transition in the above claim, then that transition clearly needs at least one further premise to justify the inference from *A* to *B*. By analogy, since claims about causal responsibility are backward-looking while claims about liability responsibility are forward-looking, to justify derivations of liability responsibility from premises about causal responsibility, we will also need at least one further premise which justifies imposing liability responsibility – or more pointedly, which justifies imposing *that kind* of liability responsibility – onto those who were causally responsible.

These further premises which help bridge the gap between the backward-looking causal responsibility claims and the forward-looking liability responsibility claims, are a sub-set of Hart's role responsibilities since they too describe the sorts of things which those who find themselves in certain situations must do, however they must only do those things *on account of being in those situations*. But they differ from Hart's broader concept of role responsibilities in two important ways: firstly, they only describe the duties which befall those who have already been found causally responsible — i.e. one will only ever incur those duties as a response to being causally responsible; and unlike Hart's role responsibilities, their place in the picture which I have been developing is alongside causal responsibility (rather than *within* an account of causal responsibility, alongside action responsibility and the connection requirement), because along with causal responsibility they too are a condition of justifiably imposing liability responsibility. This entails that the concept of Hart's role responsibilities will refer to content which might better be described as 'duties of care', and so to distinguish these two concepts from one another and to capture the idea that people only incur these special role responsibilities as a response to being causally responsible, I will refer to the latter as 'reactive norms' (norms which govern our reactions to causally responsible parties) and I will refer to what is left in the original concept of Hart's role responsibilities as 'duties

⁵⁰ Cane's objection to Hart's supposition that forward-looking responsibilities are merely a '*derivative* form of responsibility' seems at odds with my conclusion, but only until we notice that his aim is to deny that these *norms* are derivative — that is, presumably, why he says that '[u]ndertakings and agreements are another very important source of prospective responsibilities' (Cane 2002a:32).

of care'. Taking these points and terminological modifications on board, we are now left with the following *structured taxonomy of responsibility concepts*:⁵¹



Once reactive norms are added to this picture, it ceases to be a mystery how the transition from claims about causal responsibility to conclusions about liability responsibility is justified — the fact that the latter are forward-looking while the former are backward-looking is no longer a problem because reactive norms help bridge this temporal and logical inference gap. So, for instance, if one of our reactive norms states that someone who is causally responsible for another's quadriplegia should become that person's carer, then that is indeed what those who are causally responsible for others' quadriplegia could be asked to do. Likewise, if another one of our reactive norms stated that those who slander others shall be publicly flogged, then that too is what could be done to those who slander others. Finally, if another one of our reactive norms stated that those who are causally responsible for another's losses shall compensate them for the full extent of those losses, then that too is how injurers could be treated. This is how reactive norms bridge the temporal and logical inference gap between premises about causal responsibility and conclusions about liability responsibility.

The source of independent disputes about liability responsibility: However, this now raises the question of where such norms come from, because even if we grant that some sort of normative premise is indeed required to bridge this inference gap (i.e. the gap between claims about causal responsibility and conclusions about liability responsibility), given that in the end such premises will justify treating people in various often coercive ways, these premises must surely also themselves stand in need of justification.

⁵¹ I refer to this as a *taxonomy* because I have attempted to list and clearly distinguish from one another a number of different responsibility concepts which play an important role in discussions and debates about responsibility; and it is structured *per se* because I have also attempted to explain what justificatory relationships obtain between these concepts.

To see how various reactive norms might be justified, let us momentarily switch focus from tort law to the criminal law and look at what goes on when people debate the question of whether (e.g.) the death penalty is a fitting sentence for certain horrendous criminal offences. This question is often approached from two different angles: while some approach this question from the utilitarian perspective and argue that such severe punishments can only be justified if in the end their benefits (e.g. deterrence of others from committing similar crimes) will outweigh their costs (e.g. from a utilitarian perspective, killing a criminal is itself an evil), others approach this question from the deontological perspective and argue that such severe punishments can only be justified if considerations of (e.g.) retributive justice warrant them. However what is significant about this debate is that what people involved in it are doing is that they are trying to settle the question of whether a particular reactive norm of the criminal law – in this instance, the death penalty – is justified by either utilitarian (deterrence) or deontological (justice-based) arguments.

Switching our focus now back to the accident law reform debate, the question which concerns us here is whether the loss shifting mechanism indeed plays an indispensable role in ensuring that everyone takes due responsibility for their own actions, or whether this mechanism can be safely replaced with the loss distribution mechanism without losing anything important, and while conservatives allege that without this mechanism no-fault systems could not ensure that due responsibility is taken by the right people (and hence they claim that the loss-shifting mechanism *is* indispensable), reformers deny that this is so. Similarly to what goes on in the context of the above-mentioned criminal law debate, here too we find both utilitarian and deontological arguments, but on this occasion those arguments concern themselves with determining whether a reactive norm of the civil- rather than the criminal law – i.e. the norm of imposing tort liability onto causally responsible parties – is justified or not. The utilitarian arguments usually concern themselves with such questions as (e.g.) whether the loss shifting mechanism is needed for achieving optimum deterrence, but as I suggest in §2.2.2. the efficiency arguments seem to either largely favour no-fault systems, or at the very worst they justify no preference either way. On the other hand, the other arguments are precisely those five arguments which were mentioned earlier in §3.2.1., however given that these arguments still have not been assessed, it is therefore not yet clear whether they do indeed support the reactive norm of tort liability or not. Consequently, the source of the independent disputes about liability responsibility is precisely that while conservatives believe that these five arguments support embracing the reactive norm of tort liability, reformers deny that this is so. Put another way, while conservatives feel that there are good reasons (the five cited arguments) to impose tort liability onto causally responsible parties, reformers deny that this is so.

4.1.2. TWO CONCEPTUAL LOCATIONS FOR DISPUTES ABOUT RESPONSIBILITY

At its core, this part of the debate concerns itself with the question of which system – either tort law or no-fault – is more conducive to ensuring that due responsibility is taken by the right people. Given the focus on *taking* responsibility, this is essentially a dispute about *liability* responsibility — it is a dispute about such issues as *who* should bear liability responsibility, *for what* (and for what *extent*) they should bear liability responsibility, and about *what kind* of liability responsibility they ought to bear (or put another way, how this taking of responsibility should be done — e.g. by accepting tort liability, by being punished, etc.). However, whether it is right and proper to impose liability responsibility onto someone depends on two things.

In the first instance, it depends on whether the accused was indeed causally responsible for whatever it is that they are accused of being causally responsible. However this in turn depends on whether all of the conditions of the four-conditional account of causal responsibility are satisfied or not — namely, it depends on whether the accused party indeed acted as they are accused of having acted (i.e. whether claims about their action responsibility are factually correct), whether those actions were indeed a necessary condition of the outcome for which they are said to be causally responsible (i.e. whether claims about the satisfaction of the connection requirement are factually correct), and it also depends on whether in acting as they did the accused party contravened a relevant expectation regarding how they ought to have acted (i.e. whether in acting as they did they violated their duty of care, and whether the *reason* for expecting them to conform their actions to that duty of care in the first place was directed at avoiding that kind of outcome). However, a lack of capacity responsibility may also undermine claims about whether it was reasonable to expect the accused to conform their behaviour to those particular duties of care in the first place (because those who are not capacity responsible may lack the ability to understand the content and scope of the expectations which others have of them) or about the accused's action responsibility (because they may simply lack the reasoning capacity to take such expectations into account when they engage in practical deliberation). If conservatives and reformers disagree about any of these other subsidiary types of responsibility, then this may result in a dispute about causal responsibility, and that in turn may generate a dispute about liability responsibility.

In the second instance, whether it is right and proper to impose liability responsibility onto someone – and more pointedly in this second context, whether it is right and proper to impose *a particular kind* of liability responsibility onto them (e.g. tort damages, punishment, community service, etc.) – also depends on whether there is an appropriate reactive norm which justifies the transition from their causal responsibility to an imposition of (that particular kind of) liability responsibility. Hence, if conservatives and reformers fail to agree

about which reactive norms there is most reason for our legal system to adopt – in this case, whether there are good reasons to impose tort liability onto causally responsible parties – then that too may lead to a subsequent dispute about liability responsibility.

Thus, although there are numerous reasons why conservatives and reformers may not see eye to eye about issues related to the topic of responsibility in general, at the most basic level there are just two main reasons why each side objects to the other side's responsibility practices — namely, because they often disagree in their attributions of *causal* responsibility, but also because they often disagree about which *reactive norms* the law should adopt.

I. TWO WAYS OF RESOLVING THE RESPONSIBILITY DISPUTE

Given that there are two distinct sources of disputes about responsibility, this presents two distinct approaches for resolving this dispute — namely, we can either attempt to determine which side's attributions of causal responsibility are correct, or alternatively, we could also try to assess the arguments which conservatives have used to support their own claim that the law should embrace the reactive norm of tort liability.

Here is an example of the first of these two approaches. For instance, one dispute which was previously encountered involved the question of whether the driver of the cheap car should be liable for the full extent of losses which the Rolls Royce Silver Seraph driver sustained, or whether the Rolls driver should also bear some liability for their own actual losses. Conservatives argued that since the other driver's actions caused the full extent of their losses, that this is therefore why they should now be liable for that amount of damages. Here, one way in which reformers could attempt to establish that the other driver should not be asked to do this, would be by challenging the division of responsibilities which is implicit in the claim that what the driver of the cheap car was causally responsible for was the full extent of the Rolls driver's losses. After all (they could argue), in order to arrive at *that* particular attribution of causal responsibility, conservatives must endorse a division of responsibilities which does not impose a general duty of care onto drivers to not *unduly* increase the possible extent of losses which they may suffer in the event of an accident. After all, if such a duty were held to exist then reformers might be able to establish that by taking their extravagantly priced car onto the public roads the Rolls driver did indeed violate a relevant duty of care which applied to them – i.e. that they *unduly* upped the stakes by putting a terribly expensive item onto the public roads, which are so obviously a dangerous place – and hence that in doing this the Rolls driver must also accept some causal responsibility for their actual losses (and thus that they must now also accept some liability responsibility, or simply that they must forego part of their claim to compensation for the full extent of their losses).

Now compare this to the second of these two approaches. Reformers might also argue that irrespective of what we eventually decide about causal responsibility, the reason why the driver of the cheap car should not be liable for the Rolls driver's losses is because there is no good reason to suppose that *this* – i.e. that accepting tort liability – is the (only) proper way for them to take responsibility for what they have done. Conservatives insist that causally responsible parties must compensate their victims for their losses because otherwise they will get away without having to take due responsibility for what they have done, and because otherwise others will instead have to take this responsibility for them. But if reformers could show that the arguments which conservatives use to support their claims about how responsibility should be taken – i.e. the five arguments cited in §3.2.1. – do not in fact establish that responsibility can only be properly taken *by accepting tort liability for our victims' losses*, then by rejecting the claim that we have reason to embrace this reactive norm they could also reject the responsibility allegation.

II. THE SECOND APPROACH IS BETTER THAN THE FIRST

Since both sides seem to accept something like the claim that a person's causal responsibility for another's ill fortune is a proper ground for expecting them to now do something so as to take responsibility for what they have done, this dispute can therefore now be resolved in *either* of these two ways, however there are at least four good reasons which clearly favour adopting the second of these approaches.

Firstly, there are simply too many claims about causal responsibility which would have to be assessed if we adopted the first approach. After all, both sides make numerous claims about who was causally responsible (and for what they were causally responsible), and they make these claims in the context of a great many different cases. Hence, it is not clear *which* particular cases would have to be examined – or for that matter, *how many* of these cases we would have to assess – before we could safely generalise from what we have observed in the context of assessing those particular claims about causal responsibility to the wider conclusion that *all* of the conservatives' claims about causal responsibility are suspect and hence that they can not provide a sound basis for their conclusions about liability responsibility.

Secondly, as the above two examples hopefully demonstrate, the aim of resolving disputes about causal responsibility is particularly daunting because it involves challenging a large number of deeply entrenched intuitions about who owes whom what duties of care,⁵² as

⁵² In the above example, the sticking point would undoubtedly be whether it is reasonable or unreasonable to place such an expensive car as a Rolls Royce Silver Seraph on public roads, and to then expect that in the event of an accident others will be liable in tort for any losses.

well as some tacitly held judgments about the relative value of different substantive interests,⁵³ and this means that the convincingness of the reformers' argument would in the end hinge largely on whether they could sway these often deeply entrenched and highly contentious intuitions. For instance, returning yet again to the Rolls Royce Silver Seraph example, they would have to tackle the vexed question of whether it is indeed reasonable to put such expensive cars as a Rolls Royce Silver Seraph onto public roads and to expect that others will be liable in tort for the full extent of our losses in the event of an accident, but that it would not be reasonable to do this with a cheap car that had a rare Stradivarius violin strapped onto the back bumper bar. If in the end, after consulting our moral intuitions and listening to the reformers' arguments, we arrived at the consensus that *it is reasonable* for people to drive the former 'naturally' expensive vehicles on public roads but not to up the stakes by driving the latter artificially inflated vehicles, then that would block one potential avenue for defending the reformers' position. On the other hand, if the consensus went in the opposite direction – i.e. that it was indeed *unreasonable* for the Rolls driver to take to the streets in such an expensive car – then that would provide backing for the reformers' claim that the other driver was not after all causally responsible for the full extent of the Rolls driver's losses, and hence that it is unjust to expect the other driver to compensate the Rolls driver for the full extent of the latter's losses. Finally, if after consulting our moral intuitions and listening to these arguments we still arrived at *no consensus*, then that would highlight an important reason why conservatives and reformers fail to agree about this issue – i.e. namely, because their intuitions on this issue conflict at a fairly fundamental level – and this would indicate where future efforts should be directed if we still wish to resolve this dispute.⁵⁴ However, my point for the time being is simply that it is far from clear whether any of these

⁵³ Please refer to §5.1.2. for further comments on this second point.

⁵⁴ This style of argument could also be employed to challenge the 'egg shell skull rule' – the rule which holds that injurers must take their victims as they found them – which is also entrenched within tort law (e.g. see Feinberg 1970:213-4). To challenge this rule through an analogous approach, one would begin by raising the question of whether it is indeed more reasonable to expect everybody else to constantly take a level of precautions which is appropriate given the likelihood that others might be unusually prone to sustain heavy injuries from our even-relatively-trivial actions, or whether it is more reasonable for those with the metaphorical egg shell skull to (metaphorically speaking) wear a crash helmet. After all, since those who are especially prone to injury are more likely to know about their unusual disposition than others, they are therefore in a better position than others to take the requisite precautions. A proper discussion of this issue would however take me too far afield from the present point, so please do not interpret these comments as an argument in favour of the conclusion that this rule should indeed be dropped, but rather only interpret them as demonstrating how the tools which I have developed could be gainfully employed to help resolve related disputes about responsibility.

arguments would in the end get anywhere because they rely on so many contentious premises — premises which dig deep into normative intuitions which are probably firmly entrenched and resistant to being altered through rational argument anyway.⁵⁵ Hence, given that many disputes about causal responsibility are bound to hinge on some fairly contentious premises, that is another good reason why the first of these two approaches should not be adopted.

Thirdly, although many claims about liability responsibility are meant to be derived in some way from prior claims about causal responsibility, it is still never the less conceivable that at least *some* claims about liability responsibility may not derive from prior claims about causal responsibility.⁵⁶ Hence, even if we did manage to establish that conservatives' ascriptions of causal responsibility were all incorrect (an unlikely outcome), that still would not necessarily show that their claims about who should take responsibility for victims' losses were also incorrect, since there might after all be other (non causal responsibility based) grounds for expecting other parties to take responsibility.

Finally, putting aside the three aforementioned *disadvantages* associated with the first approach, there is also a clear *advantage* to the second approach — namely, that the five arguments which conservatives use to support their claim that the law should embrace the reactive norm of tort liability are all relatively clearly phrased and straight-forward, and this makes them into good candidates for assessment. Hence, given the three reasons against using the first approach, and this one final reason in favour of using the second approach, that is indeed the approach which I will take — i.e. I will assess whether the conservatives' five arguments really do support the reactive norm of tort liability or not.

4.1.3. PREPARING TO TACKLE THE RESPONSIBILITY ALLEGATION

This section (i.e. §4.1.) began by drawing attention to an alarming lack of precision and clarity in debates about responsibility, and by explaining why this lack of precision and clarity is both a cause for concern and a reason to pause before addressing the responsibility allegation.⁵⁷ Clarity was injected into this part of the debate in §4.1.1. in two ways: firstly, by

⁵⁵ Amongst other things, the analogy between the Rolls Royce Silver Seraph and the cheap car with a Stradivarius violin strapped to the back bumper bar is meant to demonstrate that these intuitions are indeed firmly entrenched — after all, why should anyone suppose that it is more reasonable to take to the roads in the former car rather than in the latter? Surely *both* choices are equally unreasonable?

⁵⁶ That was the point of the example (used in a footnote at the start of §4.1.1.(i.)) of the driver who overturns on a mountain freeway and to whom we still should lend a helping hand, despite the fact that we were not causally responsible for their predicament.

⁵⁷ Let me now use an example to demonstrate how even those who are aware of the need for precision, sometimes still fail to live up to this ideal because they do not properly distinguish the various

drawing inspiration from Hart and Kutz to distinguish the many different senses of responsibility from one another; and secondly, by using the work of Hart & Honoré, Feinberg, Scanlon and Klepper to explain what justificatory relationships obtain between these concepts. This resulted in the construction of a handy analytic tool – the *structured taxonomy of responsibility concepts* – which can be used to help identify sources of disputes about responsibility, as well as to assess various parties’ claims about responsibility. Then, in §4.1.2., the responsibility dispute was characterized as a dispute specifically about liability responsibility – i.e. about the concept which sits at the bottom most level of this taxonomy, and which thus depends for its own justification on all of the concepts which appear above it – and since causal responsibility and reactive norms are both conditions of liability responsibility, I therefore suggested that no-fault systems could be defended from the responsibility allegation by challenging the conservatives’ claims about either causal responsibility or about reactive norms. However, given the problems associated with assessing claims about causal responsibility, I foreshadowed that in the remainder of this chapter my defence of no-fault systems from the responsibility allegation would take the second approach — i.e. that I will assess the five arguments which are meant to justify the conservatives’ claim that we should impose tort liability onto causally responsible parties.

Admittedly, there are two disadvantages to choosing this second approach. Firstly, it could be argued that my minimalist approach does not tackle this allegation at its *core* – i.e. by challenging the attributions of causal responsibility which lead conservatives to insist that responsibility now needs to be taken by someone – but rather that it only tackles it at its *periphery*. Secondly, it could also be argued that my approach will regrettably not yield any significant positive conclusions about *what* people should do (and *who* should do it) to properly take responsibility (and *for what* they should take that responsibility).

responsibility concepts from one another. For instance, in discussing the question of what society should do for the disabled – whether we can ‘justify preferential [treatment of] the disabled’ over others (e.g. the unemployed or the retrenched) – Jane Stapleton writes that “‘community responsibility’ may indicate a duty to act but not the method or the level of protection which ought to be provided by the state’ (1986c:179). Although what Stapleton says here strikes me as right – in fact, the ensuing discussion in §6.2. will cite a number of her insightful remarks – unfortunately, there is still much imprecision in this quote. For instance, is she saying that facts about the community’s *causal responsibility* do not in themselves yet tell us precisely what that community should now do (i.e. what is its *liability responsibility*)? Or is she saying that the community has a *reactive norm* to care for those citizens who are down on their luck, but that it is not clear what is the content of that reactive norm? My aim in pointing this out is not to disparage Stapleton’s insightful critique of the shortfalls of many reformers’ proposals, but rather it is simply to demonstrate how a lack of precision in the use of responsibility concepts (on both sides of the debate) can generate ambiguity.

However, I believe that the virtues of my overall approach outweigh these limitations. Firstly, a minimalist approach is strictly all that is needed to defend no-fault systems from this allegation. Secondly, thanks to developing my structured taxonomy of responsibility concepts, unlike others, I have been able to pull apart these two separate argumentative approaches – something which is not usually done in debates about taking responsibility – and consequently to adopt the neater of the two.⁵⁸ Finally, in any case, my approach still manages to offer some very useful practical advice about how those who would like to assess claims about causal responsibility, or who would like to get some positive answers about taking responsibility, should now proceed.⁵⁹ Hence, I believe that my approach to defending no-fault systems from the responsibility allegation is sound.

This completes my clarification of the concept of responsibility. I now turn to assess the five arguments which allegedly support the claim about the indispensability of the loss shifting mechanism as regards ensuring that people take due responsibility for their actions.

4.2. TAKING RESPONSIBILITY

Five arguments were offered in §3.2.1. to support the claim that the loss shifting mechanism plays an indispensable role in ensuring that everyone takes due responsibility for their actions – or as §4.1.2. just put it, to support the claim that accident law should embrace the reactive norm of imposing tort liability onto causally responsible parties – and hence that since no-fault systems use the loss distribution- rather than the loss shifting mechanism, that they may therefore fail to ensure that everyone takes due responsibility for their actions. However, the present section will argue that these five arguments are un-convincing, and hence that they

⁵⁸ ... rather than having to assess the messy arguments that would otherwise have to be assessed if like others I too had failed to realize that these two different strategies can be pulled apart from one another.

⁵⁹ For instance, one consequence of my argument is that we are not entitled to just assume that if someone *is* responsible for something (in the causal responsibility sense) then they should now *take* responsibility for it (in the liability responsibility sense), because apart from the fact that this transition is not an instance of logical entailment, such assumptions fail to clearly state each party's position on such important issues as *who* should take responsibility, *for what* they should take responsibility, and *how* they should take that responsibility. In order to figure out how responsibility should be taken, we should look for arguments – similar to the ones which I will am about to assess – which might support the transition from claims about causal responsibility to conclusions about liability responsibility. My structured taxonomy also provides clear guidance to those who wish to settle disputes about causal responsibility: for instance, they could focus their efforts on addressing questions surrounding who owes whom what sorts of duties of care (and on resolving the question of what the scope or relevance of those duties should be), or they could focus their efforts on addressing the question of what sort of capacity responsibility is needed for the justifiable imposition of certain duties of care onto people.

fail to sustain the claim about liability's indispensability, which in turn also means that they fail to support the responsibility allegation.

4.2.1. WHAT IT MEANS TO TAKE RESPONSIBILITY FOR OUR ACTIONS

There are two ways of interpreting the claim that compensating our victims for their losses is simply what it means to take responsibility for our actions, however neither of these interpretations yields a convincing argument in favour of the conservatives' position. Firstly, this claim could be interpreted as *reporting what people in our society actually mean* when they say that such-and-such a person should take responsibility for their actions — namely, that what they mean is that this party should compensate their victims for their losses. But although it is *conceivable* that what people are thinking when they say that such-and-such a person should take responsibility for their actions is that those parties should compensate their victims for their losses, it is not clear that this *is* in fact what people really do mean when they say this. As Sally Lloyd-Bostock (1984) has pointed out, empirical studies of accident victims who sought compensation through the tort system suggest that victims are in fact a lot less interested in precisely *who* will pay for their compensation, than they are concerned to ensure that they *do* get their compensation in the end. Lloyd-Bostock argues that '[t]here seems to be rather little evidence that, when asked, people actually do express consensus support for a ... system' which extracts compensation specifically from causally responsible parties (1984:143),⁶⁰ and she points out that often the victim is even reluctant to seek compensation *from the injurer* because they feel that the injurer 'already "paid" in some other way', or they say that "He couldn't really help it", "You couldn't blame him", "He didn't mean to do it", or even "It was just an accident" (Lloyd-Bostock 1984:156).⁶¹ Furthermore, given that people's ideas about what ought to be done are heavily influenced by what they believe is actually done (see below), she also points out that even when victims do claim that they should be compensated *because* another party was at fault, 'it is not possible to assume that [in their own reasoning, the injurer's] fault [came] first, and th[at] liability ... follow[ed]. Rather, the victim may have the idea, possibly from his awareness of the law, that compensation must be justified by fault, and attribute fault [to the other person] in order to get compensation or to justify having got it. In other words, *the attribution of fault is a[n] after the fact] justification rather than a motive [or a reason] for seeking damages*' (Lloyd-Bostock 1984:150-1, original emphasis).

⁶⁰ i.e. there is little evidence that people support the reactive norm of tort liability.

⁶¹ i.e. in addition, there is also little evidence that the average person's attributions of causal responsibility even line up with the conservatives' attributions of causal responsibility.

Given the above, it would seem that there is in fact little empirical support for the claim that when people say that such-and-such a person should take responsibility for their actions, that what they mean is that they should accept tort liability for their victims' losses. However, perhaps more importantly, even if Lloyd-Bostock's findings were cast in doubt by future empirical studies which showed that victims do in fact want faulty parties (and not someone else) to compensate them for their losses, then it would still be far from clear why such a finding should even be thought of as *relevant* to the question of what people should do to properly take responsibility for their actions. Just because everyone might think that the appropriate form of punishment for theft is death by torture, this does not mean that death by torture would be an appropriate form of punishment for theft. By analogy, just because everyone might think that the proper way to take responsibility for the accidental consequences of our actions is to compensate our victims for their losses, this does not mean that compensating our victims for their losses is the proper way to take responsibility for our actions. What people ought to do to properly take responsibility for their actions is not a matter of what anyone *thinks* ought to be done, but it is rather a matter of what *really* ought to be done, and these two things need not coincide.

Never the less, in response to this last comment, conservatives might retort by arguing that the fact that most people in our society want the state to do something specific, provides sufficient reason to do precisely that, because this is what democratic governance requires. However given that what everyone might want can itself be open to moral criticism, although I admit that such considerations might provide some pragmatic reasons for politicians to do as the electorate wishes them to do, I do not see how the mere fact that this is what they want (*if* that is indeed what they want) could in itself morally legitimise the desired practice and make it into something that morally ought to be done. Furthermore, Lloyd-Bostock also found that people's ideas about what ought to be done in legal contexts are heavily influenced by what they believe is actually already done by the law (Lloyd-Bostock 1984:153-4, 159). But if the law's practices are to be morally assessed, then it can hardly be adequate to refer back again to what people actually think in order to justify those very practices, when their ideas about what ought to be done are themselves shaped by what they believe the law already does. Hence, the mere fact that most people in society might want the state to impose compensatory duties onto causally responsible parties is not necessarily a good reason to do this.

Secondly, the claim that compensating our victims for their losses is simply what it means to take responsibility for our actions could also be interpreted to mean that *accepting liability is simply the conscientious or virtuous thing to do*, and hence that this is why causally responsible parties should compensate their victims for their losses. However the problem with this interpretation of this claim is that it seems to get the relationship between reactive

norms and the virtue sense of responsibility – i.e. the sense in which a person is virtue-responsible if their character is such that they discharge their duties – the wrong way around. As Zimmerman points out, one can not ultimately justify the imposition of liability onto causally responsible parties at later stages of an argument by insisting that this is what a virtuous person would have done, because what we are currently trying to determine is precisely *what* a virtuous person would do under such circumstances (Zimmerman 1994:434-5). The answer to the question of what a conscientious or virtuous person ought to do hinges on a *prior* answer to the question of what reactive norms should guide one's actions when one was causally responsible for something, and hence to avoid begging the question one can not appeal to prior conceptions of what a virtuous person would or would not do in such a situation to support conclusions about what reactive norms the law should embrace. Claims about what such people would do stand in need of justification, and so *they* can not be used to justify claims about what we ought to do when we happen to be causally responsible for another's accidental losses.

This first attempt to justify the conservatives' responsibility allegation is therefore either impotent (because what we must find out is not *what people think* ought to be done, but rather *what really ought to be done*) or circular (because it attempts to justify what the law does by appeal to what people think it ought to do, even though their beliefs in this regard are shaped by what the law already does, or because it appeals to a pre-theoretical conception of what taking responsibility should involve in an attempt to justify that very same conception of taking responsibility), and so a different justification will have to be offered to support the responsibility allegation.

4.2.2. OTHER THINGS THAT MUST BE DONE TO TAKE DUE RESPONSIBILITY

The idea behind this argument is meant to be that the loss shifting mechanism allegedly ensures that causally responsible parties discharge not just their *compensatory*- but also their *other* duties. To recap, conservatives allege that, in addition to the compensatory duty, injurers should also: (1) accept and acknowledge that they were really the ones who brought about the accident; (2) offer a genuine apology to their victims; and (3) suffer due punishment where such is appropriate. The claim about the first duty was supported by the assertion that to deny one's causal role would be to call into question one's own personal identity and (sense of) integrity. The claim about the second duty was supported by arguments concerning the need to show genuine respect for victims, and by suggesting that this might even help them to recover. And finally, the claim about the third duty was left as a general claim since

punishment is not usually thought of as a primary aim of the private law.⁶² The main idea behind this argument is therefore that since imposing liability onto causally responsible parties is allegedly the *only* way to ensure that these other duties will also be discharged, in electing to *not* use the loss shifting mechanism no-fault systems can not ensure that those other duties will also be discharged.

However, even if we accepted the claim that these other duties should also be discharged to properly take responsibility for our actions – and this is a claim which I will not challenge here – there would still be other reasons why this claim could not provide a solid foundation for the responsibility allegation. Firstly, it is far from clear why anyone should suppose that the *only* way to recognize our roles as agents is by accepting liability for our victim's accidental losses. It is surely plausible that people can recognize and accept this without needing to also accept liability for the losses that eventuated, and we certainly have no reason to suppose that our integrity would be cast in doubt if we refused to accept liability for our victims' losses unless we already have prior and independent reasons to suppose that compensating our victims for their losses is indeed what a person with integrity would do.

Admittedly, it might be useful to engender a critical attitude in people so that they reflect on their own actions. Doing this might make them more reflective and cautious, and this will be a good thing if it helps reduce the overall costs of accidents. Similarly, it is also conceivable that victims may feel better when they learn that defendants did not injure them on purpose, that their safety and their interests were considered when the defendant acted, and that the defendant even feels sympathy towards them. Such knowledge may help victims retain a sense of dignity in the face of adversity, and it may even help them to recover by lifting their spirits since they will not feel like they had been intentionally victimized and insulted by the defendant, only then to be abandoned by an uncaring society and left to fend for themselves. The promise of these two positive outcomes may indeed provide some reason to impose liability onto defendants, however such reasons will only be compelling if we also have reason to believe that liability offers *the best* strategy for achieving these outcomes. So, is there reason to believe that the best way to achieve these outcomes is by imposing liability onto causally responsible parties?

Arguably, if anything, we actually have more reason to suppose that the loss shifting mechanism would *not* be particularly effective at achieving these aims. Or rather, putting the point more strongly, we have ample reason to suppose that the loss shifting mechanism would actively hinder any attempt to ensure that people truly accept their roles in the world as agents

⁶² These claims are made in various places by Nagel, Perry, Honoré and Strudler (among others) – please refer to Chapter 3 for the respective citations.

who can sometimes make bad things happen to others (albeit unintentionally), that they genuinely apologize to their victims when this is appropriate, and that they suffer due punishment when such is called for. When people suffer losses because of others' inattention, in a legal system like the tort system which imposes of liability onto causally responsible parties, defendants have every incentive to deny both privately (i.e. to themselves) and publicly (i.e. to others) that their actions were in any significant way connected to the victim's losses. After all, by publicly admitting this, we may open ourselves up to tort liability for our victims' losses, and so if anything the threat of liability provides a *disincentive* to openly accept our causal role and to honestly appraise our actions (e.g. Anderson 1999:311). On the other hand, when we suffer accidental losses because of our own inattention, there is again plenty of reason to insist that others must have been causally responsible for our losses, because unless we convince ourselves that someone else was causally responsible then we may have to resign ourselves to getting no compensation at all. Furthermore, if genuine apology and punishment are also important, then it is difficult to see how a system that forces people to pay often massive amounts of compensation, but which at the same time allows people to purchase liability insurance (and sometimes even encourages it and makes it compulsory) would achieve either of those ends. Nobody likes to part with large sums of money, and when people are forced to pay massive amounts of compensation out of their own pockets, then the last thing that is likely to be on their mind (unless they are particularly wealthy or guilt-struck) is to also feel a further genuine need to apologize to their victims. It is just as likely (if not more so) that a person in such circumstances will feel spite and resentment towards their victim, even if they were responsible for their victim's losses, because although the injurer may feel that they were to blame for the accident, they may not think themselves to have been *that* blameworthy. On the other hand, given that large compensation payments are often paid for by insurers, it is not clear how getting one's insurer to compensate one's victims could be an instance of offering a genuine apology to one's victims; and finally, if punishment were truly what we were after, then it would indeed be difficult to see how this could be achieved by imposing liability onto defendants when *they* will not pay for it in the end anyway. Hence, if what we want is a genuine apology or punishment then the imposition of liability seems an unlikely way of achieving either of these ends too.

The loss shifting mechanism is not indispensable for achieving these other three aims, and in fact it is not even a particularly good way of achieving them. Hence, even if it were true that these other three things should also be done by causally responsible parties (and I have taken no stance on whether this is so), then there would still be plenty of reason to reject the claim that the best- or even the only way of ensuring that those duties are discharged is by

making them liable for their victims' losses. Consequently, this argument also fails to support the responsibility allegation.

4.2.3. WEAK RETRIBUTIVE JUSTICE — TWO VARIATIONS

This argument comes in two forms,⁶³ and in its first form it begins with a comparison of *victims* and injurers, followed by the claim that since victims are innocent and innocence should be protected, whereas injurers are guilty and thus less deserving of preferential treatment, if a loss must fall on either a victim or on an injurer then to protect innocence the loss should fall onto the injurer rather than onto the victim. Feinberg and Coleman refer to this as the 'weak retributive justice' argument, because instead of providing a positive reason to impose burdens specifically onto guilty parties (*that* would presumably provide a *strong* reason for treating them harshly), weak retributive justice instead imposes burdens onto guilty parties because they are allegedly relatively less deserving of preferential treatment than innocent parties. While retributive justice proper requires that certain forms of conduct be punished because that is what such conduct deserves, weak retributive justice imposes such burdens onto people only reluctantly — only because imposing these burdens onto those parties is allegedly less objectionable than leaving those burdens with their victims.⁶⁴

However, the first form of this argument (i.e. the one which compares injurers to *victims*) suffers from at least two problems. Firstly, in order for this argument to work, conservatives would have to explain why relative guilt should be thought of as the *only* relevant metric by which these parties can be compared to one another. Given that these parties could also be distinguished from one another by a number of other features — features which may provide countervailing reasons to give preferential treatment to the injurer rather than to the victim — for instance, the victim might be very wealthy and the loss may be little more than a temporary nuisance to them, whereas the injurer may be so poor that forcing them to bear it may send them into complete financial ruin — in the absence of further reasons which explain why only relative guilt should matter, this argument is at best inconclusive.

Secondly, in suggesting that we must allocate the burdens of accidental losses to either victims or to injurers, this argument poses what is essentially a false dilemma, since (at least within a community that has already chosen to implement a no-fault system) *society* would

⁶³ See §3.2.1.(iii-iv).

⁶⁴ Perry's 'localized distributive justice' argument and Honoré's 'risk distributive justice' argument, which will both be mentioned in the upcoming section on corrective justice, closely resemble Feinberg's 'weak retributive justice' argument in that all of them attempt to contract the scope of legitimate targets for the allocation of losses by appeal to some fact about the injurer which allegedly picks them out as particularly deserving of being chosen as the loss-bearing target.

also have volunteered itself as a legitimate bearer for victims' accidental losses. It is a *non sequitur* to insist that in order to protect victim's innocence we must necessarily impose the burden of their losses onto injurers, when this same outcome could also be achieved by imposing this burden onto society. Hence, without further reasons to refrain from allocating accidental losses onto society, this argument must be seen as resting on a false dilemma.

In response, conservatives might retort that the reason why society should not bear the burdens of these losses either is because society is itself composed of innocents, and that they too should not be forced to bear these burdens.⁶⁵ This response marks a transition from the first- to the second form of the weak retributive justice argument, in which injurers are compared to *society* rather than to victims, and it asserts that as between the injurer and society, the latter must surely be given preferential treatment since it too is composed of innocents. Put another way, since anyone other than the injurer is innocent, and innocence should allegedly be protected (or at least, it should be given preferential treatment), the second form of the weak retributive justice argument therefore maintains that the burdens of accidental losses should not be imposed onto anyone other than causally responsible parties.

However, the second form of the weak retributive justice argument is no more compelling than the first form, and in some respects it is even weaker. The first reason is that often society is not completely free of causal responsibility. If society were to take its duty to protect people from others' dangerous conduct seriously, then (for instance) since motoring is dangerous, it could be argued that people should be prohibited from operating motor vehicles for the sole purpose of leisure — after all (this argument would run), protecting people's health and lives is surely more important than granting everyone the convenience that private motoring provides, especially when perfectly good alternatives (e.g. public transport) are available. But society does not prohibit such dangerous activities because it believes that on balance those activities will be more beneficial than detrimental. However given that some individuals will pay dearly to provide the rest of us with these benefits, it could be argued that in allowing private individuals to drive their own cars on public roads for often relatively trivial reasons, society must also shoulder some of the blame for allowing such risky activities to persist.⁶⁶ Hence if the basis for the allocation of losses were to be the relative degree of blame, then since on this account society is also blameworthy for allowing people to engage

⁶⁵ This, in essence, is Richard Posner's point when he argues that 'if the injurer is not the source of compensation, then someone else, who is innocent, must' bear this burden instead (1981:197).

⁶⁶ This sort of reasoning was used by the Pearson Commission (cited by Stapleton 1986b:111).

in dangerous conduct, that might also justify imposing some of the burden of accidental losses onto it rather than onto injurers.⁶⁷

The second reason why this latter version of the weak retributive justice argument is unconvincing is because when the comparison involves a single injurer and all of society, it is all the more likely that one of the other features which distinguishes these parties from one another will provide overriding reasons (in comparison to those provided by their different status as regards their relative guilt), which will in turn favour giving preferential treatment to the injurer rather than to society. After all, society is in a much better position to shoulder the burdens of accidental losses than individual injurers due to the fact that the losses' burdens will be thinly distributed across many people. Hence, we might actually have more reason to impose the burdens of accidental losses onto society rather than onto guilty injurers.

But the most important reason why the second form of the weak retributive justice argument is unconvincing is because it also (like the first form of this argument) presents a false dilemma — it presents the situation as if it involved either imposing the burden of accidental losses onto guilty injurers, or imposing them onto an innocent and *unwilling* society, but this is simply not the choice with which we are faced. If it were true that society was indeed unwilling to care for accident victims – i.e. if we were faced with a society that had already considered and rejected no-fault systems – then perhaps in light of its unwillingness to take on this duty that society's innocence might provide a reason to give it

⁶⁷ In all honesty, I am not fond of this argument for several reasons, but I mention it here for completeness. Firstly, if it is indeed true that on balance more good than bad would come from allowing people to drive their own private vehicles, then society should *not* disallow people to use private vehicles, and hence, on the account which I developed above in §4.1., society would *not* after all be causally responsible for these people's losses since it would not have violated a relevant duty of care in allowing this. Secondly, as Atiyah has argued, just because we might put society in charge of protecting us from certain dangers, this should not be taken to entail that when society fails to do this then it should be seen as being responsible for the losses that eventuate (1997e:138-43). Thirdly, conservatives could easily counter this reply by pointing out that although it might indeed be true that society is guilty of allowing others to engage in potentially dangerous activities, and that the victim's loss is indeed a consequence of it gambling with their security to provide others with extra liberty, since the victim was also a member of that society, they must also have received the benefits of living in it, and hence that they are now not entitled to ask for any further benefits. Fourthly, and perhaps most importantly, since on this account the basis of the claim that society should bear at least some of the burden of accidental losses would be that it was allegedly partially responsible for them, this reply would tacitly embrace the very assumption which this section is trying to reject — namely, that liability should track responsibility. Stapleton (1986b:111) also objects to this sort of argument, but her objection has more to do with compensatory issues which will be discussed in §6.2..

preferential treatment over the treatment given to injurers (the previous arguments notwithstanding). However, once society has expressed a willingness to care for accident victims, it makes little sense to insist that it should not be *forced* to bear the burdens of accidental losses when guilty parties could bear them instead, because nobody would be forcing anyone to do anything which they had not already willingly chosen to do.⁶⁸

To make the present point clearer, let me back-track just a little and put this argument in its context. The aim of the weak retributive justice argument is to support the conclusion that due to their particular way of allocating the burdens of accidents, no-fault systems could not ensure that people would take due responsibility for their actions. This, of course, requires a conception of who might be the right people for the task of taking this responsibility (e.g. injurers, those with the deepest pockets, society, etc.) as well as a conception of precisely what duties taking responsibility might require one to discharge (e.g. compensation, apology, punishment, etc.), and the claim that is made by advocates of the latter form of the weak retributive justice argument is that if one party is innocent while another one is guilty, then the right party is the guilty one and the wrong party is the innocent one, because innocence should be protected by giving it preferential treatment. However, the problem with this line of argument is that if society has *volunteered* to take care of accident victims, then it is not clear why its innocence should even matter — after all, the reason why *it* (rather than the injurer) would end up taking care of victims, would not be because it would have been mistakenly judged as being causally responsible for the victims' losses, but simply because it would have chosen to take on this responsibility. As Cane has pointed out, some of the things that we must do must be done by us not because we were causally responsible but simply because we

⁶⁸ This is essentially Coleman's response to Posner's previously cited claim that if injurers were not liable for their victims' compensation then the innocents who comprise society would instead be forced to compensate victims (Coleman 1988a:199). Two avenues are open at this point for conservatives to defend their position, but neither is compelling. Firstly, they could argue that since *they personally* had not assented to their government's decision to implement a no-fault system and hence to accept these burdens, that they should therefore not be bound by those decisions. The problem with this argument is that if it were admitted, then every other case where a democratically elected government makes decisions that are not to *every* citizen's liking could also be questioned, and this seems like at least a questionable way of challenging a government's decisions. Secondly, conservatives might also argue that it is simply wrong for the state to take these burdens onto itself because this will mean that injurers will not need to bear them any more. The problem with this argument though is that until prior independent positive reasons are given to explain why injurers should bear these losses (which is incidentally what the present argument was intended to establish), then conservatives' use of this argument would again beg the question since it would assume *that* which it was trying to establish — namely, that only injurers and not others should bear the burdens of accidental losses.

had previously made an undertaking to do those things, and hence unless we did not make those undertakings then our innocence will simply be irrelevant to the question of whether we should now do what we said we would do. Hence, unless there are other reasons why only injurers (and not society) should bear these burdens, then no-fault systems should not be criticized for forcing innocents to bear them while guilty parties stand by unaffected, because once a society has undertaken to care for accident victims, innocence and guilt simply have nothing to do with the matter of whether it should do this.

Thus, neither form of the weak retributive justice argument is compelling. In its first form, this argument fails for two reasons: firstly, because it does not consider the other distinguishing features that might also be relevant to determining whether the victim or the injurer should bear the burdens; and secondly, because it presents a false dilemma, since the aim of protecting innocents can also be achieved by imposing the burdens of accidental losses onto society. In its second form, this argument fails for three reasons: firstly, because society may not always be as innocent as conservatives make out; secondly, because other features which distinguish society from injurers (e.g. its greater ability to bear losses without being overwhelmed by them) may provide compelling countervailing reasons to impose losses onto society; and thirdly, because once a society has already chosen to implement a no-fault system, then it will not be legitimate to criticize it for imposing burdens onto *unwilling* innocent citizens. Consequently, the weak retributive justice argument does not support the responsibility allegation either.

4.2.4. CORRECTIVE JUSTICE

Finally, conservatives view the fact that no-fault systems impose compensatory duties *onto society* rather than *onto injurers* as a reflection of the reformers' preference for securing *distributive-* rather than *corrective* justice, and they criticize this preference because they believe that the practical demands of corrective justice are more important than-, and hence that they should take precedence over, those of distributive justice. Put another way, on the conservatives' account no-fault systems err because their use of the loss *distribution-* rather than the loss *shifting* mechanism expresses the reformers' regrettable choice to satisfy the practical demands of a *less important* principle (i.e. distributive justice) rather than the *more important* one (i.e. corrective justice).

My response to the above argument comes in three parts. In the first part, I flesh out in greater detail the main features of the conservatives' argument from corrective justice by presenting a (admittedly highly compressed) summary of Aristotle's classic account of corrective justice, and of Ernest Weinrib's modern development of that theory. In the second part, I outline two replies to that version of the argument from corrective justice: firstly, that

Weinrib's theory fails to show that liability *per se* should be imposed onto causally responsible parties, or even that the practical demands of corrective justice are indeed more important than those of distributive justice; and secondly, that according to other modern corrective justice theorists (e.g. Jules Coleman, Stephen Perry and Tony Honoré), corrective justice is not incompatible with no-fault systems because on these other theorists' accounts the compensatory duties which corrective justice imposes are not agent-specific but agent-general⁶⁹ and hence that these duties *can* in fact be discharged by society through a no-fault system. Finally, in part three I present my main point — I argue that corrective and distributive justice are not *autonomous* principles with *competing* practical demands, but rather that they are in fact *complementary* parts of a wider and more integrated theory of justice. On my account, which is essentially an endorsement of Peter Benson's theory, corrective justice does not impose *any* practical demands whatsoever onto anyone since by itself it is only *a component* of a wider and more integrated theory of justice and only that wider theory is capable of imposing practical demands, and so for this reason no practical demands *of corrective* justice can possibly be violated by no-fault systems. In other words, I reject this last attempt to show that the loss-shifting mechanism plays an indispensable role in ensuring that everyone takes due responsibility for their actions, by showing that the principle of corrective justice can not – and hence that it does not – favour the loss shifting- over the loss distribution mechanism.⁷⁰

I. ARISTOTLE'S AND WEINRIB'S ACCOUNTS OF CORRECTIVE JUSTICE

Aristotle: In its original form as discussed by Aristotle, corrective justice was described as a principle intended to govern the immediate interactions or transactions between individuals.⁷¹

⁶⁹ §3.2.1.(v). briefly explains the distinction between agent-specific and agent-general duties, as well as providing relevant citations.

⁷⁰ I do not however resolve the question of whether the *wider* and more integrated theory of justice favours the loss shifting or the loss distribution mechanism, since this depends on which precise account of distributive justice is taken as the correct one, and that in turn is a matter which depends on highly contentious claims about which interests are valuable and about how valuable (both in relative and in absolute terms) they might be.

⁷¹ Aristotle writes that '[o]ne kind of particular justice ... is that which is shown in the distribution of honour or money or such other assets as are divisible among the members of the community (for in these cases it is possible for one person to have either an equal or an unequal share with another); and another kind which rectifies the conditions of a transaction' (1976:176-7). Here Aristotle compares the subject matter that distributive justice is interested in to the subject matter that corrective justice is supposed to apply to; the subject matter of the former concerns the equalisanda which need to be

On Aristotle's account, justice and injustice only occur when more than one party interact with one another – where only one person is involved there can neither be justice nor injustice – and as long as everyone treats others with due respect, then the outcomes of interactions will not be objectionable from the standpoint of justice.⁷² However, if such respect is not observed (as might for example be the case with fraud or theft), then an *immediate* transactional injustice will occur between those parties — one will commit- and the other will suffer an injustice.⁷³ On the Aristotelian account such situations involve a departure from 'the mean', or that which would have been 'equal' as regards the transaction, and to rectify such departures Aristotle suggests that 'the judge takes away that by which the greater segment exceeds the half of the line, and adds it to the lesser segment' — or put in less metaphorical terms, the judge shifts back to the victim what the injurer took away, to restore the notional equality that existed prior to the departure (1976:177-82). Since interactions in such cases are *immediate* rather than mediated – i.e. an injurer *commits* the injustice against a victim who allegedly *suffers* that very same injustice, and their interaction is *not mediated* by anybody else – the restoration of justice on Aristotle's account therefore also requires a similarly *immediate* reversing transaction to be performed between those two parties, which is why on his account nobody else should be involved in remedying corrective injustices.

Aristotle's account of corrective justice appeals to conservatives for several reasons. For instance, being concerned with immediate interactions and similarly immediate remedies,

equalised (i.e. outcome-oriented considerations), whereas the subject matter of the latter concerns the manner in which transactions were carried out (i.e. process-oriented considerations).

⁷² Aristotle insists that 'it is impossible to be unjustly treated unless somebody acts unjustly' towards us, and he again makes this same point a few pages later by claiming that 'justice and injustice must always involve more than one person ... but when a man injures himself he both does and suffers the same thing at the same time' (1976:195, 201). His view of justice as lawfulness and fairness is made evident early on in Book Five when he suggests that 'the word ["justice"] is considered to describe both one who breaks the law and one who takes advantage of another, i.e. acts unfairly[, and] so just means lawful and fair; and unjust means both unlawful and unfair' (1976:172).

⁷³ What is important to understanding the notion of the *immediacy* of this transactional injustice is that on Aristotle's account the injustice which is suffered by victims is the same as the injustice that is inflicted by injurers. Following on from the previous passage, Aristotle elaborates on the subject matter of concern to corrective justice by suggesting that '[t]his latter kind [of justice] has two parts, because some transactions are voluntary and others involuntary. Voluntary transactions are, e.g., selling, buying, lending at interest, pledging, lending without interest, depositing, and letting[, whereas i]nvoluntary transactions are either secret, such as theft, adultery, poisoning, procuring, enticement of slaves, killing by stealth and testifying falsely; or violent, e.g. assault, forcible confinement, murder, robbery, maiming, defamation, and public insult' (1976:177).

corrective justice is structurally identical to tort law. Its view of the cases to which it applies, as involving wrongs that are inflicted by some and suffered by others, and of injustice as something that must necessarily involve more than one person, slots in neatly with tort law's requirement that plaintiffs must nominate defendants if they wish to recover damages, as well as slotting in with tort law's general restricted interest in only victims and their alleged injurers. The remedy which corrective justice employs also seems identical to tort law's loss-shifting remedy,⁷⁴ and it seems to be fuelled by similar sentiments about who owes the duty to fix up corrective transgressions (i.e. causally responsible parties) and why they owe such a duty (i.e. because they were causally responsible). Given the structural similarities between tort law and corrective justice, to whatever extent the remedy which he described is indeed conducive to re-establishing justice, to that extent Aristotle's account of corrective justice may be thought to warrant the conservatives' preference for tort law's loss shifting mechanism. On Aristotle's account compensatory obligations are requirements of corrective justice, and if such obligations are discharged by others then the corrective injustice will persist, and so to avoid the injustice those parties must compensate their victims.

Weinrib: Of the various contemporary accounts, Ernest Weinrib's account is the closest to Aristotle's original account of corrective justice. Weinrib's account is typified by the insistence that corrective injustices can only occur when more than one party is involved, and that the injustice of any particular corrective transgression inheres in the type of transaction (i.e. a *process*) that occurred between these parties and not in the *outcomes* of that transaction. This makes corrective injustices necessarily bilateral on his account – i.e. the injustice which is suffered by victims is seen as the flip side of the injustice which was inflicted by injurers, for otherwise the victim's loss would not necessarily be a corrective injustice but only a

⁷⁴ It is not clear however whether Aristotle himself would have considered *accidental* injuries to involve injustice. Richard Wright appears to think that Aristotle would have included accidents among the cases to which corrective justice applies (Wright 1992). However, Aristotle clearly distinguishes 'mistakes', 'misadventures' and 'injuries' from one another, and he argues that 'those who commit ... injuries and mistakes are doing wrong ... but this does not of itself make them unjust or wicked men, because the harm that they did was not due to malice; it is when a man does a wrong on purpose that he is unjust and wicked' (Aristotle 1976:192-3). This may be taken by some to suggest that on Aristotle's account accidents do not involve injustice, and hence that he did not intend corrective justice to apply to accidents. For instance, Perry argues that Aristotle's account of corrective justice is an account of 'reparation as restitution', and hence that as such it can not be re-moulded to fit the requirements of accidents where restitution is often not possible because the item in question was lost or destroyed (Perry 1992b:452-61). I shall however remain silent on this issue.

misfortune⁷⁵ – and so (again like Aristotle) Weinrib maintains that corrective injustices must be rectified by a remedy which is similarly bilateral.⁷⁶ Finally, he believes that tort law's theoretical foundations must be found in corrective justice because of the structural similarities between it and tort law — i.e. because both assume a bilateral relationship between injurer and victim and because both use a remedy that ties together the fates of victims and injurers.⁷⁷ Accordingly, he argues that only corrective justice and not instrumental arguments (such as, for example, arguments concerning economic efficiency) can provide the justification for responding to accidents with tort law.⁷⁸

However none of this is yet a categorical argument in favour of tort law and in favour of the loss shifting mechanism — rather, it only amounts to the hypothetical claim that *if* a system of tort law were employed as our society's accident response strategy, then due to tort law's structural features we would have to seek justification for doing this from corrective justice. For this reason, although his account is initially formalist, he also supplements it with

⁷⁵ Weinrib also makes this point in the context of criticizing Epstein's attempt to justify strict liability. He argues that 'once the injury is divorced from [a viable conception of] human action it ranks as a misfortune rather than as a justiciable wrong' (Weinrib 1991:314).

⁷⁶ For example, he argues that '[t]his form of justice discloses the nature of rationality in a transaction, i.e., where the interaction is conceived as being immediate to the parties as doer and sufferer of a single wrong ... the ordering of corrective justice can be represented arithmetically as the transfer of a quantity from defendant to plaintiff [and] the parties to a transaction are considered to be notional equals, whatever their actual differences in virtue or in resources. Wrongfulness [thus] consists in the violation of this notional equality and rectification in its restoration through the transfer of a quantity from the defendant to the plaintiff' (Weinrib 1991:293).

⁷⁷ (Weinrib 1983:38-9) I originally made this point in §3.1.1.(ii)..

⁷⁸ Weinrib argues that '[t]he abolitionist position [with respect to tort law – i.e. the reformers' position –] presupposes that justification takes the form of goals such as compensation or deterrence. Abolitionists reason that since tort law cannot coherently satisfy such goals, it should be replaced. Ignored is the possibility that the justification applicable to tort law is as relational as tort law itself. The abolitionists assume that justifications refer to goals. The formalist assumes only that justifications justify. ... [F]ormalism's initial concern is [thus] not with a justification's substantive merit [– i.e. formalism's initial concern is not the justification's normative plausibility –] but with the minimal condition for its functioning *as* a justification ... The formalist [however] neither disputes the desirability of achieving compensation and deterrence nor asserts the superiority of tort law to other mechanisms for handling injury. The claim, rather, is that the goals of compensation and deterrence do not serve a justificatory function in the tort context' (Weinrib 2001:335). Also see Richard Wright's helpful comments on the distinction between instrumental and non-instrumental moral arguments (Wright 1992:631).

Kant's normative ethical theory, and this is where the categorical pro-tort law conclusion is supposed to come from.⁷⁹

On Weinrib's account, the general subject matter of justice relates to *holdings*, the *people* who might have those holdings, and most importantly to the different ways that relations between people and holdings can be *ordered* (1992:407-9). On his account, social situations may at once contain numerous reason-giving features that might otherwise pull our intuitions about which course of action should be taken as regards that situation in different directions. However he also asserts that thankfully '[a] familiar feature of our moral life is our awareness that our moral experience has a variety of shapes' which are often difficult to relate to one another (Weinrib 1993:684). Consequently, he argues that contrary to what some might suppose, it would be vulgar to expect the practical reasons provided by these different shapes of moral experience to all be integrated into a single coherent strand of practical argument that would yield just one practical conclusion, and instead he insists that for each shape of moral experience we will require a separate and different form of argument for practical reason to operate within, and this is precisely what he believes corrective and distributive justice are supposed to provide (Weinrib 1993:684-8). On this account, each form of justice is supposed to embody a distinct and irreconcilable conception of what equality in relations between people and holdings might involve, and so each form of justice provides a different way of reasoning about this relationship.⁸⁰

On Weinrib's account, corrective and distributive justice are not principles of justice, but rather they are *forms* of justice which impose constraints onto our practical reasoning (i.e. onto reasoning which is concerned with arriving at conclusions about how we ought to act). Corrective and distributive justice allegedly function as filters which sort out those

⁷⁹ In fact, Weinrib states that '[t]he status of corrective justice as a form and not a principle of justice points to its limitations as a solvent of tort controversy. A corrective justice conception of negligence will not itself justify preferring the current system of liability based on fault to a more comprehensive no-fault compensation scheme' (1983:40). The reason why Weinrib prefers Kant's normative theory to (e.g.) Utilitarianism is because '[t]he Kantian approach ... can maintain the focus on [just] the two litigating parties as is required by [the structural features of] corrective justice, without concerning itself with the collateral consequences to others' (Weinrib 1983:43; also see Weinrib 2001:335-9).

⁸⁰ (Weinrib 1992:407-9, 413-6; also see Weinrib 1993:684-6) Unfortunately, Weinrib's discussion seems confined to corrective and distributive justice, with little mention of retributive justice despite the fact that Kant (whose moral theory also plays a crucial role in Weinrib's account) had rather a lot to say on the topic of retributive justice. Never the less, had he discussed retributive justice then presumably it too would have been described as a form (rather than a principle) of justice derived from yet another shape of our moral experience. Retributive justice is brought into the present discussion in §4.2.4.(iii). below.

considerations that can be combined with one another in a single strand of practical reasoning, from those considerations that must be considered in a separate practical argument.⁸¹ However although this entails that in any situation there may be several *independent* practical arguments – for instance, one that draws together the considerations which stem from shapes of moral experience that are relevant to corrective justice, and another that draws together the considerations which stem from shapes of moral experience that are relevant to distributive justice – Weinrib maintains that the reason why these arguments will not generate *conflicting* practical demands is because he asserts that the shapes of our moral experience are ordered in such a manner that conclusions derived from corrective justice arguments will always take precedence over those derived from distributive justice arguments. The reason for this ordering is allegedly that all other shapes of moral experience presuppose the concept of purposiveness which is inherent in agency and natural right that is native to corrective justice’s shape of moral experience, but also because all other shapes of moral experience introduce new and novel considerations which are not present in corrective justice (Weinrib 1993:491-5). But since on this account corrective justice is the most fundamental form of practical reasoning, Weinrib maintains that practical reason must operate first on the moral considerations which feed into corrective justice arguments (i.e. considerations about the *process* by which two parties interacted — for instance, whether one of them was careless or not), and that the other considerations (i.e. considerations related to the *outcomes* generated by those processes — for instance, whether the loss suffered by the victim was serious or only superficial) can only play a role in generating further practical conclusions once the practical requirements of corrective justice have been exhausted. Consequently, he takes this to establish that conclusions derived from corrective justice arguments will always take precedence over conclusions derived from moral considerations which feed into forms of argument that are appropriate to other forms of justice.⁸²

⁸¹ ‘The *operation* of practical reason ... varies with the specific concerns of each shape of moral experience. ... Because ... corrective justice governs the interaction of doer and sufferer, practical reason as operative in corrective justice abstracts from the particularity of welfare and good to the sheer purposiveness of agency. In other shapes of experience, which are concerned specifically with distributing the constituents of welfare or with promoting the good, practical reason operates to connect the normativeness of agency to the welfare or the good at issue. Thus, practical reason ... operat[es] in a manner appropriate to the specific shape [of moral experience] in question’ (Weinrib 1993:687, original emphasis).

⁸² Weinrib’s view of corrective justice as a form of practical reasoning dates back to an earlier paper in which he argued that ‘the term “corrective” applies to the types of *reasons* for an arrangement rather than to an arrangement itself’ — an account which he borrowed from Nozick who also argued that ‘the term “redistributive” applies to the types of *reasons* for an arrangement rather than to an arrangement

The first upshot of this prioritisation is supposed to be that distributive and corrective justice do not actually need to be reconciled with one another because where the demands of corrective justice differ from those of distributive justice, Weinrib believes that the former will always take precedence over the latter. The second upshot of this prioritisation is meant to be that although corrective justice does not itself establish that tort law offers the most morally appropriate response to accidents, since tort law must ultimately be founded in corrective justice because of its structure, and corrective justice allegedly captures the most fundamental aspects of our moral experience about human interactions, Weinrib takes this latter point to entail that tort law must therefore be the most morally appropriate response to accidents. If correct, Weinrib's account of the relationship between corrective and distributive justice would indeed entail that by compensating victims through a no-fault system we would have failed to impose obligations onto causally responsible parties which we ought to have imposed onto them — i.e. his account of this relationship would entail that no-fault systems would indeed fail to observe the most important requirements of justice, and hence that they may fail to ensure that everyone takes due responsibility for their actions.

II. REPLIES TO WEINRIB'S CORRECTIVE JUSTICE ARGUMENTS

Problems with Weinrib's account: However, there are at least two reasons why Weinrib's account fails to establish that injurers have an agent-specific duty to compensate their victims as a matter of justice. Firstly, although Weinrib insists that corrective justice is the most conceptually basic form of justice because it introduces fewer novel considerations than other forms of justice, there is reason to suspect that the lack of substantive content in the sorts of considerations that corrective justice arguments take into account would actually prevent corrective justice arguments from ever generating conclusions that justify anything like tort law's *loss* shifting remedy. A common critique of Weinrib's position is that since his theory is so heavily steeped in disembodied notions of wrongdoing – disembodied, because his notion of wrongdoing eschews outcome-oriented considerations⁸³ – that in the end his account fails to explain why the corrective injustices which are allegedly present in accidents have anything to do with losses *per se*, and hence why those injustices should be rectified

itself' (Weinrib 1983:39, original emphasis; Nozick 1974b:27, original emphasis). He also claims that since 'corrective justice is a form ... and not a principle of justice', that it can therefore peacefully co-exist alongside distributive justice without needing to be reconciled, since '[i]t does not [actually] state a normative requirement which must be followed' and which might otherwise come into conflict with the normative requirements of distributive justice. These comments clearly demonstrate that, on Weinrib's account, the priority of corrective over distributive justice is a consequence of the Kantian normative component of his theory, and not a consequence of the Aristotelian formalist component.

⁸³ i.e. considerations of the *substance* that was lost by the victim.

specifically by getting injurers to *compensate* their victims rather than (e.g.) by asking them to sincerely apologize or even by punishing them (e.g. Coleman 1992f:439-40; Perry 2000a:441-5). On his Kantian account, since the injustice that is perpetrated by injurers can not be identified with the actual type and extent of loss that the victim suffered (because that would make the type and extent of the injurer's wrongdoing contingent on the actual outcomes rather than on the injurer's faulty exercise of will), to retain the bilateral nature of the relationship between victims and injurers that is meant to exist in specifically *corrective* injustices, the injustice suffered by victims must also be identified with something other than their type and extent of loss. But given that tort law's remedy shifts *losses*, and yet losses can play no part in the injustice which the injurer allegedly inflicted and which the victim suffered, many people have therefore argued that it is a mystery how Weinrib's account could ever provide a foundation for tort law's *loss* shifting remedy. Thus, even if we accepted the conclusion which Weinrib draws from the claim that other forms of justice bring in novel considerations which are not native to corrective justice,⁸⁴ then that still would fail to support the conclusion which he wishes to draw – namely, that we should embrace tort law's reactive norm of imposing tort liability onto causally responsible parties – because, if anything, the considerations which corrective justice disregards on Weinrib's account are precisely the very same ones that are required to ground conclusions about liability.⁸⁵

Secondly, although Weinrib tries to establish the priority of corrective over distributive justice by pointing out that all other shapes of moral experience presuppose the concept of purposiveness inherent in agency that is (allegedly) native to corrective justice, the problem with using this claim to support the further claim that the practical demands of corrective justice have priority over the practical demands of distributive justice, is that although the concept of purposiveness may indeed be presumed by all other shapes of moral experience, it also makes little sense to talk about purposiveness unless we acknowledge that there are objects with substantive features at which this purposiveness can be directed. To make sense of claims about how relations between people and holdings should be ordered so as to achieve (e.g.) equality, it is just as important to have a conception of the objects at which purposiveness will be directed, as it is to have the conception of purposiveness itself. Hence, when Weinrib's account is fully developed, it will turn out that distributive and corrective

⁸⁴ ... and that this gives priority to the demands of corrective justice over those of distributive justice ...

⁸⁵ A similar point has also been made by others in the context of discussing the so-called 'practical syllogism' — i.e. the question of how conclusions about *action* can be derived from practical arguments which only contain premises about *beliefs* and *desires*; the point being that it is not clear how such novel content could possibly arise in the conclusion given the sort of content that the premises contain (e.g. Aristotle 350 B.C.E.:Part 7; Hume 1874:II, iii, 3).

justice are *complementary* rather than *opposed* to one another, since neither corrective nor distributive justice can generate practical demands on its own.⁸⁶

Weinrib therefore fails to establish that the practical demands of corrective justice trump those of distributive justice. Consequently, even if we supposed (as some conservatives and reformers do) that no-fault schemes are an attempt to implement distributive justice whereas tort law schemes implement corrective justice,⁸⁷ since the practical demands of corrective justice do not trump (but, rather, are complementary to) those of distributive justice, we would therefore still lack reason to criticize no-fault systems for failing to embrace reactive norms which justice requires them to embrace. Thus, since compensatory obligations need not necessarily be imposed onto causally responsible parties as a matter of corrective justice, no-fault systems therefore should not be criticized for failing to do this.

Corrective justice does not impose agent-specific compensatory duties, and so it does not favour systems that use the loss shifting mechanism: Furthermore, not all corrective justice theorists agree that corrective justice necessarily favours systems that use the loss shifting mechanism over those that use the loss distribution mechanism, because not all of them agree that corrective justice imposes agent-specific compensatory duties. For instance, Jules Coleman argues that ‘[t]he New Zealand [no-fault] plan neither affronts corrective justice, nor is its existence irrelevant to corrective justice [because] whether or not corrective justice itself imposes moral duties on individuals in a community will depend on other practices that are in effect[, since] certain practices [within a community] simply mean that no duties in corrective justice arise in [that] community’ (1992c:402-3; Coleman 1992d:493, note 7 to Ch. 19; also see same comments in Coleman 1992e). In a similar vein, Stephen Perry also argues that tort schemes which implement corrective justice could ‘be replaced by more general distributive schemes, like a compulsory no-fault insurance plan, without violating any fundamental moral rights’ (1992b:513). Finally, Tony Honoré argues that ‘to introduce a state compensation scheme would not ... violate corrective justice’, and he later reaffirms this position by explaining that ‘it would not be unjust ... for the state to replace tort liability in certain areas by a scheme of no-fault insurance based on the just distribution of losses [because t]he principle of corrective justice that justifies the straightforward cases of tort liability ... has ... to be tempered by considerations of distributive and retributive justice that limit the extent to

⁸⁶ Essentially the same point is also made by Peter Benson who is discussed in §4.2.4.(iii). below.

⁸⁷ For example, Klepper suggests that while the moral foundation of tort law might be the principle of corrective justice, that no-fault systems may ‘be grounded in distributive rather than corrective justice’ (Klepper 1990:226). Culhane has also suggested that victims’ rights to compensation may ultimately be grounded in different duties — one imposed onto society in general by distributive justice, and another imposed specifically onto causally responsible parties by corrective justice (Culhane 2003).

which it [i.e. corrective justice] can properly be applied' (1999c:91, 93). Honoré's theory of corrective justice is especially compatible with no-fault systems because on his account compensatory duties which are imposed onto injurers under corrective justice *can* be discharged by others (e.g. by society) on the injurer's behalf — i.e. on his account this is not an agent-specific duty (Honoré 1999c:74)

On each of these theorists' accounts, corrective justice imposes agent-general rather than agent-specific compensatory duties, and so these compensatory duties need not necessarily be discharged specifically by causally responsible parties through the loss shifting mechanism, but rather they can just as well be discharged by a no-fault system through a loss distribution mechanism. Hence, on these other theorists' accounts corrective justice does not necessarily favour systems which use the loss shifting mechanism. But let us put aside problems with theories of corrective justice which draw specifically on the Aristotelian tradition, and turn to a much more basic problem with viewing principles such as corrective, distributive and retributive justice as sources of potentially conflicting practical demands.

III. CORRECTIVE AND DISTRIBUTIVE JUSTICE DO NOT COMPETE

The final, and perhaps the most pressing, problem with the conservatives' appeal to corrective justice to support their claim about liability's indispensability, is that this appeal treats corrective justice as if it were just one of a number of alternative principles which can be cited to justify the reactive norms which one prefers, and that in choosing which principle to cite we are not constrained in any way. However, if distributive and retributive justice are indeed the counterparts of corrective justice in that they can *all* generate their own practical demands, then there must surely be some principled way to arbitrate between those often conflicting practical demands, and as the previous section already showed, the practical demands of corrective justice will not necessarily trump those of distributive justice when this is done. Our other option is to not conceive of these as *autonomous* principles, each of which is capable of generating its own set of practical demands, but rather to only see them as components of a wider and more integrated theory of justice. However, as I will now explain, when this is done corrective justice will no longer favour tort law's reactive norms because *as a mere component* of a wider theory of justice, it will not have *any* practical demands of its own, and hence such non-existent practical demands will neither be able to conform- nor to conflict with either tort law's or with no-fault systems' reactive norms.

Apparent conflict between corrective and distributive justice: Larry Alexander has argued that '[s]ocial philosophy is embarrassed by the existence of more than one first principle, that is, by two or more principles that have overlapping domains of applicability and that do not stand to each other in the relation of lexically superior and subordinate or primary and

derivative' (Alexander 1987:2-11). The principles⁸⁸ that Alexander refers to in this passage are those of corrective, retributive and distributive justice; and the reason why he alleges that social philosophy has reason to be embarrassed is because although on many theorists' accounts each of these principles is meant to yield categorical conclusions about what ought to be done in the situations to which that principle applies, unfortunately these conclusions can not be categorical because often the other principles also seem to apply equally well to those very same situations, and they yield very different and incompatible conclusions about what ought to be done in those particular situations.

Alexander takes three steps to explain how the conflict between corrective, retributive and distributive justice comes about. Firstly, to demonstrate how conflict can arise between the demands of retributive and distributive justice, he asks us to consider the following case:

A, a mean-spirited person, has an entitlement (through inheritance, say) to a rowboat. *B*, a child, is drowning. *C* takes *A*'s rowboat over *A*'s protest to rescue *B*, thus violating *A*'s rights. *C*'s act is 'wrong' [and so deserves punishment according to retributive justice. But according to distributive justice] *C* deserves praise and reward, not blame and punishment, [even]though *C* violated a right. [Hence, r]etributive concerns – *C*'s moral desert – do not mesh coherently with [distributive justice's] non-desert-based system of entitlements.

(1987:3)

Secondly, Alexander also argues that:

[r]etributive justice and corrective justice cannot be squared [with one another] because corrective justice requires compensation from persons that exactly equals the amount of harm [that] they have caused[, but] this requirement will frequently cause suffering either more than or less than retributively deserved [because:] 1. Some persons engage in highly culpable wrongful acts that fortuitously cause no damage or only minimal damage. 2. Some persons engage in minimally culpable wrongful acts that fortuitously cause cataclysmic damages ... that if fully compensated would cause the wrongdoer to suffer far in excess of her culpability, [and] 3. In our tort system, persons who cause damages for which they are liable have often engaged in activities that are not culpable at all.

(1987:4-5)

⁸⁸ It does not matter that Alexander refers to these as *principles* of justice rather than (e.g.) as *forms* of practical reasoning, since even when corrective, retributive and distributive justice are seen as forms, each of them is still thought to require rather different things under the same circumstances.

Finally, to demonstrate how conflict can arise between corrective and distributive justice, Alexander asks us to consider another example:

Suppose [that distributive justice] requires that *A*, *B*, *C* and *D* each have 10 units of goods, and [that] they have [in fact] each received those 10 units. Now suppose further that *A* acts in a way that destroys 4 units of *D*'s goods. The 'equal shares' formula of distributive justice, with only 36 units of goods to distribute, would demand that *A*, *B*, and *C* each contribute a share to *D*, so that each now has 9 units of goods. Corrective justice would, however, require that *A* give *D* 4 units of goods, with the result that *A* now has 6 units while *B*, *C* and *D* have 10. Unless we have some reason to believe that corrective justice 'trumps' distributive justice, we have no method of resolving this conflict without jettisoning either corrective justice or distributive justice.⁸⁹

(1987:6)

Alexander's argument can be supplemented with examples of familiar controversies within political philosophy, which are also symptomatic of this apparent conflict between different principles of justice. For instance, the debate between John Rawls and Robert Nozick, concerning the question of whether patterned or historical principles of justice provide the correct account of justice in holdings, is another example of the way in which different conceptions of justice can yield different and often incompatible conclusions about what ought to be done in a particular situation to observe the requirements of justice. While Nozick's entitlement theory sees justice in holdings as a historical matter whereby the moral legitimacy of a certain distribution of resources is seen as hinging on the moral justification of the *processes* which created that distribution,⁹⁰ on Rawls' account justice in holdings is a matter of whether the pattern of *outcomes* generated by the transfers of resources between individuals conforms to the political criteria which would be endorsed by people in positions of relative equality. Consequently, although in Alexander's third example Nozick's entitlement theory would endorse the same sorts of conclusions as those which were required by corrective justice, the requirements of Rawls' theory would echo the requirements of distributive justice. The relevance of the debate between Rawls and Nozick to the current discussion is that since each theorist endorsed a radically different conception of justice in

⁸⁹ Alexander develops a similar argument directed specifically at entitlement theories of distributive justice such as (e.g.) Nozick's and Epstein's theories (1987:7-11).

⁹⁰ ... that is, processes involved in both the *acquisition* and the *transfer* of those resources ...

holdings, it should have come as no surprise that they would not agree about which distributions of resources were just, and which ones were in need of rectification.⁹¹

In situations that involve disputes about the alleged practical demands of justice, each of these three principles may require us to do something different. But yet, we can not do all of these things concurrently since doing one of them may be incompatible with doing what another principle requires us to do. Hence, without some way of arbitrating between these often conflicting practical demands, we are left in a position of serving three separate masters, each whom might be of a different mind about what we allegedly ought to do in that situation to observe the requirements of justice.

Resolve the conflict by eliminating corrective justice: A common way of attempting to overcome this problem is by trying to eliminate one of these principles, and by reconciling only the remaining two principles with one another. For instance, James Nickel has argued that corrective justice ought not to be conceived of as being autonomous from distributive justice, because the only departures from prior distributions of resources which should ever be rectified as a matter of justice are those which would otherwise create a distributively unjust outcome. On Nickel's account, corrective justice is nothing more than the executive stage of distributive justice — he views its sole function as being to correct departures from prior just distributions, but the question of precisely which of those distributions were just must on his account be settled in terms of the conception of justice in holdings embodied within the principle of distributive and not corrective justice (Nickel 1976-7). Along almost identical lines, Larry Alexander (1987) also argued that although distributive and retributive justice can be retained and reconciled with one another, that corrective justice should be jettisoned because it can not be reconciled with the other two principles, and because he views the demands of distributive justice as prior to (and hence as always liable to override) the demands of corrective justice. Finally, more recently, David Wood has also argued that corrective justice seems at best to be nothing more than the executive stage of distributive

⁹¹ Although Nozick's discussion (and to a lesser extent Rawls' discussion) tends to blur the distinctness of these two principles of justice (i.e. of corrective and distributive justice respectively) by placing them both under the single umbrella heading of 'distributive principles', I do not think it unfair to characterize their disagreement by suggesting that while Rawls' idea of what justice in distributions might involve is captured by the principle of distributive justice, Nozick's idea of justice in distributions is captured by the principle of corrective justice (Rawls 1973a; Nozick 1974d). Alexander certainly suggests that their debate can be viewed in this manner (1987:2-4), but he is not alone since others have also suggested this interpretation (e.g. Benson 1991-2; Perry 2000b:247, 54). Christopher Schroeder (1990-1:160-1) also believes that corrective, distributive and retributive justice are in need of being reconciled with one another. Also see Justice Mason's (2000) discussion.

justice, and that given the conflict between them, corrective justice should not even be seen as a legitimate principle of justice (Wood 2004).⁹²

However, I shall not employ Nickel's, Alexander's or Wood's strategy here because I do not find the intuitions which corrective justice attempts to express to be so implausible that they only deserve to be eliminated. However, since I do not endorse the specific conclusions which conservatives reach by developing these intuitions either, in what follows I will discuss how another corrective justice theorist – namely, Peter Benson – has developed these intuitions.

Benson's account of corrective justice: Like Weinrib, Peter Benson (1991-2) agrees that the normative basis of corrective justice is the Kantian concept of abstract right which emerges out of our moral personality — that is, which emerges out of our ability to abstract away from the actual, to free ourselves of contingency and determinism, and by virtue of which we are responsible agents. Furthermore, although corrective and distributive justice are also distinct from one another on Benson's account⁹³ – for instance, on his account only distributive justice can specify the sorts of things that can be owned and the precise content of rights and liberties that ownership confers onto owners – Benson believes that to respect the requirements of abstract right, distributive justice must not make it impossible for agents to exercise their moral capacities, and so he maintains that in this way corrective justice does indeed have lexical priority over distributive justice because it imposes constraints upon what is otherwise the sovereign domain of distributive justice (Benson 1991-2:527).

⁹² Others have taken an even more direct route to the pro-distributive justice conclusion and argued that since a 'just distribution of resources requires equality of treatment based on need[, that] the availability of an identifiable tortfeasor ... or the cause of the disability ... ceases to be relevant' (Stapleton 1986b:115). However, I think that this line of argument is too quick because it is not immediately obvious that what counts as equal treatment is just a matter of the relevant parties' need since, for instance, luck egalitarians are often prepared to depart from *strictly* equal treatment (where this is required to preserve the effects of people's choices while eliminating the effects of their good or ill fortune) while still claiming that such treatment would constitute *equal* treatment *per se* (e.g. Markovits 2003). Something more needs to be said here about either what constitutes equal treatment (since it is implausible to suppose that only strictly equal treatment fits this bill), or about why taking account of 'the cause of the disability' (e.g. in cases where the victim's disability was caused by their own culpable failure to pay sufficient attention to what they were doing, or even when they intentionally injured themselves) would necessarily lead us to not treating them equally.

⁹³ Benson insists that corrective and distributive justice are distinct in the sense that neither is *reducible* to the other (1991-2:527). Contrast this to either Nickel's, Alexander's or Wood's claim that corrective justice is merely the executive stage of distributive justice, and hence that its concerns ultimately do *reduce* to the concerns of distributive justice.

However, unlike Weinrib, on Benson's account this lexical priority does not entail that the practical demands of corrective justice outweigh the practical demands of distributive justice, because Benson also argues that distributive justice imposes reciprocal constraints upon corrective justice since on his account it sets the bounds to what corrective justice can (and indeed what it *must*) protect by spelling out the criteria which make it possible to even recognize whether a *particular* loss constitutes an infringement of someone's abstract right (Benson 1991-2:615-6). Benson insists that to distinguish right from wrong in *particular* situations, we must reach beyond the concept of abstract right – i.e. beyond neutral ideas like freedom and equality (see §5.1.2. for an explanation of why I refer to them as neutral *per se*) – and enlist the aid of substantive public conceptions of justice which specify the equalisanda that must allegedly be equalized, and the regimes of distribution which might be required, for justice to be observed, however this he claims is the sovereign territory of distributive justice (1991-2:528, 602). For reasons which are not dissimilar to those mentioned in §4.2.4.(ii). above in the context of criticizing Weinrib's account, Benson also argues that the concepts employed by corrective justice are too disembodied to support practical conclusions with the sort of substantive content that is required to justify (e.g.) tort law's *loss* shifting remedy, and so he insists that corrective justice must inevitably be anchored to some normatively plausible conception of *the good*, and that, he insists, will have to be specified by a theory of distributive justice. Consequently, on his account abstract right can not by itself (i.e. prior to consulting our theory of distributive justice) establish entitlements to *any* external objects (e.g. to the benefits of tort liability), because it is the role of distributive justice to specify which objects can be owned and what bundle of rights and liberties ownership of those objects might confer onto owners (Benson 1991-2:617-8).

Put another way, Benson's point is that we can not determine the content of a person's entitlements, or whether their rights have even been violated for that matter, if all we have to go on is the subject matter of corrective justice, because corrective justice only tells us that people's capacities as persons should be respected and not infringed. But to determine how these capacities can be respected or promoted, or whether a particular loss infringed another's moral personality, Benson insists that we must look to distributive justice, because distributive justice is what specifies the substantive interests that we value and hence protect. On Benson's account, the principles of acquisition and transfer described by corrective justice operate on a domain the content and scope of which is specified exclusively by distributive justice, and so although he would agree that corrective justice imposes some constraints onto distributive justice, he would also insist that the latter imposes some reciprocal constraints on the former, and Benson sees these mutual constraints (rather than the priority of one over the

other) as the essence of the relationship between corrective and distributive justice (1991-2:618-9).

Relevance of Benson's account to the present discussion: My aim in this section has been to explain why isolated appeals to corrective justice can not justify the conservatives' position — i.e. to explain why it is not necessarily a requirement of justice that causally responsible parties should compensate their victims for their accidental losses, and hence why justice does not favour those systems which use the loss shifting mechanism. Thus, borrowing from Benson, my present point is that to arrive at conclusions regarding what allocation of compensatory rights and duties is required *as a matter of justice*, we need to integrate the allegedly autonomous and separate principles (or forms) of justice into a single coherent theory. However once this is done, it will no longer make sense to claim, as conservatives do, that corrective justice favours tort law's scheme of compensatory rights and duties — that justice favours the mechanism of liability — because *by itself* corrective justice does not favour *any* mechanism at all since by itself it does not have *any* practical demands at all. On my Bensonian account, although corrective and distributive justice are distinct, neither can by itself generate any practical conclusions — i.e. conclusions about how we ought to act — and so corrective and distributive justice can never as such come into conflict with each other over the practical demands that they impose upon us because neither corrective nor distributive justice imposes any demands on its own.⁹⁴

Like Weinrib, Benson recognizes that corrective and distributive justice concern themselves with qualitatively different content and that corrective justice imposes constraints onto distributive justice. But unlike Weinrib, Benson also points out that distributive justice imposes reciprocal constraints onto corrective justice, which is why he maintains that each form of justice is complementary (rather than opposed) to the other form of justice — i.e. because each one provides an element which is required for reasoning to generate practical conclusions about how we ought to act if justice is to be observed. On Benson's account, to determine whether justice favours tort law's or no-fault's mechanism, we must consult the content of distributive justice since that is after all where our convictions about the value of competing interests will be expressed. However, unless conservatives can show that accident

⁹⁴ Technically, conflict *can* occur between corrective and distributive justice on the Bensonian account when the domain and scope of rights and duties specified by distributive justice is insufficient to allow agents to exercise their moral personality (e.g. when it does not permit agents to exercise their capacity for ownership) (1991-2:620). However, the possibility of *this* sort of conflict in no way favours the conservatives' position, because to do that they would have to establish that the protection which no-fault systems offer to specific substantively-specified interests is as a matter of fact inadequate to enable agents to exercise their moral capacities.

law should embody *their* values, and hence that it should protect victims' injured security interests by imposing compensatory burdens onto injurers (presumably because liberty interests are less important than security interests), then they will have failed to show that justice favours tort law's scheme of compensatory rights and correlative duties, or simply, that justice requires that liability be imposed onto causally responsible parties for the losses that they accidentally impose onto their victims, and hence that no-fault systems are morally objectionable on account that they use the loss distribution rather than the loss shifting mechanism.⁹⁵

4.2.5. THE LOSS SHIFTING MECHANISM IS NOT INDISPENSABLE

This section has assessed five arguments which are often cited in support of the claim that tort law's loss shifting mechanism plays an indispensable role in ensuring that everyone takes due responsibility for their actions, and hence that in using the loss distribution mechanism no-fault systems can not ensure that everyone will take due responsibility for their actions. However, I have argued that all of these arguments are un-convincing, and consequently I now conclude that the fact that no-fault systems use the loss distribution- rather than the loss shifting mechanism is no reason to suppose that no-fault systems might fail to ensure that everyone takes due responsibility for their actions.

4.3. CHAPTER SUMMARY

After clarifying the concept of responsibility and standardizing the language used to discuss responsibility disputes, §4.1. suggested that the five arguments cited in §3.2.1. were intended to support the claim that the loss shifting mechanism plays an indispensable role in ensuring that everyone takes due responsibility for their actions, or put another way, those arguments are meant to support the conservatives' belief that the law should retain (or adopt) the reactive norm of tort liability. However, in §4.2. I argued that these arguments are not compelling, and

⁹⁵ Whether a *fully worked out* theory of justice – i.e. one which integrates and reconciles the plural demands of corrective, retributive and distributive justice – would support the conservatives' position, is a question which I leave un-answered, because to answer this question I would have to take a stance on which account of distributive justice is the most normatively plausible — i.e. I would have to take a stance on which things are valuable and about how valuable they might be (both in absolute and in relative terms). However, such an argumentative strategy would base too much of my own argument on assumptions about the substantive value of various competing interests, and such assumptions are at best highly contestable and hence they can not provide a solid foundation for my arguments. But, in any case, this still means that exclusive support for tort law will only come about if the conservatives' intuitions about the value of competing liberty and security interests are accepted as being more normatively plausible than the reformers' intuitions.

so I concluded that we therefore lack convincing reasons to suppose that the loss shifting mechanism is indeed indispensable. Given that the loss shifting mechanism is not indispensable (or at least that we lack convincing reasons to suppose that it *is* indispensable), the fact that no-fault systems use another mechanism (i.e. that they *distribute* rather than *shift* losses) is therefore no reason to suppose that they might fail to ensure that everyone takes due responsibility for their actions, and for this reason I now reject the responsibility allegation.

5. COMPENSATION

Having dealt with the responsibility allegation in the previous chapter, this chapter sets out to defend no-fault systems from the other allegation which conservatives level against them — i.e. it defends no-fault systems from the compensation allegation.

If compensatory policies specified through process-oriented criteria were indeed superior to those specified through outcome-oriented criteria, then tort law's compensatory decisions would set a compensatory benchmark or norm, and so no-fault's departures from that norm would rightfully attract legitimate criticism *qua* departures from a norm. However, §5.1. will reject the two arguments which are meant to show that tort law's compensatory policies are superior to no-fault's compensatory policies — i.e. it will reject the responsibility- and the impartiality arguments. Consequently, §5.2. will then argue that as far as compensatory questions are concerned — that is, that as regards questions like *who* should be compensated, *for what* they should be compensated, and *how much* compensation they should be offered — there is no reason to suppose that no-fault systems' departures from tort law's compensatory standards are a cause for concern *qua* departures.

However, this does not show that no-fault systems' compensatory decisions are correct, but only that the conservatives' objections to them lack warrant. Thus, in my concluding remarks I will also note that my rejection of the compensation allegation should not be treated as a positive endorsement of no-fault systems' approach to compensatory issues, but only as a rejection of two weak bases for the compensation allegation.

5.1. TORT LAW'S COMPENSATORY POLICIES ARE NOT SUPERIOR

Conservatives offer two arguments to support their claim that compensatory policies specified through process-oriented criteria (i.e. those of tort law systems) are superior to those specified through outcome-oriented criteria (i.e. those of no-fault systems) — I have called these the *responsibility-* and the *impartiality* arguments. However, this section rejects both of these arguments, and this rejection entails that no-fault systems' compensatory decisions (which differ from those of tort law systems) are therefore not objectionable *qua* departures from tort law systems' compensatory standards.

5.1.1. THE RESPONSIBILITY ARGUMENT FAILS

According to the responsibility argument, since rights must ultimately be underpinned by correlative duties, a victim's compensatory rights will only exist when somebody else was causally responsible for their losses – i.e. when the loss came about through a process which crucially involved another person's actions – because on the conservatives' account *that* is the only time when somebody else will have a correlative compensatory duty in virtue of *being* causally responsible- and hence of having to now *take* due responsibility for that loss. Hence, conservatives claim that to determine if someone should be compensated or not, we should look at *how* their loss came about – specifically, we should check whether someone else was indeed causally responsible for it – rather than asking whether that loss was sufficiently important to warrant compensating them for it, because the latter approach (i.e. the one taken by no-fault systems) will not necessarily yield any information about whether somebody else was causally responsible- and hence whether they should now take responsibility for that loss.

The responsibility argument is brief, and my reply to it is also brief. In essence, two crucial assumptions underlie the responsibility argument: (i) that whoever was causally responsible for another's losses should now *take responsibility* for their actions; and (ii) that to take that responsibility they should *compensate their victims* for their losses. After all, without these assumptions it would be a *non sequitur* to claim that by identifying losses for which others were causally responsible we would thus identify losses for which victims necessarily had *compensatory rights* on account of the fact that some other party would have a *duty to take responsibility* for those losses — causally responsible parties would only have *compensatory* duties if they should indeed take responsibility for their actions and if accepting liability for their victims' losses was indeed the proper way to take that responsibility, and so victims would likewise only have the correlative compensatory rights if these two conditions were met.

But as the previous chapter argued, it is neither clear that *causally responsible parties should take responsibility*, nor that *compensating our victims for their losses* is an essential part of taking that responsibility. Although causally responsible parties *may* indeed need to do *something* to take responsibility for their actions, conservatives offer no convincing reason to suppose that *compensating victims for their losses* is one of those things. But, if it is not necessarily true that causally responsible parties should take responsibility, nor that compensating our victims for their losses is an essential part of taking responsibility, then causally responsible parties need not necessarily compensate their victims, and so it is indeed a *non sequitur* that by identifying losses for which others were causally responsible we

identify losses for which victims will necessarily have compensatory rights.¹ Thus, the responsibility argument fails to establish that tort law's compensatory policies (specified as they are through process-oriented criteria) are superior to no-fault's compensatory policies (which are specified through outcome-oriented criteria) – i.e. it fails to show that tort law's compensatory decisions are norms, and thus that departures from those decisions can be criticized *qua* departures from norms – because the losses which are picked out by tort law's compensatory policies are not necessarily ones which others should bear liability.

5.1.2. THE IMPARTIALITY ARGUMENT FAILS

The second reason why conservatives insist that compensatory policies should be specified through process-oriented criteria is their conviction that this is the only way for the state to remain impartial with respect to its citizens' plural conceptions of the good. Now, if this was indeed the only way for the state to remain impartial, then the compensatory decisions of tort law systems could indeed be treated as setting a *de-facto* compensatory baseline or norm, and thus departures from this norm (e.g. by no-fault systems, which use other criteria to specify their compensatory policies) could be criticized as departures from compensatory norms and thus as instances of under- and over-compensation. However, this section will argue that the impartiality argument does not justify a conclusion which favours tort law's way of specifying compensatory policies, because in fact this argument is equally scathing of *both* tort law's and no-fault's approaches to specifying compensatory policies.

I. THE FAIRNESS PRINCIPLE

Jules Coleman and Arthur Ripstein (1995) discuss the impartiality argument in the context of considering whether the suggestion that everybody should bear the costs of their own actions – a suggestion which they call the 'fairness principle' – should be understood in *value-neutral* terms or whether it should rather be understood in *value-laden* terms. On their account, the idea that everyone should bear the costs of their actions is a hallmark of liberal theories of

¹ Put another way, I take no stance on whether the losses which are identified through tort law's compensatory policies will indeed be ones for which people other than the victims are *causally responsible*, but as the previous chapter argued, the fact that somebody else is causally responsible shows neither that somebody else should now *take responsibility* for them, nor that they should take responsibility *in that particular manner* (i.e. by accepting tort liability) — an appropriate reactive norm is also needed to justify the transition from claims about causal responsibility to either of these two latter claims about liability responsibility. But, if others would not necessarily have a duty to compensate victims for losses which are identified through tort law systems' compensatory policies, then contrary to the conservatives' claim, the victims of those losses would not necessarily have compensatory rights (grounded in their injurers' correlative compensatory duties) either.

justice.² But they insist that for this idea to even be intelligible, we first need a prior specification of the conditions that must be satisfied in order for a loss to be seen as *a cost of our own actions* (i.e. as a merely unfortunate- and thus not as a compensable loss) as opposed to being seen as *a cost of somebody else's actions* (i.e. as a wrongful- and thus as a compensable loss), and unfortunately different conditions are favoured by these two competing interpretations of the fairness principle. Namely, when the fairness principle is understood in value-neutral terms, then it is thought to require the state to treat all losses which came about *through a particular process* as the costs of others' actions — i.e. the value-neutral interpretation of this principle favours conditions specified by process-oriented criteria like *fault* and *causation*. On the other hand, when the fairness principle is understood in value-laden terms, then it is thought to require the state to treat all losses *of a particular kind and/or magnitude* as the costs of others' actions — i.e. the value-laden interpretation of the fairness principle favours conditions specified by outcome-oriented criteria.

Coleman and Ripstein acknowledge that many liberal theories of justice adopt a value-neutral interpretation of the fairness principle precisely because liberals take this to be the only interpretation which gives equal protection to everybody's interests while at the same time allowing everyone the freedom to formulate and pursue their own conception of the good.³ For instance, while libertarians try to use the allegedly process-oriented criterion of *causation* to specify the conditions that must be satisfied in order for a loss to be treated as a cost of somebody else's (as opposed to our own) actions, egalitarians try to use the allegedly process-oriented criterion of *choice* to specify these conditions. However, Coleman and Ripstein insist that although the liberals' impartiality argument sounds initially convincing, the aim of protecting people's interests by appeal to a value-neutral interpretation of the fairness principle can not be met since process-oriented criteria are simply too indeterminate to distinguish those losses which are costs of *our own*- from those losses which are costs of *other people's* actions (or, for that matter, which are the consequences of natural causes).

² See §3.2.2.(ii). for an explanation of this position. Coleman and Ripstein write: 'Let us refer to the claim that each person should bear the costs of her activities as the principle of fairness. That principle requires a conception of the costs of an activity[, and *any form of liberalism* must answer the question of where misfortunes properly lie in a way that satisfies the principle of fairness' (Coleman and Ripstein 1995:94, emphasis added). The same sentiments are also expressed by luck egalitarians who claim that people should bear the costs of their own choices, but only once those choices have been adjusted to take account of the effects of brute luck (e.g. see Markovits 2003).

³ (Coleman and Ripstein 1995:97) Will Kymlicka also agrees that state impartiality is a central feature of liberal political theories when he suggests 'that we [will best] promote people's interests by letting them choose for themselves what sort of life they want to lead' (Kymlicka 1990b:199).

Coleman and Ripstein discuss libertarianism and egalitarianism to demonstrate why process-oriented criteria such as *causation* and *choice* are in fact incapable of distinguishing *costs of my actions* from *costs of your actions*. Hence, their reflections on how the fairness principle should be understood are also relevant to our own inquiry — i.e. to the question of whether compensatory policies specified through process-oriented criteria are indeed superior to those specified through outcome-oriented criteria or not.⁴

II. THE FRUSTRATED ASPIRATIONS OF LIBERTARIANS AND EGALITARIANS

Coleman and Ripstein describe the libertarians' use of the *causation* criterion as a response to the callousness of the 'Hobbesian State of Nature', and the egalitarians' use of the *choice* criterion as a response to the boundless generosity of the 'World of Perfect Community' (Coleman and Murphy 1990b). In a Hobbesian State of Nature, victims would normally bear their own losses irrespective of how those losses came about — this is sometimes referred to as the *default victim* liability rule.⁵ At the other extreme, in a World of Perfect Community, by default all losses would be shared in common — I shall refer to this as the *default society* liability rule. The problem with both of these extremes however is that each seems to allow some people to get away without bearing the costs of their actions⁶ — i.e. neither extreme satisfies the requirements of the fairness principle. In the Hobbesian State of Nature, even those who *intentionally* harm others would not have to bear the costs of their actions because nobody would ever be forced to compensate others since there would be no state to do the

⁴ The argument presented in the present section draws predominantly on Coleman and Ripstein's discussion of the problem of indeterminacy, because their paper combines a discussion of the topic of indeterminacy with a discussion of the impartiality argument. However, the impartiality argument is also discussed in Stephen Perry's 'The Impossibility of General Strict Liability' (originally published in 1998, and reprinted in 2000c), and in Perry's paper 'The Moral Foundations of Tort Law' (1992b) which predates Coleman and Ripstein's explanation of how the criteria of causation and choice lead to indeterminacy. Christopher Kutz has also discussed this problem recently (2004:583).

⁵ However, as I point out in a note at the end of §2.1.1., *tort law's* default victim rule is nowhere nearly as nasty as what would occur in the Hobbesian State of Nature, since fault-caused losses are after all compensable under negligence systems. Coleman and Ripstein's characterisation of the compensatory situation in a State of Nature should perhaps be tightened up, since those who would be particularly strong and who had many friends could in fact compel their injurers to compensate them. The point however is that without a state to enforce moral entitlements to compensation, many people would face the sorts of 'inconveniences' that Nozick said would be experienced in a Lockean State of Nature (Nozick 1974a). Coleman and Ripstein's main point is simply that by default no one would be compensated in a Lockean or Hobbesian State of Nature.

⁶ ... or, put another way, each seems to allow some people to get away *without taking due responsibility for their actions* ...

forcing — in a sense, there would be gross under-compensation in the State of Nature. Similarly, in the World of Perfect Community, indulgent and imprudent individuals who fritter away their resources would not have to bear the costs of their actions either, because there all losses would be held in common by society — and so, by contrast, there would be gross over-compensation in the World of Perfect Community. In the Hobbesian State of Nature victims of armed robbery would be treated on par with victims of natural disasters (*neither* would be compensated), and in the World of Perfect Community gamblers and spendthrifts would be treated on par with victims of misfortune (*both* would be compensated). Thus, Coleman and Ripstein contend that people could get away without bearing the costs of their actions in both scenarios because too few would be compensated in the Hobbesian State of Nature, and too many would be compensated in the World of Perfect Community.

Libertarians and egalitarians start at opposite ends of the socio-political spectrum delimited at one end by the Hobbesian State of Nature and at the other end by the World of Perfect Community, though each is one step removed from the respective extreme position. Coleman and Ripstein suggest that while libertarians attempt to use the process-oriented criterion of *causation* to exclude some instances of losses from the callous *default victim* liability rule,⁷ egalitarians attempt to use the process-oriented criterion of *choice* to exclude some instances of losses from the overly generous *default society* liability rule.⁸ So while libertarians equate ‘the costs of one’s actions’ with the seemingly process-oriented notion of ‘the *consequences* of one’s actions’, egalitarians equate ‘the costs of one’s actions’ with the seemingly process-oriented notion of ‘the costs of one’s *choices*’.⁹ But although libertarians and egalitarians use *different* criteria to shun the problematic default liability rules of the extremes at which they initially find themselves, their aim is nevertheless *the same* — i.e. to ensure that everyone bears the costs of their actions (to observe the fairness principle).

However Coleman and Ripstein argue that neither attempt to observe the fairness principle’s requirements is totally successful because process-oriented criteria like causation

⁷ ... in an attempt to ensure that those losses *will* generate compensatory entitlements — i.e. to avoid under-compensation. The reason why I say that this rule is *callous* is because it treats victims of armed robbery on par with victims of natural disasters, even though it might be thought that while the former’s losses are obviously wrongful, the latter’s losses are only merely unfortunate.

⁸ ... in an attempt to ensure that those losses *will not* generate compensatory entitlements — i.e. to avoid over-compensation. The reason why I suggest that this rule is *overly generous* is because it seems to provide compensation even to victims of merely unfortunate losses.

⁹ *Causation* and *choice* are described as process-oriented because it seems that to determine if something is a cost of our actions, we do not check *what* was lost, but only *how* that loss came about — whether it was *caused* by another, or whether it was a consequence of another’s *choices*.

and choice are *indeterminate* — i.e. neither can unambiguously distinguish losses which are costs of others' actions from those which are not costs of others' actions, without resort to some further criterion, and for precisely the same reason, this criterion can not be process-oriented but (perhaps surprisingly) it must rather be outcome-oriented.

Libertarianism and the indeterminacy of causation: Libertarians use the criterion of *causation* in their attempt to ensure that victims who seem to have a legitimate claim to compensation — i.e. those whose losses were *caused* by another — get their entitlements, and that their injurers bear the costs of their own actions. The rationale behind using this criterion is that it initially seems capable of distinguishing losses which should be borne by injurers from losses which should be borne by victims, since *prima facie* it seems plausible that in answer to the question 'For which losses should victims be entitled to compensation?', we should reply 'For those losses which were *caused* by somebody else.'¹⁰ Since libertarians hold that everybody owns themselves — and by extension that everybody also owns their labour and the fruit of their labour — they therefore reason that if people were not liable for the consequences of their actions then this would allow some people to breach other people's moral boundaries.¹¹ On this account, since the consequences of my actions are the fruit of my labour (rotten and unwelcome as they may sometimes be), by extension of the libertarian principle of self-ownership their proper place is with me, and if I were not required to compensate others for the consequences of my actions then something that should allegedly lie with me might be left within somebody else's boundary. This boundary-crossing rationale is taken by libertarians to justify their use of the criterion of *causation* to exclude some apparently legitimate victim claims for compensation from the libertarian's inherited but callous default victim rule,¹² which would deny compensation even to seemingly deserving victims.

However, as Coleman and Ripstein point out, what libertarians apparently fail to notice is that causation is everywhere.¹³ Coleman and Ripstein argue that:

[although t]he injurer's role [in accidents] is obvious ... the victim's role is no less real. In all but the most bizarre cases, the accident could have been prevented had

¹⁰ It seems equally plausible that in answer to the question 'Which losses or costs do injurers have a duty to bear?', we should reply 'Those which are of their own making' or 'Those which they caused'.

¹¹ For example, Nozick holds that although '[v]oluntary consent opens the [moral] border for crossings' by others, all other crossings (including accidental ones) are morally troublesome and thus in need of rectification (Nozick 1974c:57-8).

¹² ... *inherited*, that is, from the Hobbesian State of Nature, from which they are one step removed ...

¹³ I previously mentioned this in §4.1.1.(i), and in passing in §4.2.4.(iii)..

the victim stayed home, taken a different route, or whatever. Thus, any injury is always a joint product.

(Coleman and Ripstein 1995:104)

To ensure that legitimate claims for compensation are not frustrated by the callous *default victim* liability rule (the rule that denies compensation to *all* victims by default), the criterion of *causation* would have to demarcate moral boundaries between separate people. But Coleman and Ripstein maintain that this criterion can't perform this function because as I explained in §4.1.1.(i)., whether something is classified as a *cause* of an event or merely as its *condition* depends on various other issues, and so these other issues (and not *causation*) would actually end up doing the work of distinguishing losses from one another as either costs of *my* actions or as costs of *your* actions. They argue that:

[t]he libertarian had hoped to embrace a general regime of strict liability as an interpretation of the idea that people should bear the costs of their activities. But any attempt to retrieve that idea by narrowing the range of causation [by calling some causes 'conditions'] faces a dilemma. If we concede that the explanatory interest we are pursuing in identifying causes is tied to our interest in assigning liability[, then] we must first interpret the idea that people should bear the costs of their choices in order to know our explanatory purposes in establishing liability. Of course, if we need an interpretation of the principle in order to distinguish causes from conditions, [then] causation cannot itself provide the basis for an interpretation. Thus, causation provides no leverage in distinguishing plaintiff from defendant unless we already have some other way to distinguish them.

(Coleman and Ripstein 1995:105)

Coleman and Ripstein's point seems to be that although in a purely mechanical sense the criterion of *causation* can identify a number of different contributors, it can not provide us with special reasons to treat any one of those causes as particularly significant. Causes can be treated as significant only when they are the hallmark of agency or responsibility, but agency requires something more than mere mechanical causation. Hence, the criterion of *causation* fails to demarcate the moral boundaries between separate people, and this is why it ultimately fails to exclude all legitimate victim claims for compensation from the callous *default victim* liability rule — i.e. why it fails to avoid under-compensation.

*Egalitarianism and the indeterminacy of choice:*¹⁴ Egalitarians use the process-oriented criterion of *choice* in their own attempt to prevent those who they believe are *not* entitled to

¹⁴ I comment on the problems associated with luck egalitarianism in §6.3..

compensation – e.g. those who lost out due to their own imprudence, indulgence, their own individual expensive tastes, and so forth – from being compensated. The rationale for using this criterion is that it also initially seems capable of distinguishing losses which should be borne by injurers from losses which should be borne by victims. Egalitarians believe that although people are responsible for the consequences of their own choices, nobody should be held to account for consequences of circumstances which befall them (Markovits 2003; Vincent 2006). Egalitarians believe that a pertinent distinction can be drawn between ‘option luck’ for choices and ‘brute luck’ for circumstances (e.g. Dworkin 1981:293), and so they try to exclude illegitimate claims for compensation from the overly generous *default society* rule by equating ‘the costs of one’s actions’ with ‘the costs of one’s choices’ (or ‘the costs of one’s option luck’). Although egalitarians believe that people should be compensated for the consequences of their brute luck, they also maintain that nobody is entitled as a matter of justice to compensation for the unwelcome consequences of their option luck.

However a critical problem with using the criterion of *choice* to exclude all illegitimate claims for compensation from the overly generous *default society* liability rule is that even if the distinction between *choice* and *luck* were not riddled with the more common problems,¹⁵ it would still be far from clear that only *conscious* choices should be counted as that person’s choices. *All* actions have some level of risk (no matter how small) associated with them, which leads Coleman and Ripstein to suggest that ‘virtually any human action can be represented as a “calculated gamble”’ — as a choice to either do this and refrain from doing that, or to do that and refrain from doing this.¹⁶ However, since choice is everywhere,

¹⁵ Two problems come to mind. Firstly, it had better not be the case that we must rely on people’s honesty to ascertain whether an action was chosen by them or not, since everyone has ample reason to lie about this when it can affect whether they will be compensated for their losses or not. Secondly, on some accounts – e.g. see Neil Levy’s (2004) comments in this regard, mentioned but subsequently rejected towards the end of §4.1.1.(i). – the truth of determinism is taken to entail that no choices are ever truly our own, because in actual fact all choice is fully determined by prior events which leaves no room for free will and genuine authorship. Daniel Markovits mentions these two objections in his recent paper on the topic of egalitarianism, and he refers to them respectively as ‘moderate scepticism’ and ‘radical scepticism’ regarding ‘whether or not the basic distinction between choice and luck can [even] be held’ (Markovits 2003:2303-4).

¹⁶ They point out that nearly all accidents could have been prevented if the victim had chosen to (e.g.) stay at home rather than doing what they actually did, because even apparently benign choices are risky. They put this point humorously by suggesting that even ‘if I ... stay in my room [in an effort to avoid accidents], I may get bedsores’ instead (Coleman and Ripstein 1995:123). Their point is that everyone *constantly* chooses which risks they wish to take and which ones they wish to avoid, which entails that very few if any outcomes will *not* be a consequence of some choice.

Coleman and Ripstein therefore maintain that egalitarians would never in fact be able to categorize any losses as the results of brute luck (rather than option luck) and hence as compensable, because every outcome would be a consequence of option luck — i.e. every loss would be a consequence of *some* choice (even if only a tacit one) that the victim had previously made. Hence, they conclude that if the criterion of *choice* was used to distinguish losses which were the costs of my actions (and hence my own to bear) from losses which were not the costs of my actions (and hence to be borne in common by society), then society would never bear the costs of *any* losses at all.

Admittedly, egalitarians could attempt to side-step this problem by insisting that for an outcome to count as a consequence of *choice*, risk could not have played any role whatsoever in bringing it about — this way, outcomes that came about as a consequence of a choice which involved only a minor element of risk, could still be classified as consequences of brute luck. But Coleman and Ripstein point out that this move would not really make the egalitarian's position any better, because if *choice* were construed in such a way that for something to count as a consequence of choice it could not have involved any risk at all, then unfortunately every activity which eventually turned out other than how the chooser had anticipated would require compensation — every unwelcome loss would have to be borne in common by society because risk would obviously have played some role in generating it. Accordingly, Coleman and Ripstein conclude that:

... if we construe risk ... expansively, we lose the connection with control that first made [the criterion of *choice*] appealing. But if instead we limit the idea of risk to those circumstances in which the person could in fact control the outcome, the results are still stranger. [For example, i]f you and I [we]re both trying to build a better mousetrap, and I outs[old] you, society would have to indemnify you [since you presumably did not go into competition with me to lose, but to win, and hence the loss must obviously have been an instance of brute unluck]. Indeed, any risk that did not work out would have to be treated as brute luck, thus, leaving the category of option luck ... empty. Like causation in the libertarian's account, [choice] seems to be everywhere and so [it too] provides no way of deciding to whom particular misfortunes belong.

(Coleman and Ripstein 1995:123)

In order for option luck to perform the job it was intended to perform, like *cause*, the criterion of *choice* would also have to be coupled with some further criterion to help us determine which outcomes are the results of option luck (i.e. our own choices) and which ones are the results of brute luck (i.e. not our choices). However this would again mean that

this further criterion, and not the criterion of *choice*, would be doing the work of distinguishing losses which were costs of *our own* actions from those which were costs of *others'* (or *nobody's*) actions. Hence, Coleman and Ripstein conclude that the criterion of *choice* is no more capable of picking out those losses which are the costs of our own actions than the criterion of *causation*, since both criteria are in fact indeterminate.¹⁷

The failure of process-oriented criteria: Libertarians and egalitarians fail to accommodate the fairness principle in different but related ways. Both start out by embracing the default liability rules of attractive (due to their simplicity) but extreme (because they do not accommodate the fairness principle) socio-political positions; each attempts to moderate the extremity of their initial position, and hence to accommodate the fairness principle, by using process-oriented criteria such as *causation* and *choice*¹⁸ to identify exceptions to their overly severe¹⁹ default liability rules; but each ultimately fails to accommodate the fairness principle because process-oriented criteria are simply too indeterminate to identify any exceptions to these default liability rules.²⁰ Coleman and Ripstein therefore conclude that process-oriented criteria such as *causation* and *choice* can not identify exceptions to the *default victim* and *default society* liability rules (adopted respectively by libertarians and egalitarians), precisely because they are unavoidably indeterminate — neither process-oriented criterion can identify

¹⁷ Herbert Hart and Tony Honoré (1959:72) also argue that if person *A* puts person *B* in a position characterized by the fact that all choices which *B* has available to them are sufficiently bad, then although in one sense *B* may 'freely' choose to do something which he knows will generate a bad outcome, but because *B*'s choice was *reasonable* as judged by someone who considers the value of what he would have had to do instead if he made the other choice, we therefore say that *B* did not really choose that but rather that he was coerced into choosing it. So, Hart and Honoré would also agree that substantive value judgments (i.e. judgments concerned with outcome-oriented considerations) play a crucial role in deciding if a person's *choice* will count as *their own* or not.

¹⁸ ... as opposed to outcome-oriented criteria which focus on such things as the *type* of loss that it was (e.g. was it the loss of a limb or was it only a bruised ego), its *extent* (e.g. large or only small), its *impact* on the victim (e.g. catastrophic versus superficial), and so forth ...

¹⁹ ... i.e. either too *callous* or too *generous* ...

²⁰ Perry points out that Ronald Coase made essentially the same point – i.e. that causation and choice are indeterminate – thirty years earlier in his 'critique of A. C. Pigou's thesis that the economically appropriate way to deal with an externality is to place the cost ... on *the* party who caused it' (Perry 1992b:465, original emphasis; Coase 1960). Coase's point here is that most losses are not the consequences of just *one* party's choices or actions (i.e. either the victim's or the injurer's choices or actions), because usually they are consequences of *both* the injurer's and the victim's choices.

any actions as being especially significant, and so neither criterion can fundamentally inform compensatory decisions either.²¹

III. AN OUTCOME-ORIENTED FORMULATION OF THE FAULT CRITERION

Given this conclusion, Coleman and Ripstein go on to point out that it should come as no surprise that even in a negligence system the sorts of considerations that must *actually* go into determining whether someone was at fault or not are not process-oriented after all, but that they are in fact thoroughly outcome-oriented. Negligence systems impose a requirement of reasonable care which specifies how careful one must be in the conduct of their activities, and only when a person has not been sufficiently careful can they be judged as having been at fault. In a negligence system:

[s]o long as I am careful, I am not liable for harms that I cause you. Those misfortunes are yours, as though they had been caused by [your own actions or by] some natural event. [However i]f I am careless, then I am liable for whatever harms I cause you – those misfortunes are mine, costs of my activity which I must bear. The whole point of the [negligence] system is that when I am careless I may own more than the intended consequences of my actions; hence, the duty to repair.

(Coleman and Ripstein 1995:109)

In order to establish that someone else should compensate us for our losses under a negligence system, we must show that they were indeed too careless and that this carelessness was the cause of the accident (Stuhmcke 2001:1-3). But whether someone was careless or not is not something that can be determined *without* taking into consideration the value of the competing interests that were at stake — that is, of what the injurer stood to gain by acting as they did (which Coleman and Ripstein refer to as the injurer's 'liberty interests') and what the victim stood to lose by being exposed to those actions (which they call the victim's 'security interests'). Rather, to whatever extent the Learned Hand test formulation of the fault criterion – i.e. the formulation of the fault criterion which is inherent in the Learned Hand test for the existence and the scope of a duty of care – is representative of how the fault criterion is generally conceived of by conservatives, it is arguable that whether someone was careless or not depends unavoidably on the outcome of a comparison of the value of the specific liberty and security interests that were at stake. For example, the amount of care expected of

²¹ In fact Coleman and Ripstein's position is that the very project of trying to specify which losses should generate compensatory entitlements by resort to the coupling of a default liability rule together with some criterion that specifies legitimate exceptions to this rule, must inevitably fail because on their account this can not be done without looking at whatever it was that was lost and taking some stance on its value (Coleman and Ripstein 1995:120).

someone whose actions are at risk of causing loss of life is going to be a lot greater than the amount of care expected of someone whose same actions may inadvertently bruise another's ego, and the reason why we are justified in holding them to different expectations is precisely because the value of what the other person stands to lose in the first scenario is so much greater than the value of what the other person stands to lose in the second scenario. The amount of care that we must take in the conduct of our activities varies in accordance with the sort of losses that others are at risk of suffering, with the sort of prospective benefits that we (or society) stand(s) to gain, and with the likelihood that the risk may materialize into harm. Hence, the degree of care that we must take in the pursuit of our liberty interests will always vary with the value of the security interests that we will put at risk by pursuing our own interests, which means that the amount of care that we must take in order to avoid the adverse judgment that our actions were at fault will also vary with the relative value of the competing liberty and security interests.²² This is, after all, why in a negligence system injurers are usually judged to have owed their victims a duty of care when their victims' security interests outweighed their own liberty interests – when it would have been cheaper for them to take greater precautions than for their victims to bear the risk of incurring those losses – i.e. because a consideration of the value of the interests that are put at stake will always bear on such decisions.²³

When I suggested earlier that some *other* non-process-oriented criterion²⁴ would ultimately have to do all of the work of distinguishing the costs of our own actions from the costs of others' actions, it was precisely this kind of outcome-oriented formulation of the fault criterion that I had in mind. However, this formulation of the fault criterion avoids

²² Perry writes that 'due care [is] the level of care that results in optimal care being taken ... by either or both parties ... *if* the other party is exercising due care' (2001:63). Arthur Ripstein also emphasizes this point elsewhere (Ripstein 1999:43-6).

²³ Perry also thinks that this is the same formulation of the fault criterion as the one which is embodied within the Learned Hand test for the existence and scope of a duty of care — he argues that '[f]rom an economic perspective, negligence is ... the failure to take care when the cost of [this] is less than the expected loss' (2001:62-3). Perry also makes this point when he points out that although Epstein attempts to ground his theory of strict liability in the concept of causation, that in the end he 'avoids the Scylla of indeterminacy only by surreptitiously embracing the Charybdis of fault' (Perry 1992b:465). Finally, Perry explicitly advocates an outcome-oriented formulation of the fault criterion in the context of discussing Coleman's 'mixed conception of corrective justice, where he argues that 'fault is, so far as corrective justice is concerned, interest-sensitive; the nature of the victim's detrimentally-affected interest – the aspect of his well-being that was set back – is the *main* concern' (Perry 1992a:936, emphasis added). See §4.2.4. for a discussion of corrective justice, and §3.2.1.(v). for further notes.

²⁴ ... other, that is, than *causation* or *choice* ...

indeterminacy *only by resorting to outcome-oriented considerations*, and so conservatives must therefore acknowledge that they too distinguish wrongful and merely unfortunate losses from one another on the basis of compensatory policies specified through outcome-oriented criteria. Hence, irrespective of whether we choose to protect people's interests through a tort system or through a no-fault system, the state will still need to take some stance on the value of its citizens' interests, because to form judgments about *fault* (or *causation*, or *choice*, or whatever else) victims' injured security interests will still have to be evaluated so that they can be compared to something else — i.e. in no-fault systems they will be compared to the public scale of value which lists those interests that will be protected and those that won't, and in tort systems they will be compared to their injurers' liberty interests.

IV. HOW THIS BEARS ON THE FAILURE OF THE IMPARTIALITY ARGUMENT

On the account presented in §3.2.2.(ii), only a process-oriented formulation of the fault criterion can avoid running afoul of the impartiality argument. However, I have argued that although such a formulation would indeed avoid the Scylla of impartiality, it would unfortunately run into the Charybdis of indeterminacy. Indeterminacy can only be avoided by resort to substantive evaluations of people's interests — in fact, the formulation of fault embedded within the Learned Hand test for the existence and scope of a duty of care, relies precisely on such evaluations — which means that evaluations of outcomes inform *both* tort law's and no-fault's compensatory decisions. Consequently, since both systems' compensatory policies rely on substantive evaluations of outcomes, *both* systems therefore run afoul of the impartiality argument, and so conservatives are not entitled to claim that tort law systems' compensatory policies are superior to the compensatory policies of no-fault systems on account of how well they fare with respect to the impartiality argument.

5.2. REJECTION OF THE COMPENSATION ALLEGATION

The previous section rejected two arguments which were meant to support the claim that underpins the compensation allegation — i.e. it rejected two bases for the conservatives' claim that tort law's way of specifying compensatory policies is superior to no-fault's way of specifying those policies. This section will now explain the significance of this rejection of those two arguments for my assessment of the compensation allegation.

5.2.1. THE SIGNIFICANCE OF REJECTING THE RESPONSIBILITY ARGUMENT

The responsibility argument draws its initial strength from Hohfeld's observation that for a legal *advantage* (i.e. a claim, a liberty, a power or an immunity) to be properly founded, it must correlate to somebody else's legal *disadvantage* (i.e. a duty, a no-right, a liability or a disability respectively). Put another way, the responsibility argument rests on the plausible

claim that unless someone else owes the victim a compensatory duty, then the victim can't possibly be said to have a properly founded compensatory right either.

However, the responsibility argument's *first* error is that it rests on the mistaken supposition that others will only ever come to have compensatory duties in virtue of being causally responsible for the victim's losses, and its *second* error is that it also rests on the mistaken supposition that those who have to take responsibility will need to do so by accepting liability for their victims' losses. The first point explains the conservatives' insistence on linking compensatory issues to an inquiry about whether someone else was causally responsible for the victim's losses, and the second point explains their insistence on linking compensatory issues to the question of whether someone else should take responsibility for the victim's losses. But, there is no particular reason to suppose that we may *only* come to have duties to assist others as a consequence of being causally responsible for their current plight,²⁵ and as the previous chapter showed conservatives offer no convincing reason to suppose that the only proper way to take responsibility for our actions is by accepting liability for our victims' losses. Hence, the responsibility argument can't support a preference for tort law's over no-fault's compensatory decisions, because even if conservatives are right in claiming that the compensatory policies of no-fault systems fail to identify losses for which others should *take* responsibility on account of being causally responsible for them, the point is that the compensatory policies of tort law systems will also fail to identify losses for which others should *take* responsibility because in the first instance being causally responsible is not a sufficient ground for having liability responsibility imposed onto one, and in the second instance we need not necessarily accept tort liability for our victims' losses in order to accept liability responsibility.

5.2.2. THE SIGNIFICANCE OF REJECTING THE IMPARTIALITY ARGUMENT

In discussing the impartiality argument, my aim was not to show that criteria such as *causation* and *choice* are indeterminate, because *this* is not a particularly novel claim — it is a claim that has been repeatedly made by many other philosophers. Rather, my aim was to use this well-known fact about the indeterminacy of such criteria as a reason for rejecting the claim that there is a *well-founded* and *relevant* distinction between the criteria which tort law systems use to specify their compensatory policies (e.g. the criterion of *fault*) and the criteria which no-fault systems use to specify their compensatory policies.

On the surface, the distinction between process and outcome-oriented criteria seems well-founded and relevant. As the introduction to §3.2.2. pointed out, while process-oriented

²⁵ For instance, Robert Goodin has argued that our obligation to help others stems from plural sources (Goodin 1985).

criteria seem to describe something about the way in which a victim's loss came about (e.g. that it came about through a wrongful *process*), outcome-oriented criteria seem to tell us something about the loss itself (e.g. that it is a wrongful *outcome*) — this, it seems to me, is the natural way to understand the distinction between the criteria which tort law and no-fault systems use to specify their respective compensatory policies. Furthermore, as the remainder of that section argued, it also seems plausible that conservatives should embrace this distinction (i.e. that this distinction is *relevant* to their argument against engaging in radical reform of accident law) because while no-fault systems' use of outcome-oriented criteria seems to lead them to violate the ideal of state impartiality, tort law systems' use of process-oriented criteria does not seem to have this result. Hence, to whatever extent the distinction between process- and outcome-oriented criteria is well-founded, to that extent the claim that compensatory policies should only ever be specified through process-oriented criteria such as fault and causation would also seem to be well founded, and so again to that very same extent the compensatory decisions of tort law systems could also be treated as providing a baseline or norm against which the compensatory decisions of no-fault systems would then be compared and criticized, thus substantiating the compensation allegation.

However, it is one thing to say that this distinction *seems* well-founded, but quite another to show that it *is* well-founded, and the latter position is certainly not one that can be endorsed given the observation that truly process-oriented criteria are in fact indeterminate and therefore useless, and the related observation that in order to avoid indeterminacy even the fault criterion must in the end be given an outcome-oriented formulation. If the *fault* criterion (and other criteria such as *causation* and *choice*) must in the end be given an outcome-oriented formulation, then conservatives are not entitled to claim that the impartiality argument favours tort law systems' compensatory decisions, since the compensatory policies of *both* systems are in fact specified using criteria that violate the ideal of state impartiality. The conclusion that should therefore be taken away from the above discussion is that the distinction between process- and outcome-oriented criteria is *not* well-founded – i.e. it is not true that tort law's compensatory policies are specified without needing to make reference to contestable evaluations of people's interests (that they describe only *processes*), and that no-fault's compensatory policies are specified in a way that *does* make reference to such contestable evaluations (that they describe *outcomes*) – and this does indeed undermine the second basis for the claim that compensatory policies must be specified through the sorts of criteria which conservatives favour. The only sorts of criteria which conservatives could conceivably use to specify their compensatory policies (if those policies are to not be indeterminate) would also have to make reference to such ultimately contestable evaluations, and so they would also run afoul of the impartiality argument.

What is significant about my discussion of the impartiality debate is not that I have established that criteria such as causation and choice are indeterminate, but it is rather that I have pointed out the illusory nature of the distinction between the conservatives' and the reformers' preferred criteria – i.e. I have pointed out that it is not true that while no-fault systems are concerned with assessing *what* was lost, tort law systems are only concerned with assessing *how* it was lost – and in doing this I have blocked off the other way of supporting the compensation allegation. Thus, the conservatives are not entitled to claim that the compensatory policies of tort law systems are superior to the compensatory policies of no-fault systems on account of how well they fare with respect to the impartiality argument, because in order to avoid indeterminacy the conservatives must also use outcome-oriented criteria to specify their compensatory policies, and hence their compensatory policies will also violate the ideal of state impartiality.

5.3. CHAPTER SUMMARY AND FURTHER IMPLICATIONS

The compensation allegation rests on the claim that compensatory policies must be specified through criteria such as *fault* and *causation*,²⁶ and that claim is in turn supported by two separate arguments. However, this chapter has rejected both of those arguments: the *responsibility* argument fails because it rests on the mistaken assumptions that causally responsible parties must necessarily take responsibility for their actions, and that the only proper way for them to take that responsibility is by compensating their victims for their losses; and the *impartiality* argument turns out to be just as critical of tort law's way of arriving at compensatory decisions as it is of no-fault's way of doing this. Thus, neither argument can justify the conservatives' belief that tort law's compensatory decisions provide a norm against which no-fault's departures can be assessed and criticized. Hence, as regards questions such as *who* should be compensated, *for what* they should be compensated, and *how much* compensation they should be offered, neither the responsibility nor the impartiality argument provides a compelling reason to prefer tort law's answers to no-fault's answers — and this undermines the basis for the conservatives' compensation allegation.

However, what exactly is the *positive* significance of my rejection of the compensation allegation to these compensatory issues — for instance, does my rejection entail that we should now endorse the same answers to these three questions as the answers which typical no-fault systems give? Should we now suppose that typical no-fault systems compensate *the right people*, that they cover people for the loss of- or injury to *all (and only) those items which are indeed valuable*, and that they provide *the correct extent* of compensation? Put

²⁶ ... rather than through outcome-oriented criteria which focus on the importance or significance (i.e. the substantive value) of the victim's loss.

another way, if tort law's approach to arriving at compensatory decisions is not superior to no-fault's approach, then does this mean that the answers which typical no-fault systems give to these three compensatory questions are indeed the correct ones to give?

In brief, the answer to these questions is 'no'. Although this chapter has maintained that tort law's approach to compensatory issues is not superior to the approach which no-fault systems take, this neither entails that the opposite is true (i.e. that no-fault system's answers are superior to tort law's answers), nor, more pointedly, that typical no-fault system's answers are correct — after all, it is conceivable that the approach which typical no-fault systems take to compensatory issues may strike other significant problems, though for now I defer a discussion of this issue until the following chapter. However, although my rejection of the two arguments which were tendered in support of the claim that compensatory policies must be specified through process-oriented criteria can not be treated as a positive endorsement of the approach which typical no-fault systems take to compensatory issues, it should nevertheless suffice to achieve this chapter's aim — i.e. to defend no-fault systems from the conservatives' compensation allegation.

6. CONCLUSIONS

The previous two chapters were geared towards rejecting two specific allegations which conservatives level against no-fault systems. However, this final chapter will reveal that in addition to defending no-fault systems from those two allegations, those chapters' arguments also suggest some further positive conclusions.

Firstly, after §6.1. summarizes the main features of my defence of no-fault systems from the conservatives' two allegations, §6.2. will then show that despite this conclusion being favourable to no-fault systems, the temptation to endorse the reformers' typical proposals should be resisted because Chapter 5's arguments entail that the only defensible kinds of no-fault systems are ones which are a form of social welfare rather than accident law systems, and hence that what we should do is to embrace those systems *instead of* accident law rather than attempting to *reform* accident law in line with no-fault's principles. Secondly, §6.3. will show that Chapter 4's denial of a necessary link between causal responsibility and liability responsibility also informs a debate about social welfare policy design, because it entails that people's causal responsibility for their own deprivation should not be treated as a sufficient reason to reduce their entitlements to claim benefits.

6.1. MY DEFENCE OF NO-FAULT SYSTEMS

Following Chapter 2's summary of the reformers' main arguments in favour of radical accident law reform, Chapter 3 then explained the conservatives' two reasons for resisting the reformers' call to replace tort based accident law systems with no-fault systems — i.e. it presented the conservatives' responsibility and compensation allegations. However, the next two chapters respectively defended no-fault systems from each of those two allegations.

Firstly, Chapter 4 rejected the five arguments which conservatives cite to substantiate their claim that the mechanism of liability plays an indispensable role in ensuring that everyone takes due responsibility for their actions. Hence, the mere fact that no-fault systems do not impose tort liability onto causally responsible parties, and that instead they use the loss distribution mechanism to obtain the funds required to compensate people, is not a good reason to suppose that causally responsible people (i.e. injurers) will not, and that innocents (i.e. all of society) instead will, take responsibility under no-fault systems.

Secondly, Chapter 5 rejected both of the arguments which conservatives cite to show that tort law's compensatory decisions set a legitimate compensatory norm. The *responsibility argument* is based on the unwarranted assumption that compensating our victims for their losses is an essential part of taking responsibility for our actions; and the *impartiality argument* is just as critical of tort law's way of drawing the distinction between compensable and non-compensable losses as it is of no-fault's way of drawing this distinction. Thus, since conservatives are not entitled to claim that tort law's compensatory decisions set a legitimate compensatory norm, no-fault's departures from those compensatory decisions are therefore not instances of under- and over-compensation *qua* departures from a legitimate norm.

Hence, one conclusion which we might now be tempted to draw from the previous two chapters' arguments is that those chapters offer a kind of vindication of the reformers' position. After all, Chapter 4 rejected the conservatives' reasons for claiming that responsibility would be abnegated under no-fault systems, and Chapter 5 rejected the conservatives' reasons for claiming that no-fault systems would under- and over-compensate. Thus, to whatever extent a rejection of our adversaries' criticisms can be treated as a finding that is favourable to us, to that same extent the previous two chapters' arguments have also been favourable to the reformers' position.

6.2. BEYOND ACCIDENT LAW REFORM

However, this section will argue that the temptation to endorse the reformers' position should be resisted, because on closer inspection Chapter 5's arguments are incompatible with their typical proposals and with their view of no-fault systems as accident law systems. Firstly, §6.2.1. will show that Chapter 5's arguments are incompatible with the specific standards of compensation which the reformers often endorse. However, more importantly, §6.2.2. will show that a bigger problem is that the systems which reformers typically endorse retain this distinctively compensatory focus – i.e. that reformers still conceive of them as aiming to *compensate* the *victims* of *accidents* for their *losses* – but yet that focus is inappropriate because what Chapter 5's arguments truly entail is not just that accident law should be retained and *reformed*, but rather that it should be completely *abandoned*.

6.2.1. A CRITIQUE FROM *INSIDE* THE COMPENSATION DEBATE — PROBLEMS WITH THE STANDARDS OF COMPENSATION WHICH REFORMERS TYPICALLY ENDORSE

The systems which reformers typically endorse often offer *substitute* and *solace* as well as equivalent compensation, and the extent of compensation which they offer is often *corrective* rather than re-distributive (see end of §3.1.2.). However, even if we overlook this distinct compensatory focus of their proposals for a moment (though I will shortly return to criticize

this aspect of their proposals too), the specific standards of compensation which these two features express will still be inappropriate given Chapter 5's finding that outcome-oriented considerations play a crucial role in compensatory decisions.

If Chapter 5's conclusion had been that only process-oriented considerations underpin compensatory decisions, then the reformers' endorsement of those specific compensatory standards would indeed be justified. After all, if it were true that compensatory policies should be specified through process-oriented criteria, then the right answer to the question "For *which kinds* of losses should people be compensated?" would indeed have been that people should be compensated for *all kinds* of losses, as long as those losses came about through the right kind of process — e.g. as a consequence of another person's negligent conduct. Had Chapter 5 affirmed the conservatives' claim that process-oriented considerations should be used to specify compensatory policies, then this would indeed have entailed that irrespective of what was lost — whether it was the capacity to earn a wage, damage to an asset (e.g. a scratch to the duco of their car), bodily injury (e.g. the loss of an eye or a leg, a cut or an abrasion), or the experience of pain, suffering and anguish — as long as that loss came about in the right manner, then the victim should be compensated for it — i.e. this would have entailed that people should be offered *substitute* and *solace* as well as equivalent compensation, as per the reformers' common suggestion. Similarly, if Chapter 5 had affirmed the conservatives' claim that process-oriented considerations should be used to specify compensatory policies, then this would also have entailed that the right answer to the question '*How much* compensation should people be entitled to receive?' would have been that they should be compensated for the *full extent* of their losses — i.e. that *corrective* rather than redistributive compensation should be offered. Put another way, if compensability was indeed determined by processes rather than by outcomes, then the right conclusion to draw would indeed seem to be that as long as a person's losses came about in the right way, they should be compensated for the *full extent* of *all* of those losses, since anything else would involve us making outcome-oriented assumptions about either *which kinds* of losses are serious or about *what portion* of those losses was serious.

However, as a matter of fact Chapter 5 showed that outcome-oriented considerations play a crucial role in shaping compensatory decisions — after all, they make it possible to overcome indeterminacy — and in light of this it is not clear how the reformers think that they can justify their specific standards of compensation. After all, if losses are only compensable when they are serious, then no-fault systems should not compensate people for all of their losses but rather they should only compensate people for their serious losses, and so it is plausible that the reformers should only have endorsed systems which offer *equivalent* but not *substitute* and *solace* compensation. The focus on seriousness reflects our aim of protecting

important interests by undoing serious damage to those interests, and if the payment of compensation is *not* likely to make any real difference to the victim – and this is more likely to be the case when the loss involved an item that has no plausible monetary equivalent since often no amount of money can make up for such losses – then that *may* indeed be a good reason to treat that loss as one which is not compensable.¹ Likewise, if losses are only

¹ My reservation here (i.e. the fact that I say that this is only a *plausible* consequence of my arguments) is both an expression of my reluctance to make the stronger claim that equivalent compensation is *always* more important than substitute and solace compensation, as well as a reflection of the fact that contestable substantive evaluations play such a prominent role in ordering interests in terms of their importance, and this casts doubt on the certainty of my own convictions on this issue. On the first point, it is conceivable that my suggestion (to only offer equivalent compensation) may gain support from something like Robert Goodin's distinction between *means-replacing* and *ends-displacing* compensation, and from his claim that the former is more important than the latter (Goodin 1991). If Goodin's means-replacing compensation is the same as my equivalent compensation and his ends-displacing compensation is the same as my substitute and solace compensation, and if the former is indeed always more important than the latter, then that may indeed warrant at least the conclusion that no one should ever be deprived of corrective compensation merely to allow another to be paid substitute and solace compensation (a conclusion which is close to my suggestion). However, on this first point, my reservations stem from the fact that Goodin's arguments appeared in a radically different context – he wanted to show that if a new state policy were to lead some people to suffer losses, then the mere fact that those losses would be compensated for would not justify that policy – and this difference may create a disanalogy that prevents his arguments from being re-deployed to support my own suggestion. But secondly, even if we put aside the question of whether equivalent compensation is always more important than substitute and solace compensation, there will still be other reasons to be reserved. For instance, it often strikes me as futile to offer someone money when the item which they lost has no plausible monetary value – e.g. to offer them damages for the pain and suffering which they once endured but which has now long since passed – and it strikes me as more worth while to use that same money to compensate someone else for a loss that *can* be truly compensated. I also have similar sentiments when the choice involves either giving money to someone for whom money will never make up for what has happened (e.g. the death of their child), or using that money to make up an important financial shortfall somewhere else (e.g. providing a source of income to someone who is incapable of working). However, if the comparison instead involved either compensating one person for a relatively trivial but large economic loss (e.g. the huge cost of repairs to the Rolls Royce Silver Seraph), or providing a substitute or solace to someone who suffered a serious loss (e.g. the parent who lost their child), then my intuitions may indeed sway in the opposite direction. One factor that may explain these different intuitions is that people sometimes need to have their mind taken off their personal tragedies so that they can move on with their life, and hence perhaps substitute and solace compensation is valuable for its ability to help people climb out of an otherwise paralysing state of sorrow by helping them re-discover life's value. However, I also suspect that such contrary intuitions

compensable to the extent that they are serious, then the reformers should have insisted that no-fault systems should only compensate people for that portion of their losses which was indeed serious but not for any greater extent, and so again it seems that what they should have said is that no-fault systems should only offer *redistributive* rather than corrective compensation. Hence, Chapter 5's finding that compensatory decisions hinge unavoidably on outcome-oriented considerations entails that reformers should have endorsed systems which only offer redistributive and mainly equivalent compensation rather than corrective and also substitute and solace compensation.

So the first reason why we should resist the temptation to endorse the reformers' typical proposals is because if we accept Chapter 5's claim that outcome-oriented considerations play a crucial role in shaping compensatory decisions, then we will also have to reject the specific standards of compensation which are embodied in the reformers' typical proposals, since we will have no reason to suppose that people should be compensated for the *full extent* of *all* of their losses. Thus, even if we assume that there is nothing objectionable about the reformers' retention of this distinct compensatory focus within their typical proposals, we should still not endorse a significant number of their proposals because no-fault systems should at best only pay *redistributive equivalent* compensation rather than corrective and also substitute and solace compensation.

6.2.2. A CRITIQUE FROM *OUTSIDE* THE COMPENSATION DEBATE — PROBLEMS WITH THE COMPENSATORY FOCUS OF THE REFORMERS' TYPICAL PROPOSALS

However, it would be a mistake to halt our investigation here and to conclude that the *only* problem with the reformers' typical proposals is that they express the wrong standards of compensation – i.e. that no-fault systems should offer only redistributive equivalent compensation rather than corrective and also substitute and solace compensation – because this conclusion misleadingly implies that there is nothing inherently wrong with the reformers' retention of this distinct *compensatory* focus. Admittedly, it is tempting to assume that since Chapter 5's discussion was geared towards resolving a *compensatory* dispute – a dispute which addresses the questions: (i) for *which kinds* of losses should people be compensated; and (ii) *how much* compensation should they be entitled to receive – that it is

stem out of our prior highly subjective and thus contestable intuitions about which things in life are important, and about how important they might be both relative to one another and in absolute terms. But, given that judgments of this sort are often highly subjective – i.e. what's important to me may be of relatively little importance to you – I therefore prefer to draw the reserved conclusion which I have drawn above — namely, that it is only *plausible* that no-fault systems should only offer equivalent but not substitute or solace compensation.

now therefore only natural to retain the terminology of compensation when we draw out the further implications of Chapter 5's arguments.² However, I will now show that this terminology and the narrow compensatory focus that comes along with it should not be retained, because if we carefully examine Chapter 5's arguments, we will notice that what those arguments truly entail is not just that accident law should be retained and reformed, but rather that it should be completely abandoned because the compensatory focus and terminology which are both so integral to accident law are inappropriate in the context of no-fault systems.

I. COMPREHENSIVE SCOPE OF COVERAGE

Although conservatives typically endorse no-fault systems with a *limited* scope of coverage (see end of §3.1.2.), given Chapter 5's claim that people's entitlements should hinge on outcome-oriented considerations, what they really ought to have endorsed are systems with a *comprehensive* scope of coverage. After all, if what matters is not *how* people got into the situation that they are now in (i.e. a process-oriented consideration) but rather *whether* their situation involves serious deprivation (i.e. an outcome-oriented consideration), then entitlement decisions should not be swayed by whether someone's serious deprivation arose in this rather than in that context — e.g. on the roads, in a hospital operating theatre, or at work, as opposed to it being a consequence of disease or just something that they were born with. Thus, another problem with the reformers' typical proposals is that the scope of coverage of no-fault systems (another one of the eight features which can be used to characterize accident law systems) should not be limited as per the reformers' typical proposals, but rather comprehensive — i.e. no-fault systems should cover anyone who is seriously deprived rather than only those whose deprivation arose in a limited range of covered occupational contexts.

However, this criticism of the reformers' typical proposals is in fact a lot more serious than it may initially appear, because my point is not just that no-fault systems should help *all* victims who accidentally suffer serious injuries or losses — i.e. my point is not just that as regards their scope of coverage, no-fault systems should not restrict this scope to a limited range of occupational contexts — but it is rather that no-fault systems should not even restrict their concerns to just the needs that *victims* of *accidents* develop when they suffer *losses*, and

² In fact, the discussion in §6.2.1. did just that when it argued that at best no-fault systems should only offer *redistributive equivalent* compensation rather than corrective substitute and solace compensation, because *these* are indeed answers to those two compensatory questions — i.e. my expressed preference for *redistributive* compensatory standards addresses the 'how much compensation' question, and my preference for *only equivalent* compensatory standards addresses the 'which kinds of losses' question.

that the help which they offer should not even be thought of as *compensation*. These are conceptual as well as terminological points, and they bear significantly on how we should view the reformers' retention of this distinct compensatory focus in their typical proposals, and so I will now say a little more about each of them.

The first problem is that systems which restrict their focus to just *accidents* would still inadvertently allow process-oriented considerations to surreptitiously limit the scope of their coverage, because the seriousness of people's deprivations would not after all be the determinant of their entitlements, since it would also have to be true that the affected parties arrived in that situation in a particular manner — i.e. as a consequence of a process that it is accurate to describe as 'an accident'.³ Jane Stapleton has suggested that perhaps the reason why reformers have retained this narrow focus on just accidents is because of a simple oversight — i.e. that it is probably a 'legacy' of the fact that although their interest was initially captured when they noticed 'a particularly "urgent need" to replace [tort] with a public system of *accident* compensation', unfortunately their preoccupation with *this* urgent need subsequently led them to 'overlook ... the fact that the absence of [a formal compensation system in non-accident areas] suggests an even greater need' in those other areas (Stapleton 1986c:148, original emphasis).⁴ However, irrespective of what the best

³ The point being made here is that 'accidental' refers to a process, and so if we believe that outcomes and not processes should determine people's entitlements, then no-fault systems should not restrict their focus to just accidents. However, Richard Lewis (1987) has also argued that the term 'accident' is problematic because it is notoriously difficult to define — especially within the context of systems in which people's entitlements are determined by outcome-oriented considerations. For instance, some of the difficulties which are faced in trying to come up with an adequate specification of 'accident' include: (i) whether an accidental injury must necessarily involve sudden changes, or whether it can develop gradually; (ii) if gradual changes are allowable, then whether the onset of the condition must be rapid, or whether it can be slow; (iii) whether the injury needs to be a consequence of a single specific event, or whether it can be the result of a build-up of many small and individually insignificant events; and (iv) whether only unintended and unforeseeable outcomes can be considered accidental, or whether some intended and foreseeable outcomes can also be accidental.

⁴ Two other explanations for this phenomenon which Stapleton considers are: (i) Woodhouse's suggestion that it is cheaper to restrict reform proposals to cater for a sub-set of the needy; and (ii) Calabresi's suggestion that a focus on accidents is justified because at least accidents can be deterred. However she rejects these explanations because: (i) considerations of thrift do not necessarily warrant picking out *that* particular sub-group of the needy; and (ii) Calabresi's argument is only an efficiency argument, but it fails to justify the exclusion of others on more important moral grounds (her claim here seems not to be that efficiency considerations do not have a moral aspect, but rather that there are more important moral considerations — presumably ones of justice, though Stapleton does not make

psychological explanation might be for why reformers have retained this narrow focus on just accidents, the fact remains that if the scope of coverage of no-fault systems should indeed be comprehensive (and the previous two paragraphs have argued that it *should* be comprehensive), then this narrow focus on just accidents should *not* be retained. Thus, to ensure that no-fault systems do not allow process-oriented considerations to surreptitiously limit the scope of their coverage, those systems should cover everyone whose state of affairs is characterized by serious deprivation, and not just those whose deprivations came about as a consequence of an accident — i.e. the *seriousness* and not the ‘accidentality’ of states of affairs is what should matter under no-fault systems.⁵

Secondly, if no-fault systems only focussed on people’s *losses*, then that too would be a problem since that too would allow process-oriented considerations to surreptitiously limit the scope of their coverage. To see this, note first that when compensatory policies are specified through process-oriented criteria like the ones which conservatives endorse, the states of affairs which are subsequently identified by those policies are indeed losses — i.e. occurrent reductions in welfare, perhaps consequent to sudden or maybe even traumatic events.⁶ After all, if we assume that people are only entitled to claim benefits when their deprivations came about in a particular manner (e.g. as a consequence of another person’s faulty actions), then the *history* of *how* those deprivations came about (i.e. that a prior more satisfactory state of affairs was later diminished through some process) is what will determine whether those deprivations will be picked out or not, but the mere fact that someone is now seriously deprived will not in itself be seen as significant. However, once we claim that serious deprivation (i.e. an outcome-oriented consideration) is the proper basis of people’s entitlements, then the states of affairs which will generate entitlements will not just (and not necessarily) be those that involved a *worsening* of a prior more satisfactory state of affairs — i.e. not just *losses* — but rather all states that are characterized by the presence of that deprivation. Thus, to ensure that no-fault systems do not allow process-oriented

this explicit — which outweigh the efficiency considerations (Stapleton 1986c:146-7). Earlier in the piece, Stapleton also entertains the plausible hypothesis that this bias towards favouring victims of *traumatic* reductions in welfare over others is a consequence of some psychological quirk of our thinking which results in greater sympathy going towards the latter (Stapleton 1986b) — perhaps we have a natural tendency to view those suffering from chronic diseases as malingerers.

⁵ Stapleton also argues ‘no justification on principle can be found for [drawing] a distinction ... on the basis of’ whether somebody’s deprivation came about *because of an accident* once we agree that people’s entitlements hinge on outcome-oriented considerations (1986c:178-9; also see 1986b:108-18; and 1986d:10-11, 17-32)

⁶ Though see Richard Lewis’ previously cited comments (three footnotes above) on the difficulties encountered in trying to give an adequate definition of ‘accidental’.

considerations to surreptitiously limit the scope of their coverage, they should also jettison this focus on losses – they should not just protect people against suffering *reductions* in welfare – and instead they should protect people against deprivations — i.e. the *deprivational* and not the ‘lossy’ quality of states of affairs is what should matter under no-fault systems.

Finally, given that no-fault systems should not just protect people against suffering *accidental losses* (see the previous two paragraphs), but rather that they should offer protection against *serious deprivation*, it is also inappropriate to refer to those who would receive such protection as ‘victims’, or to refer to the protection which they would receive as ‘compensation’. As regards the first point, the phrase ‘entitled party’ seems more appropriate than ‘victim’, because it unduly stretches the discourse to include in the category of ‘victim’ even those who are (e.g.) deprived due to the birth lottery (e.g. those who were born into poverty, or with various congenital defects) or those who are incapacitated by disease, however they too would have to be protected by no-fault systems if serious deprivation provided the basis for people’s entitlements. As regards the second point, it also seems more appropriate to refer to what these entitled parties would receive as ‘benefits’ rather than as ‘compensation’, since the fact that such systems would protect people against serious deprivation (rather than against accidental losses) suggests that the sorts of backward-looking or historical considerations which normally inform specifically *compensatory* decisions⁷ have no role to play in determining people’s entitlements under no-fault systems.

As I said earlier, there are two separate but related issues here. Firstly, there is the purely terminological issue — namely, that the discourse is unduly stretched when we retain the tort-derived terminology of ‘accidents’, ‘losses’, ‘victims’ and ‘compensation’ in our descriptions of what no-fault systems do, because it is unduly confusing to refer to people who were always faced with a particular disadvantage – for instance, those who were born with a serious visual impairment, with an attention deficit disorder, with no limbs, or with some other condition which leaves them seriously deprived – as ‘victims’, to refer to their deprivations as ‘losses’, to keep up the facade that such systems would only protect people against ‘accidents’, or to refer to the assistance which such a system would offer to them as ‘compensation’.⁸ But secondly, this is not only a terminological issue, since my point is also that by continuing to use these terms we run the risk of inadvertently assuming that the

⁷ Please refer to my earlier discussion of the distinction between *corrective* and *redistributive* compensation in §2.1.2..

⁸ Note though that the use of the term ‘compensation’ is perhaps less problematic, since this term is also used in this non-standard way in the context of debates about egalitarianism. For instance, Ronald Dworkin talks about ‘compensation to alleviate [natural] differences in physical or mental resources’ (1981:300), and Will Kymlicka talks about ‘compensating [for] natural disadvantages’ (1990a:77).

systems which we should now endorse are still accident law systems – i.e. mere replacements for tort law, which will still aim to *compensate* the *victims* of *accidents* for their *losses* – however this is clearly not the case since what such systems would really do is to assess *states of affairs* (rather than just accidents); one outcome of such assessments may be that *entitled parties* (rather than victims) will be identified; entitled parties may then qualify for various forms of assistance which may include eligibility to claim *benefits* (rather than compensation); and benefits will be paid for *disadvantages* (rather than for losses).⁹

⁹ These points are also raised by Stapleton who argues that the reformers' failure to notice that they are no longer entitled to retain the restricted focus on accidents, directly resulted in their earlier-mentioned (see §6.2.1.) adoption of corrective standards for compensation, as well as offering substitute and solace compensation in addition to equivalent compensation: 'The most important result of this unrigorous thinking and its resultant tort-derived accident preference is that it raises ... the baseline of benefits considered adequate under any new "*replacement compensation*" scheme. [R]eformers seek to provide ... benefits to approximate as near as is feasible ... the compensatory position in tort damages [—] the provisions of earnings-related benefits ... and often [even] some benefits for non-economic losses' (Stapleton 1986c:148-9, original emphasis). However, she points out that although in the context of tort law 'it seemed quite sensible to require sufficient benefits to restore the victim's pre-injury standard of living' (Stapleton 1986c:149), once process-oriented criteria of compensability are abandoned in preference for something more like the 'needs principle' – i.e. in preference for outcome-oriented criteria – this 'corrective justice' attitude is no longer acceptable. On her account, a retention of these tort-derived compensatory standards and the associated terminology 'formalizes the preference to accidents [and then without justification] extends that preference to a larger class for which there [never was an] independent reason to accord *compensatory* benefits as opposed to straightforward financial assistance' (Stapleton 1986c:150, original emphasis). Stapleton's piercing analysis suggests that although it might indeed be reasonable *for conservatives* to talk about accidents, losses, victims and compensation, this terminology can not consistently be used *by reformers* who believe that compensability hinges on outcome-oriented considerations. On Stapleton's account, reformers should therefore jettison this old tort-derived terminology, and adopt a new terminology which more accurately reflects the fact the systems which they endorse have a lot more in common with social welfare systems than they do with accident law systems. Stapleton argues that 'once the tort system is abandoned as an appropriate compensation mechanism there is no [longer a] rational justification for [retaining] preferential treatment [of some over others, and] the result is a shift towards the *welfare philosophy* based on needs underlying the *social security* system' (1986b:115, emphasis added). The account which she later offers to explain the retention of such preferential arrangements, and of the more general limited focus of such schemes on the category of 'accidents', is that since reformers saw themselves as being in the business of searching for a *replacement* to the current scheme – i.e. of finding a better way to do the same thing as what the current system was already doing – they therefore presupposed 'that it is only fair ... to replace the existing regime if the new benefits approximate as

Hence, in addition to the previous section's conclusion that the reformers' typical proposals embody *the wrong* compensatory standards – i.e. that the two 'compensatory' features should be different to what reformers claim they should be – another reason why we should not endorse their typical proposals is because Chapter 5's finding that outcome-oriented considerations play a crucial role in shaping people's entitlements also entails that contrary to what the reformers typically maintain, the scope of coverage of no-fault systems should not be limited but comprehensive. However, if the *scope of coverage* of no-fault systems should indeed be comprehensive rather than limited, then no-fault systems should not really even be thought of as *accident law* systems *per se* (because it is misleading to characterize their function as offering *compensation* to *victims of accidents* for *losses*), and this in turn entails that there are indeed serious problems with the reformers' retention of a distinct compensatory focus within their typical proposals. Thus, since a more accurate description of what no-fault systems do is that they offer *benefits* to *entitled parties* for *serious deprivations*, the previous section's conclusion (i.e. the conclusion of §6.2.1.) should now be revised in the following way — the problem with the reformers' typical proposals is not just that no-fault systems should offer only *redistributive equivalent* compensation (rather than corrective and also substitute and solace compensation), but more pointedly it is rather that they should only offer redistributive equivalent *benefits*.

II. PURE SYSTEMS

If we ask the question 'What features should no-fault systems exhibit?', so far this section's discussion has highlighted three distinct reasons to resist endorsing the reformers' typical proposals: firstly, no-fault systems should offer only *redistributive benefits* rather than corrective compensation; secondly, a lot of the time benefits should only be paid for items that have plausible monetary *equivalents*, rather than also to act as a substitute or as solace; and thirdly, the scope of coverage of no-fault systems should be *comprehensive* rather than limited — i.e. so far this section has highlighted significant problems with at least three of the eight features of the reformers' typical proposals. However, Chapter 5's defence of no-fault systems from the compensation allegation also entails that the reformers' typical plan to retain tort law and to run it alongside no-fault systems in either a *dual* or *mixed* configuration is also problematic, because the tort remedy should not be retained but abolished.

The reason for this is that as Chapter 5 argued, neither the responsibility nor the impartiality arguments provide compelling reasons to impose a compensatory duty onto

closely as possible to the expectations generated by the tort remedy' (Stapleton 1986c:149). However, the assumption that no-fault systems were to *replace* an *accident* law system was on her account itself something that should have been re-considered.

causally responsible parties. However, if causally responsible parties do not have a duty to compensate their victims for their losses,¹⁰ then their victims do not have the correlative compensatory right either, and so there is simply no point (from the perspective of satisfying specifically compensatory aims) in retaining the tort based accident law system and running it alongside the no-fault system, because nobody will ever in fact be entitled to avail themselves of the privileges which the tort system confers.¹¹ Put another way, since serious deprivation is what provides the basis for claiming benefits under no-fault, and according to Chapter 5's argument nobody has that further special right to seek the more generous top-up compensation through the tort system (in a mixed system) or to seek damages but to waive their right to claim no-fault benefits (in a dual system) merely on account of *how* their deprivation came about, there is therefore no point to designing dual or mixed no-fault systems because nobody should ever be granted the right to sue.¹²

Thus, another consequence of Chapter 5's argument is that contrary to what the reformers often maintain, no-fault systems should be *pure* rather than mixed or dual.

6.2.3. SUMMARY AND SOME POSITIVE CONCLUSIONS

This section's aim was to show that in spite of the fact that Chapter 5's arguments were originally employed to defend no-fault systems from one of the *conservatives'* two allegations, surprisingly those very same arguments also provide good reasons to resist the temptation to now endorse the *reformers'* specific proposals even though they take themselves to champion the values of no-fault. To highlight these reasons, I will now summarize the foregoing discussion in two different ways.

¹⁰ I am assuming here that *other* arguments – e.g. arguments from efficiency – do not support the imposition of such a duty onto them.

¹¹ If the tort based accident law system performs other useful functions – e.g. accident cost reduction – then that may be a separate reason to retain it, though note that from the outset (see §2.2.2.) I have claimed that arguments from efficiency do not support retaining the tort based accident law system. In any case, the present point is simply that compensatory aims do not provide reasons to retain tort law.

¹² Interestingly, Stapleton also believes that compensatory rights should be abolished, but she argues for this by claiming that these rights 'are outweighed by the public benefit that abolition of their rights would produce' (Stapleton 1986c:151). However, while her argument appeals to utility maximization in order to justify the abolition of people's compensatory rights, my argument aims to show that the accident law system's compensatory rights are not even properly founded to start with, and hence that this is why they need to be abolished. Thus, while Stapleton justifies the abolition of tort rights by claiming that it is a worth-while sacrifice, on my account no justification is required here because the rights which would be abolished were never really legitimate in the first place.

Viewed from one perspective, what this section has shown is that Chapter 5's arguments entail that no-fault systems should have a different set of features from those that the reformers typically suggest. Chapter 5's arguments entail that the scope of coverage of no-fault systems should be *comprehensive* (rather than limited), that they should be *pure* (rather than dual or mixed), and that they should only pay *redistributive equivalent* benefits (rather than corrective and also substitute and solace compensation). Hence, viewed from this perspective, a significant problem with the various no-fault systems which are listed in the Appendix is that most of them have a limited (rather than comprehensive) scope of coverage, and that too many of them are either designed to operate alongside tort law in a mixed or dual configuration (rather than being pure), or to pay corrective compensation (rather than redistributive benefits), or to cover people for deprivations that have no monetary equivalents. Consequently, even if we assume that there is nothing inherently wrong with using the language of compensation to draw out the wider implications of Chapter 5's arguments, we will still have plenty of reason to reject the specific standards of compensation which the reformers typically endorse, because no-fault systems should only pay redistributive equivalent compensation rather than corrective and also substitute and solace compensation. Or, put a different way (though still retaining the language of compensation), although the reformers' typical proposals can not be accused of under- and over-compensating on account of the fact that their compensatory decisions depart from tort law's compensatory standards, a considerable number of the reformers' typical proposals can still never the less be accused of under- and over-compensating on account of the fact that Chapter 5's arguments entail that those proposals adopt the wrong standards of compensation.

However, viewed from a different perspective, what this section has shown is that Chapter 5's arguments entail that no-fault systems are not really even a form of accident law because it is highly misleading to characterize what they do as offering *compensation* to *victims* of *accidents* for their *losses*, and there are two consequences to this observation. One consequence is that there *is* indeed something wrong with using the language of compensation to draw out the wider implications of Chapter 5's arguments as I just did in the preceding paragraph because that language is misleading and at odds with the principles which underpin no-fault's approach to ascertaining people's entitlements, and so to rectify this what we should now say about the reformers' typical proposals is that they are problematic not just because they endorse *the wrong* standards of compensation, but rather (more pointedly) because they should not even have endorsed *any* standards of compensation since *compensation* is not something that no-fault systems should offer. Secondly, another reason why the reformers' position should not be endorsed is because if no-fault systems are not accident law systems then it is not that accident law should be *reformed* in line with no-

fault's principles – we can't do that, because no-fault systems are not a form of accident law – but rather that we should abandon accident law completely and use no-fault systems *instead of* accident law systems.

However, this section's arguments do not only provide us with reasons to reject the reformers' typical proposals – i.e. they do not merely offer these negative conclusions – but rather, they also support us drawing some further positive conclusions regarding what no-fault systems should look like. Firstly, we should note again that no-fault systems must exhibit at least the following four features: they should only offer *redistributive equivalent*¹³ *benefits* rather than corrective substitute and solace compensation; their scope of coverage should be *comprehensive* so as to cover people against all serious deprivations rather than only offering limited coverage to accident victims against suffering losses in certain causally specified contexts; and they should be *pure* rather than operating alongside tort law in a mixed or dual configuration. Hence, whatever else no-fault systems might need to look like, this section's arguments suggest that they should at least exhibit those four features.¹⁴

Admittedly, this is still an incomplete specification of the shape which no-fault systems should take — for instance, we still lack information about the other four of the eight features which no-fault systems should exhibit since I have said nothing about their *voluntariness* (whether they should be compulsory or optional), about their *funding* (whether it should be public or private), about their *administration* (whether it should be bureaucratic or judicial) or about the method of *calculation and payment* of benefits that they should employ (whether they should provide periodically reassessed annuities or once-off lump sums). Never the less, the shift in focus from paying compensation to paying benefits, and the fact that serious deprivation rather than wrongdoing would be the condition of eligibility to claim benefits under such systems, both suggest that we should probably think of no-fault systems as *a form of social welfare*.¹⁵ However, if no-fault systems are indeed a form of social welfare, and if

¹³ Note that these are *two* features.

¹⁴ While I acknowledge that this is somewhat repetitious, it is still never the less important to note that my derivation of these features from Chapter 5's arguments not only provides us with reasons to reject the reformers' typical proposals (a negative conclusion), but that it also provides reformers with some positive guidance (the positive conclusion).

¹⁵ If this conjecture about no-fault systems being a form of social welfare is right, then we may also be entitled to speculate that as regards those other four features, no-fault systems should probably resemble social welfare systems. Firstly, since principles of equity provide at least some justification for implementing social welfare systems, no-fault systems may therefore need to be *compulsory* rather than optional — i.e. nobody should be allowed to opt-out of contributing funds to the operation of the no-fault system by (e.g.) offering to waive their own right to claim no-fault benefits, because that

we also agree with the arguments that were presented in Chapter 2 in favour of abandoning tort based accident law systems, then one final observation which we should now also make is that once tort law is abandoned we will not need to implement any *further* system as long as we already have a social welfare system in place, but rather we will need to ensure that this system exhibits the right sorts of features — i.e. the ones which I endorsed above.¹⁶

Regrettably, these positive conclusions regarding what no-fault systems should look like are still not sufficiently specific to provide concrete answers to such practical questions as *which deprivations* are sufficiently serious to warrant our concern, and *how much* benefits should people be paid for those deprivations, and the reason for this is that answers to such practical questions require a commitment to a theory of *the good* which I am presently not entitled to make. After all, until we rank in terms of their value the many items in which people may form a legitimate interest, we will also lack the ability to say *what portion* of *which deprivations* is indeed serious.¹⁷ Admittedly, I could state my own intuitions about which deprivations are serious and which ones are not — for instance, I could assert that although a shortage of orphanages, missing or malformed limbs, and a poor education are all serious deprivations, that damaged luxury cars, small financial shortfalls, and bruised egos are not serious deprivations. But although these intuitions could indeed be combined with the above positive conclusions to yield concrete answers to such practical questions, unfortunately this would diminish the value of my work because then my positive conclusions would no longer be as principled as they once were¹⁸ since they would now also express my

would frustrate the principles of equity. Furthermore, if no-fault systems really are a form of social welfare, then like other social welfare systems they too may need to be *publicly funded* and administered through a *state bureaucracy* (after all, it is public money that would be spent), and benefits should probably also be paid in the form of *annuities* for which eligibility would be *periodically re-assessed*.

¹⁶ John Gal (2001) also comments on the inappropriateness of using specifically *compensatory* standards within social welfare systems.

¹⁷ ... i.e. to determine *how much* benefits should be payable for *which* deprivations.

¹⁸ The above positive conclusions about what no-fault systems should look like are *principled* in the sense that they are an elaboration and an expression of the basic commitments which reformers themselves express when they present their case in favour of legal reform, and because they flow out of the arguments which are used to defend no-fault systems from the compensation allegation. For instance, the reason why on my account no-fault systems should not pay earnings-related compensation but rather only something more akin to a pension, is because the mere fact that someone was once substantially better off than they are now is neither here nor there as far as assessments of their entitlements are concerned, since the point of such assessments is to check if the affected party is seriously deprived and not whether they are worse off than they previously were. Furthermore, on my

own idiosyncratic value judgments about what is valuable and what is not. The only other way to get concrete answers to these practical questions while avoiding the charge of parochialism is to commit to a principled normative account of need – an account which offers a principled basis for distinguishing those things which are allegedly truly needs from the allegedly lesser things which are perhaps only preferences or maybe even just wants¹⁹ – since whether someone is seriously deprived is plausibly a matter of whether they are truly in need. However, although this approach could also help me to generate concrete answers to such practical questions, unless I also explored the sorts of issues that surround different theories of need, then that too would diminish rather than enhance the value of my work.²⁰

Hence, given the space constraints of this final chapter, my positive conclusions must remain somewhat general — i.e. they must remain an endorsement of a family of views about the features which no-fault systems should exhibit rather than being an endorsement of a

account the mere fact that someone experienced pain and suffering at some stage in the past is not necessarily a good reason to pay them benefits, although the fact that they are incapable of earning an income to support themselves may indeed be a good reason to pay them benefits — firstly, this is because the point of paying benefits is not to compensate people but to relieve serious burdens, and it is doubtful that giving someone money in exchange for the pain and suffering which they once experienced but which has now receded into the past will satisfy this aim; and secondly, because it is also likely that this money will make more of a difference if it is used to relieve someone else's serious deprivation which does have a plausible monetary equivalent value (though see my cautionary comments in an earlier footnote in §6.2.1. to the effect that it is not always clear that more good is achieved by offering equivalent- rather than substitute and solace benefits).

¹⁹ For instance, David Braybrooke (1987) discusses some different accounts of need.

²⁰ ... since this would introduce new material, but yet the problems that this material would introduce would remain unexplored. The point is that whether someone is seriously deprived is plausibly a matter of whether they are truly in need, however whether someone is truly in need is not a straight forward issue. For instance, *you* may view the things which *I* claim to need as mere wants; or, even if we agree that needs differ from person to person, we may still worry about how to treat the opulent 'needs' of people with 'expensive tastes'; or, we may disagree about what should be done about the pressing special needs of 'utility sinks' who may consume disproportionately large amounts of resources if, in our attempt to achieve distributive equality, we try to make *them* as well off as everyone else. The specific source of the worry here is therefore that if 'serious deprivation' is conceived of in terms of 'need', but yet 'need' is itself a slippery term (which it is), then although I would have now opened up my position to objections on account of failure to properly address the issues which crop up in the context of this debate, in the end I will still be no closer to providing specific answers to the sorts of questions which trouble us because it will still be far from clear who should- and who should not be eligible to claim benefits under the no-fault systems which I endorse, for which kinds of deprivation they should be entitled to claim benefits, and what extent of benefits they should be entitled to claim.

complete and final blueprint design that could now be used to implement (or to assess) a functioning no-fault system. Never the less, this need not be seen as a failing of the position which I endorse, because my positive conclusions can always be combined with a normative account of need *at a later stage* to yield concrete answers to these practical questions, and so I do not see this as an embarrassment but rather I take it to be a distinct virtue since my approach is sufficiently flexible to accommodate a number of such different theories, and this is a feature which is likely to be valued in a secular society.

6.3. SHOULD CAUSAL RESPONSIBILITY AFFECT ENTITLEMENTS?

I have just argued that the only kinds of no-fault systems which are compatible with Chapter 5's arguments are those which are a form of social welfare, and that under these systems *serious deprivation* should be a necessary condition of eligibility to claim benefits.²¹ But it also seems plausible that *causal responsibility* should be a condition of eligibility to claim benefits too, in the sense that if a person is causally responsible for their own deprivation then their entitlement to claim benefits to relieve that deprivation should be reduced — for instance, this position is endorsed by luck egalitarians. This may be viewed as a problem for my position because Chapter 4's denial of a necessary link between causal responsibility and liability responsibility – i.e. my claim that conclusions about liability responsibility (i.e. about how people should be treated) cannot be derived through mere logical entailment from premises about their causal responsibility (i.e. about what they have allegedly done) – may seem like a *denial* of the *relevance* of causal responsibility to how people should be treated, and hence like a rejection of such causally-based disentitlement clauses.

However, this section will argue that the position which I have endorsed is not objectionable on account of this, because Chapter 4's denial of a necessary link between causal responsibility and liability responsibility is only a denial of the *sufficiency* and not a denial of the *necessity* of claims about causal responsibility for conclusions about how people should be treated. This is important for two reasons: firstly, because on my account, the fact that someone was causally responsible for their own deprivation *may* indeed be a reason to reduce their entitlements (i.e. I do not claim that a person's causal responsibility is irrelevant to how they should be treated); however, secondly, it is also important because whether this *is*

²¹ My suggestion that no-fault systems should give priority to paying *equivalent* benefits was built upon the observation that *only serious deprivations* should generate entitlements (and only when it is plausible that those deprivations will indeed be relieved through the payment of benefits), and my claim that no-fault systems should only pay *redistributive* benefits was built upon the observation that people should only be entitled to receive benefits for *the serious portion* of their deprivations and not necessarily for the whole portion.

or *is not* a reason to reduce their entitlements, ultimately depends on a range of other normative considerations and not just on facts about their causal responsibility, because on the account of responsibility that was presented in Chapter 4 it is never a straightforward matter *whether* and *how* someone's treatment should be affected by their causal responsibility. Thus, this section will show that in addition to protecting the systems which I endorse from the current objection, Chapter 4's arguments also help to explain why luck egalitarians often support some rather un-egalitarian seeming social welfare policies — namely, because they have mistakenly assumed that a person's causal responsibility for their own deprivation is a *sufficient* reason to reduce their entitlement to claim benefits, when in fact it is *at best* only a *necessary* condition of their ineligibility.

6.3.1. LUCK EGALITARIANISM AND CAUSALLY-BASED DISENTITLEMENT CLAUSES

Intuitively, it seems right that if someone is causally responsible for their own deprivation then their entitlement to claim benefits to remedy that deprivation should be lower than what it would have been if they had not been causally responsible for their own deprivation. For instance, it seems right that a gambler who gambles away all of their money and is now living in squalor should have a weaker entitlement to claim benefits to remedy their poverty than someone else who was inadvertently born into a similar kind of poverty, and the reason for this seems to be precisely that the gambler is causally responsible for their own deprivation whereas the other person is not.

This same intuition also finds expression in some prominent versions of the luck egalitarian position. For instance, to luck egalitarians like Eric Rakowski and Richard Arneson, causal responsibility plays a fairly straight forward regulatory role in shaping people's entitlements. Rakowski believes that if someone is causally responsible for their own deprivation then they and not anyone else should suffer the burdens associated with that deprivation — i.e. on Rakowski's hard-line account people's entitlements should closely track their causal responsibility.²² And although Arneson's 'responsibility-catering prioritarian' account is somewhat less hard-line and more sophisticated — he believes that priority should be given to helping those people who were not causally responsible for their

²² This interpretation of Rakowski's (1991) position is suggested by Elizabeth Anderson who argues: 'Consider an uninsured driver who negligently makes an illegal turn that causes an accident with another car. Witnesses call the police, reporting who is at fault; the police transmit this information to emergency medical technicians. When they arrive at the scene and find that the driver at fault is uninsured, they leave him to die by the side of the road. According to Rakowski's doctrine, this action is just, for they have no obligation to give him [publicly funded] emergency care[; though even i]f the faulty driver survives, but is disabled as a result, society has no obligation to accommodate his disability' (Anderson 1999:295-6).

own deprivation over those who were causally responsible for their own deprivation, and that the funds used to help them should preferably be obtained from those who were not causally responsible for their own good fortune rather than from those who were causally responsible for their own good fortune²³ – on his account people’s entitlements should still track their causal responsibility, albeit loosely rather than closely. Put another way, on both of their accounts it is largely automatic that if someone was causally responsible for their own deprivation then their entitlements should be reduced, and the main difference between their positions is in how closely people’s entitlements will track their causal responsibility — on Rakowski’s account, very closely (causal responsibility entails ineligibility to claim benefits); and on Arneson’s account, only loosely (causal responsibility affects who gets priority over whom, both in terms of eligibility for receipt of benefits as well as the provision of funds for the payment of benefits to others).

Rakowski and Arneson would therefore both endorse a social welfare policy under which a cigarette smoker who refuses to quit their bad habit and consequently becomes ill, would have a lesser entitlement to receive medical treatment than someone else who suffers similar health problems but not due to things for which they are causally responsible, and the reason why on their account the smoker’s entitlements would be diminished is precisely because the smoker is causally responsible for their own deprivation — that is, given the scarcity of medical resources – i.e. the fact that the health care budget is not limitless – if someone must miss out on receipt of medical treatment, then on their account it should surely be whoever was causally responsible for their own illness.²⁴ Claims along similar lines are also made about alcoholics who are responsible for their liver cirrhosis and now need a liver transplant,²⁵ about people with type two diabetes or heart disease who also need expensive

²³ Arneson argues that it is better to help the unlucky than the imprudent (because the former is not responsible for their own deprivation), and that it is better that those who pay for making others better off were less responsible for their holdings rather than more responsible (because the former are less entitled to their holdings than the latter) (Arneson 2000:344). In a sense, Arneson’s responsibility catering prioritarianism recommends that those who are causally responsible for their own situation should be largely left alone wherever possible, and that redistribution should mainly take place between those who are not responsible for their situation, with resources flowing from the undeserving rich to the undeserving poor.

²⁴ This seems to be the point of Arneson’s reply to Anderson’s critique when he argues that considerations of responsibility *must* play a role in determining people’s entitlements, for otherwise ‘some individuals [who] behave culpably irresponsibly, again and again, [will end up] draining resources that should go to other members of society’ (Arneson 2000:349).

²⁵ It is claimed that their position on the waiting list for a liver transplant should be demoted in relation to others who are not causally responsible for their liver cirrhosis. This, for instance, is Walter

medical treatment,²⁶ and even about those who line up in the *dole que* seeking unemployment benefits if the reason why they are now unemployed is because they voluntarily resigned from their employment.²⁷ Although Elizabeth Anderson (1999) has argued that such causally-based disentitlement clauses would be thoroughly inegalitarian, those who endorse such clauses see them as merely an expression of the plausible intuition which allegedly lies at the heart of all egalitarian thinking – namely, that equality requires the preservation of people’s choices, but only once those choices have been cleansed of the distorting effects of luck (e.g. see Markovits 2003; or Vincent 2006) – and hence they believe that there is therefore nothing specifically inegalitarian about their recommendations, since they are only an elaboration of those sturdy and highly plausible moral intuitions. On their account, at the heart of the luck-egalitarian position lies the plausible intuition that people’s entitlements should track their causal responsibility, and they believe that when the practical implications of this intuition are fully drawn out, we will realize that the entitlements of those who were causally responsible for their own deprivations should indeed be reduced to take their causal responsibility into account.²⁸

Glannon’s position – he argues that given the scarcity of medical resources ‘entitlements to healthcare for a diseased condition are inversely proportional to control and responsibility’ – and he also claims that ‘[t]his view is supported by the egalitarian ethic espoused by certain political philosophers [he names Rawls, Dworkin, Arneson and Roemer] who argue that society should indemnify people against poor outcomes that are the consequences of causes beyond their control, but not against outcomes ... for which persons are responsible’ (1998:35).

²⁶ Here it is argued that those who develop their diseases because of a poor diet and a lack of exercise should also have a lesser claim on medical treatment than others who were not responsible for their own ill health (e.g. Martens 2001:172-3, he mentions but does not support this position).

²⁷ This seems to be at least part of the justification behind Centrelink’s policy of reducing people’s unemployment benefits (or imposing mandatory waiting periods that prevent one from receiving social welfare payments straight away) if they are responsible for losing their jobs (Centrelink 2006).

Admittedly, those who support such dis-entitlement clauses probably also suppose that some justification for such policies might also derive from considerations of deterrence — i.e. that the government wants to discourage people from losing their jobs merely because they find those jobs unpleasant, in an attempt to curb the burden on the tax payer.

²⁸ Note that we can not object to the luck egalitarians’ claims about how smokers (and others who are causally responsible for their own deprivation) should be treated relative to non-smokers merely by claiming that smokers are addicted, since *ex hypothesi* we are assuming that they *are* causally responsible and so we must have already ruled out the possibility that there is some responsibility-undermining factor at play here. The point of drawing attention to someone’s addiction is presumably to establish that they were *not* causally responsible by pointing to some capacity responsibility undermining factor (in this case, by pointing to their addiction which presumably undermined their

6.3.2. WHY THIS SEEMS LIKE AN OBJECTION TO MY POSITION

The reason why this might initially seem like an objection to the no-fault systems which I have endorsed above is because Chapter 4's denial of a necessary link between causal responsibility and liability responsibility – i.e. its claim that facts about a person's causal responsibility (about what someone has done) do not necessarily entail any particular conclusions about their liability responsibility (about what they should now do) – may initially sound like a straight out denial of the relevance of causal responsibility to how people should be treated. After all, it may seem that in denying that I necessarily should take (liability) responsibility for the things that I am (causally) responsible for – e.g. that in denying that I should necessarily pay for the repairs to your car when I am causally responsible for the damage to that car – I must surely also deny the relevance of facts about my causal responsibility to how I should now be treated. Hence, since it is highly implausible to suggest that people's causal responsibility should never impact on how they are treated – surely my causal responsibility for the damage to your car should have *some* impact on how I am subsequently treated – if this were indeed what was entailed by Chapter 4's denial of a necessary link between causal responsibility and liability responsibility, then that would make the no-fault systems which I endorse seem rather objectionable.

6.3.3. WHY THIS IS NOT AN OBJECTION TO MY POSITION

However, the reason why Chapter 4's rejection of a necessary link between causal responsibility and liability responsibility should not be interpreted as equivalent to the objectionable claim that causal responsibility is irrelevant to how people should be treated, is because my rejection of this necessary link is only a denial of the *sufficiency* of premises about a person's causal responsibility for specific conclusions about their liability responsibility but it is not a denial of their *necessity*, and yet only the latter (i.e. only a denial of their necessity) would have constituted a denial of their relevance.

To see this, note that there were two dimensions to Chapter 4's denial of a necessary link between causal responsibility and liability responsibility – one dimension had to do with logical versus normative entailment, and the other was about how taking responsibility should be done – but neither of those points constituted or presupposed a *denial* of the *relevance* of

ability to be responsible agents) — or at least this is what I argued is §4.1.1.. However, if we assume that these parties *were* causally responsible, then we must also tacitly assume that no other factor undermined their causal responsibility, and so we are not entitled to now raise the possibility that they may have been addicted in order to get them off the hook. The objection to be tackled is therefore that as regards a person who is not lacking capacity responsibility, the responsibility-tracking intuition tell us that their entitlements should be reduced.

causal responsibility to liability responsibility. The first point was that since causal responsibility and liability responsibility look in different temporal directions – causal responsibility is about what people have allegedly done in the past, whereas liability responsibility is about what people should allegedly do in the future – that conclusions about one can't possibly be derived through mere logical entailment from premises about the other. For this reason, and with Scanlon's and Klepper's support, I argued that only normative but not logical entailment could warrant the transition from causal responsibility to liability responsibility, but that to get normative entailment in addition to citing premises about a person's causal responsibility when we try to justify claims about their liability responsibility we would also need to make reference to further normative premises, and I called those premises 'reactive norms' (please see the figure towards the end of §4.1.1.(ii)). However, although this means that *more must be said* to warrant the claim that someone should take responsibility for something than merely pointing out that they were causally responsible – i.e. we must also show that there are good reasons, which support relevant reactive norms, that warrant holding them responsible for that – this does not mean that on my account causal responsibility is *irrelevant* to how people should be treated — rather, it only means that premises about people's causal responsibility play a much more subtle role in justifying conclusions about how people should now be treated, because they are not sufficient by themselves to justify such conclusions.

The second dimension to Chapter 4's denial of a necessary link between causal responsibility and liability responsibility was that I also wanted to show that even if we agreed that someone should now take some kind of (liability) responsibility for something on account of their (causal) responsibility for it, the sole fact of their causal responsibility would not yet be enough to reveal precisely *how* they should take that responsibility — i.e. it would not yet reveal *what kind* of liability responsibility they should take. After all, it is conceivable that people might take responsibility in a number of different ways – e.g. by submitting themselves to punishment, by re-educating themselves, by apologizing, or maybe even by accepting tort liability (although I denied this last point), etc. – and neither the fact that they were causally responsible, nor the fact that they should now take responsibility, yet tells us anything about *how* they should take that responsibility. Thus, my second point was simply that we must *also* consult reactive norms to find out what *the appropriate way* of taking responsibility might be under various circumstances – how taking responsibility should be done in this particular case – however note yet again that nothing in this commits me to supposing that causal responsibility is *irrelevant* to people's entitlements — rather, I merely claim that facts about causal responsibility are not sufficient to by themselves justify specific conclusions about how someone should now be treated.

Chapter 4's rejection of a necessary link between causal responsibility and liability responsibility is only a denial of the sufficiency rather than a denial of the necessity of facts about causal responsibility for conclusions about liability responsibility, and so it is not a denial of the relevance of facts about causal responsibility to conclusions about how those parties should now be treated. Hence, since neither of these two points entails or presupposes that causal responsibility is irrelevant to how people should be treated, the above concerns therefore do not constitute an objection to the position which I endorse.

6.3.4. WHAT'S WRONG WITH LUCK EGALITARIANISM?

The no-fault systems which I endorsed above would not disregard people's causal responsibility when they determine how those people should be treated. However, at the same time they also would not presuppose that it is already clear *that* and *how* a person's causal responsibility should affect their treatment – for instance, they do not presuppose that it is already a *fait accompli* that their entitlements should be reduced – because as I argued in §4.1., the effect that a person's causal responsibility should have on how they are subsequently to be treated can not be known until after we have examined our reactive norms, since they are what tells us how people should be treated on account of their causal responsibility. But, on the account given in §4.1.1.(ii)., we will only find out what reactive norms we have reason to embrace by examining a range of different normative considerations.²⁹ Thus, in the first instance, to determine whether causally responsible people's entitlements should be reduced, we must assess and weigh up these different normative considerations against one another because although some of them may indeed warrant embracing a reactive norm that endorses a policy of reducing causally responsible people's entitlements (e.g. we might suppose that public funds should not be wasted by feeding gambling habits), other considerations (e.g. that perhaps we would not want to live in such a cold and uncaring society as the one which Rakowski seems to endorse) may recommend against doing this. Secondly, it is also conceivable that some of these considerations may bear not on what people's *entitlements* ought to be, but on some *other aspect* of how they should be treated – for instance, that they might bear on whether the causally responsible person should be punished, re-educated, asked to apologize, or on

²⁹ For instance, §4.2. considered (and rejected) five arguments in support of the reactive norm of tort liability: amongst these were appeals to the alleged requirements of justice (corrective justice), to virtue (that a virtue-responsible person would do this or that), and to substantive evaluations of people's interests (weak and strong retributive justice). But it is also conceivable that utilitarian considerations could be called upon to support the reactive norm of tort liability, and in fact that is presumably precisely why conservatives claim that deterrence requires the use of the mechanism of liability — i.e. this is presumably an attempt to show that utilitarian considerations endorse that reactive norm.

something completely different, but yet that their eligibility to claim benefits should not be affected – and so although *some consequences* may indeed need to be visited onto causally responsible people, after assessing and weighing up these different normative considerations it may turn out that those consequences will not affect their entitlement to claim benefits. Thus, until we look at these normative considerations, we simply will not know what effects a person’s causal responsibility should have on how that person should subsequently be treated.

This approach stands in stark contrast to the approach taken by luck egalitarians, because (as I commented earlier in §6.3.1.) on their account a person’s causal responsibility *automatically* reduces their entitlements — i.e. on their account, causal responsibility is *sufficient* for liability responsibility, and that is indeed a prominent reason why they think that it is perfectly legitimate to give lower priority to the needs of the alcoholic, of the smoker and of the ‘dole bludger’ or the ‘job snob’. However, what is particularly striking about nearly all of the debates about the legitimacy of introducing such causally-based disentitlement clauses into social welfare systems, is that nearly everyone – i.e. both the luck egalitarians, and those who oppose them – assumes that the *only* problem with such disentitlement clauses is that we may sometimes have good reasons to think twice about whether the accused party was indeed causally responsible. Hence, while the luck egalitarians focus their efforts on showing that most of the time causal responsibility *can* be established, their opponents argue that a lot of the time it *can not* be established and that for this reason we should be weary of treating people differentially on the basis of such judgments.³⁰ However, if we accept Chapter 4’s

³⁰ For instance, the whole focus of Glannon’s paper (which argues for the claim that it is OK to reduce people’s entitlements as long as they were causally responsible and as long as they could reasonably be expected to have known that this would be a consequence of their causal responsibility) is on showing that alcoholics are causally responsible, but he then assumes that ‘if he [i.e. the alcoholic] is responsible for it, then his entitlement to a liver transplant may be diminished’ (1998:44) — i.e. causal responsibility is the only stumbling block to disentitlement on his account. Secondly, although Daniel Brudney (2007) adds a further clause which makes it less likely that particular alcoholics will become disentitled – he claims that it must also be true that the person acted recklessly in the sense that they knew that by engaging in alcoholism they would now enter into competition with others for scarce life-saving livers – he too in the end assumes that what really matters is whether the person was causally responsible, and that once this is established it follows (largely automatically) that their entitlements should be reduced. This same focus (and blind spot) is also reflected on the other side of the debate, because those who think that such a policy would be too harsh also focus almost exclusively on debating whether the alcoholic’s (or the smoker’s, or whoever else’s) actions satisfied the conditions of individual causal responsibility – e.g. whether they were voluntary, given the addictive nature of alcohol – and they do not even hint at the possibility that there might be more to determining whether such a policy would be reasonable than facts about that person’s causal responsibility (e.g. Beresford

analysis of responsibility – and especially if we accept its claim that causal responsibility is *at best* only a *necessary* condition of liability responsibility³¹ – then we will realise that this is not the only reason to hold off from introducing such causally-based disentitlement clauses into social welfare systems, because even if it turned out that (e.g.) the alcoholic, the chain smoker, and the ‘dole bludger’ are causally responsible for their respective deprivations, in order to justify imposing such entitlement restrictions onto them, we would *also* have to show that on balance normative considerations support this sort of treatment of causally responsible people. Thus, we should reject the luck egalitarian’s assumption that a person’s causal responsibility for their own deprivation should *automatically* reduce their entitlements – i.e. their claim that causal responsibility is *sufficient* for a particular kind of liability responsibility that affects entitlements – because that claim is a direct denial of Chapter 4’s claim that reactive norms are required to justify conclusions about how people should be treated on account of their causal responsibility — i.e. it is the denial of a claim which we must have already approved if we accepted Chapter 4’s defence of no-fault systems from the responsibility allegation. But, if we reject the luck egalitarians’ claim about causal responsibility being sufficient for liability responsibility, then we will no longer necessarily feel compelled to put into place such harsh disentitlement clauses into social welfare systems.

However, this last point should not be misinterpreted as the rather similar-sounding claim that such disentitlement clauses must be rejected. Rather, my point is simply that before we introduce such disentitlement clauses into social welfare systems, we should check all of the relevant normative considerations to see what there is most reason for us to do, and we should only put such disentitlement clauses into place if on balance there exists more reason to adopt a policy that treats such people in this harsh manner rather than to adopt a policy which does not do this. But importantly, we should also remember that if we do put such disentitlement clauses into place, then the reason why causally responsible people will be treated less generously than others will not be simply because they were causally responsible, but rather it will be because they were causally responsible *and* because that is the best course of action all things considered.

6.3.5. COMMENTS ON ANDERSON’S CRITIQUE OF LUCK EGALITARIANISM

Thus, on my account Elizabeth Anderson is right to open her critique of luck egalitarianism by asking ‘If much recent academic work defending equality had been secretly penned by conservatives, could the results be any more embarrassing for egalitarians?’ (1999:287), and

2001; Martens 2001). An exception to this rule is Robert Goodin who first identifies and then criticizes this precise blind spot (Schmidtz and Goodin 1999).

³¹ i.e. in the sense that it may be a disentitlement clause.

to criticize luck egalitarians for having lost sight of truly egalitarian aims — e.g. addressing ‘the concerns of the politically oppressed’; redressing ‘inequalities of race, gender, class and caste’; and eradicating ‘nationalist genocide, slavery and ethnic subordination’ (Anderson 1999:288). She is right to say these things because on my account luck egalitarians have indeed taken a much too narrow view of the sorts of considerations which can legitimately inform egalitarian thinking. Her criticism of luck egalitarianism should not be seen as merely an *outsider’s* expression of horror at the surprising coldness of the luck egalitarian position — as disillusionment at the fact that those sturdy-looking premises which provide the foundations for the egalitarian position³² lead to unpalatable outcomes when their practical implications are fully drawn out — but rather it should be seen as an expression of concerns which lie at the very heart of the egalitarian position — i.e. this in an *insider’s* perspective.

Put another way, true egalitarians should not be as quick as Rakowski and Arneson to reduce the entitlements of those who were causally responsible for their own deprivations, because normative considerations also have a legitimate role to play in determining whether this should indeed be done or not, and these considerations are intrinsic to the egalitarian project and not extrinsic distractions from that project’s main concerns. While luck egalitarians assume that people’s entitlements should *automatically* track their causal responsibility, on my account this is not automatic for two reasons: firstly, it is not automatic that people’s entitlements should track their causal responsibility because *whether* someone’s causal responsibility should affect their entitlements or not depends on a possibly wide range of normative considerations, and some of these may recommend against doing this; and secondly, because it is also plausible that causal responsibility may only be relevant to *other aspects* of how causally responsible parties should be treated, but not to their entitlements *per se*.³³ Chapter 4 presented an analysis of the concept of responsibility — i.e. it developed the structured taxonomy of responsibility concepts — and the role which causal responsibility

³² Namely, that to achieve true equality we should preserve the effects of people’s choices, but only after we have eliminated the effects of luck — see earlier footnote for relevant citations.

³³ As I mentioned above, Robert Goodin also criticizes the all-too-common assumption that a person’s causal responsibility (or what he calls ‘blame responsibility’) for their own deprivation should automatically reduce their entitlements (which he calls ‘task responsibility’ and I have called ‘liability responsibility’). Goodin argues: ‘Task responsibility is often thought to flow, automatically (indeed, analytically), from blame responsibility. To determine whose responsibility it should be to correct some unfortunate state of affairs, we should on such logic simply determine who was responsible for having caused that state of affairs in the first place. Those who are responsible for causing an unfortunate situation are responsible for fixing it. ... Nothing, it seems, could be simpler, more analytically straightforward’ (Schmidtz and Goodin 1999:151). However, on the subsequent pages he demonstrates that it is far from obvious that this assumption is justified.

plays in shaping people's entitlements on that account is a lot more subtle than the role which it plays in luck egalitarian accounts. But if we accept Chapter 4's analysis of responsibility, then we will no longer have reason to suppose that the mere fact that someone was causally responsible for their own deprivation is now a sufficient reason to reduce their entitlements, since more is required by way of normative argument to show that this is the right thing to do.

6.3.6. HAVE I CONTRADICTED MYSELF?

Nevertheless, it is conceivable that conservatives might now complain about my claim that causal responsibility *may* after all be relevant to determining people's entitlements, because this claim may seem to contradict my earlier claim that compensatory policies can not be specified through process-oriented criteria. Put simply, my opponents might now accuse me of inconsistency on account of re-introducing precisely the same sorts of process-oriented considerations into my *entitlement* decisions as the ones which they wanted to use (but which I denied to them) in their *compensatory* decisions, because it may indeed seem that if we allow causal responsibility to be a condition of ineligibility under the systems which I endorse, then facts about *how the deprivation came about* – i.e. that it came about *because of* their actions – will after all play a crucial role in determining people's entitlements. But if facts about *how* a state of affairs came about were problematic when they were used by the *conservatives* to ground their compensatory decisions, then why should they now be any less problematic when *I* use them to ground my entitlement decisions? To lay this worry to rest and to forestall this potential objection, I will now make two more points to highlight the stark difference between my own and the conservatives' position.

Firstly, a critical difference between my causal responsibility and the sorts of process-oriented considerations which Chapter 5 rejected, is that while the latter were not meant to rely on any outcome-oriented considerations – that is, after all, how they were meant to deliver impartiality – the former is thoroughly steeped in outcome-oriented considerations. To arrive at conclusions about causal responsibility, we can not avoid outcome-oriented considerations precisely because as I pointed out at various junctures in §4.1.1., such considerations play a central role in determining what people's duties of care might be — i.e. it is precisely on those occasions when *too much* is at stake for others and *too little* is at stake for us that we should exercise greater care, but both of these judgments require assessments of the value of various outcomes. Thus, my admission that causal responsibility may play a role in shaping people's entitlements is not inconsistent with Chapter 5's critique of the conservatives' claim that process-oriented criteria should be used to specify compensatory policies, because the condition which I now admit may be relevant to determining people's entitlements (i.e. causal responsibility) is not at all like the sorts of conditions which were rejected earlier in Chapter 5 (i.e. process-oriented criteria).

However, even if the conservatives had claimed that people should only be compensated for their losses when someone else was *causally responsible* for them,³⁴ there would still be a substantial difference between my claim about the role which causal responsibility plays in determining people's entitlements and their claim about its role — namely, while on my account causal responsibility only *may* be a condition of *ineligibility*, on their account causal responsibility is a *sufficient* condition of *eligibility*.³⁵ The difference here is crucial because on their account the mere fact that someone else is causally responsible for our deprivation is already as a sufficient reason to grant me an entitlement — i.e. causal responsibility has *fundamental* normative significance to *entitlement* decisions. However, on my account the significance of causal responsibility to entitlement decisions is not fundamental at all — rather, it is at best only *borrowed* from other normative considerations — because as I argued earlier: (i) the mere fact that someone else is causally responsible for my deprivation is neither here nor there as regards my entitlements;³⁶ (ii) my deprivation must be serious if it is to have the potential to bestow entitlements onto me; and (iii) my own causal responsibility will only be a condition of my ineligibility *if other normative considerations support it being such*. Put another way, the fact that someone is causally responsible for their own serious deprivation is only a disentitler (rather than being an ‘entitler’), and it is only a disentitler if other normative considerations (e.g. deterrence, policy, etc.) recommend this — i.e. only other normative considerations can make causal responsibility relevant to entitlements *per se* — which means that causal responsibility is not fundamentally relevant to entitlements. On my account, causal responsibility is only a condition of eligibility in the restricted sense that it *may* be relevant to arguments that support reactive norms which affect causally responsible people's entitlements, and so it is *those other norms* and not causal responsibility that has the fundamental normative significance for entitlements (if anything has that significance).³⁷

³⁴ ...rather than claiming that people should only be compensated for their losses when those losses came about in the right way (something which supposedly doesn't draw on outcome-oriented considerations) ...

³⁵ ... and on the luck egalitarians' account causal responsibility is a *necessary* condition of *eligibility*.

³⁶ Put more precisely, it is neither here nor there *qua* another being causally responsible, but to whatever extent the fact that another person is causally responsible might indicate that *I* am not causally responsible for my own deprivation, to that same extent the fact that someone else is causally responsible for my deprivation *may* be relevant to my entitlements but only *qua* my causal responsibility, and even then it would only be relevant if other normative considerations recommend this — see point (iii).

³⁷ As I pointed out above at the top of §6.3.4., that is what it means to say that claims about liability responsibility can only be derived from facts about causal responsibility through *normative* rather than

Hence, I offer two replies to the worry that by admitting that causal responsibility *may* be relevant to people's entitlements I have inadvertently contradicted myself. Firstly, what was rejected in Chapter 5 (i.e. process-oriented criteria) is very different to what I now admit may be relevant to people's entitlements (i.e. causal responsibility is a thoroughly outcome-oriented concept). Secondly, a lot rides on the word 'may' in my claim that causal responsibility may be a condition ineligibility, because while the conservatives would view causal responsibility as a sufficient condition of eligibility (i.e. causal responsibility has fundamental normative status as regards entitlements), on my account causal responsibility is only possibly a condition of ineligibility, and even then it is only such if other norms allow this (i.e. other norms, rather than causal responsibility, have the fundamental status as regards entitlements).

6.4. CLOSING REMARKS

The bulk of this thesis (i.e. Chapters 4 and 5) was devoted to offering a defence of no-fault systems from the *conservatives'* two allegations, and since *reformers* claim to champion the no-fault cause, it would therefore be easy to read this thesis as a simple endorsement of the reformers' position. However, this chapter has argued that although no-fault systems are not objectionable on account of the conservatives' two allegations, never the less this should not be taken as an endorsement of the reformers' position because their typical proposals are in fact not supported by the principles which they claim to champion — i.e. endorsing no-fault systems is not the same as endorsing the reformers' position.

Hence, although Chapters 4 and 5 addressed a debate about whether accident law should *remain unaltered* (i.e. the conservatives' position) or whether it should be *radically reformed* (i.e. the reformers' position),³⁸ Chapter 6's conclusion is that neither of these two answers is actually correct since what we should do on my account is even more radical — we should *abandon accident law completely* and *ensure that social welfare systems exhibit the right set of features*. Namely, on my account social welfare systems should be *pure* and *comprehensive*, entitlements should be *redistributive* and mostly *equivalent*, and although *serious deprivation* should be a necessary condition of eligibility to claim benefits, *causal responsibility* may also be a condition of ineligibility if on balance there is sufficient reason to endorse a causally-based disentitlement policy. Whether there *is* indeed sufficient reason to endorse such a causally-based disentitlement policy is not however an issue which can be

through *logical* entailment — i.e. it means that other norms play a crucial role in justifying *that* and *how* the causally responsible party should now take responsibility.

³⁸ I also briefly discussed but subsequently rejected an intermediate position — namely, §2.2.3. examined the suggestion that accident law should be *incrementally reformed*.

satisfactorily resolved here, since to achieve such a resolution I would have to survey a range of different normative considerations,³⁹ and since this would undoubtedly be a lengthy investigation I will therefore leave this task for another occasion.

So, in summary, this thesis has considered two objections which are often leveled against no-fault systems, but it has argued that although those objections can be met, doing so leads in a direction which is at odds with the accident law reform advocates' typical recommendations.

³⁹ The problem here is not dissimilar to the problem that would have been encountered in the second half of Chapter 4 if rather than tackling the five arguments which the conservatives cite to support their claim that the reactive norm of tort liability should be embraced, I instead attempted to refute their claims about *who* was causally responsible and *for what* they were causally responsible.

APPENDIX. A BRIEF SURVEY OF NO-FAULT SYSTEMS

Szakats points out that as early as 1881, Oliver Wendell Holmes prophesied that ‘the state might conceivably make itself a mutual insurance company against accidents and distribute the burden of its citizens’ mishaps among all its members.’ (Holmes 2000:56; Szakats 1968b:56) However it was not until 1928 that a ‘committee ... was set up by the Columbia University Council for Research in the Social Sciences’ to study the appropriateness of tort law as a mechanism for the compensation of motor vehicle accident victims, and to come up with alternative suggestions (Szakats 1968b:56). In 1932 the committee reported that tort law was indeed inappropriately equipped to deal with motor vehicle accidents, and that ‘[l]itigation in such cases results in ... trials which are largely contests of skill and chance’.¹ Furthermore, given that ‘only 17.3 percent of motor vehicles in the United States carried third party liability insurance ... the [victims’] chance of actual recovery was only one in four’ (Szakats 1968b:57). In summary, the committee’s most notable recommendations were: (i) that drivers should be strictly liable (i.e. without regard for fault) for the consequences of their driving; (ii) that all drivers should take out compulsory third party liability insurance; however (iii) that victims who suffer losses as a result of their own misconduct should not be entitled to compensation; and (iv) that the scheme should be operated by a special body set up specifically for the purpose of administering this scheme.

As far as no-fault systems go, this one is not particularly radical by today’s standards – in fact, it appears little different to what current tort systems do anyway – especially since people who suffered losses as a result of their own misconduct would be denied compensation, and since, more importantly, this system would retain the tort remedy of loss-shifting as its only remedy available to victims — after all, it would be based on third party liability insurance, and not on first party self-insurance. However the most significant aspects of this proposal from the perspective of its effect on the history and subsequent development of no-fault systems, was that it openly criticized the idea that compensation should take the

¹ The skill referred to is presumably the skill of the lawyers representing the adversaries to the tort action, and the reference to chance may either be a reference to the luck (or lack thereof, depending on whether it refers to the victim or the injurer) of whether the accident was a result of a faulty action, or the luck involved in securing a particularly competent lawyer to argue on one’s behalf. This quote is taken from an extract quoted by Szakats from the original *Report by the Committee to Study Compensation for Automobile Accidents (1932)* (Szakats 1968b:57).

form of damages paid only to those who were fortunate enough to be injured by another's negligence, that it advocated compulsory insurance,² that victims' eligibility for compensation would not depend on showing that their losses resulted from another's fault,³ and that it would involve the set-up of a totally separate infrastructure to tort law to deal with compensating victims of motor vehicle accidents. With this sketch of the early history of no-fault, let me now describe some of the proposals that followed the Columbia Plan and to draw attention to where they stand with respect to the eight features of accident law.

A. MAZENGARB PLAN — 1942

Dr Mazengarb's plan is a modified version of the Columbia Plan which, in addition to offering compensation regardless of injurer fault, also retains 'the right of individual[s] to have [their] claim for damages determined by' a court in a tort action against their injurer (Szakats 1968e:89). Under this plan, which would also be administered by a special body set up specifically for this purpose, and funded by levies and taxes on drivers' licenses and petrol, victims could elect to either (i) claim compensation from this body without having to establish defendant fault but they would forfeit their right to sue in a tort action, or (ii) sue their injurers in a tort action but they would forfeit any rights to receive no-fault compensation even in the event that their tort action failed.⁴ Benefits covering medical expenses and loss of earnings recovered under this scheme would only be payable for up to the first 12 months following the accident. Given the paltry benefits available to victims who chose the no-fault option, it would be safe to say that this plan was intended mainly as a safety-net measure to give those who were not fortunate enough to be injured through

² It could be argued, as Professor Craig Brown does, that the widespread use of liability insurance means that practically even tort systems become loss *distributive* rather than loss *shifting* systems (Brown 1990). However, even if we put aside the reasons for distinguishing loss shifting from loss distribution which were stated in §3.1.2., this distinction would still be useful because the distribution which occurs under tort law is a by-product of everyone having liability insurance, whereas in no-fault the distribution of losses is something that is actively sought.

³ ... putting aside the fact that their own fault, as the cause of the accident, barred recovery, because doing so could be justified on grounds of trying to promote greater deterrence, and not by reference to victims' entitlements to compensation ...

⁴ Szakats' summary is somewhat confusing at this point because although he claims that under this plan victims could only collect *either* no-fault benefits *or* pursue a tort action, he then also claims that the plan makes provision for recovery of double payments where 'the injured person after having received payment from the Board recovers from the wrongdoer by way of court action' (Szakats 1968e:91).

another's fault a chance of recovering something rather than nothing.⁵ When the exclusive nature of the no-fault and tort options is taken into account, together with the other aspects mentioned above, it would seem most appropriate to classify this system as a dual limited redistributive compensation scheme.

B. EHRENZWEIG FULL AID INSURANCE PLAN — 1954

Under the original Ehrenzweig Full Aid Insurance plan, developed by Professor Albert Ehrenzweig in 1954, drivers would be given an option to take out a special form of voluntary insurance in return for indemnity from liability for negligently causing another's losses, and gaining access to a compensation scheme that would cover them for "all losses inflicted by the operation" of a motor vehicle'.⁶ If one chose to not take out this form of insurance, then they would have to take their chances with the uncertain and often callous outcomes of the tort system. For those who took out this special form of insurance, which Professor Ehrenzweig envisaged could be provided by commercial insurers, benefits would usually be paid in the form of periodical annuities similar to Worker's Compensation payments rather than in lump sums, and there would be no limit on the total claims that would be paid to the one insured party — '*[t]otal permanent disability* would entitle the [victim] to the basic weekly indemnity for life' (Ehrenzweig 1960-61:287).

The original version of this plan was however criticized on grounds that it did not seem to provide a clear outline of the 'machinery [to be used] for the settlement of disputes regarding [e.g.] the amount of compensation or the duration of weekly benefits'. It was also criticized for leaving it up to individuals to decide whether to take out this form of insurance or not (rather than, in contrast, making it compulsory for them to do so), as doing so 'would not secure mass participation of motor car owners without which the plan could not effectively operate' (Szakats 1968e:92). Thus, in a later version of this plan, aimed at compensating victims of medical accidents, Ehrenzweig acknowledged that participation in this plan should after all be compulsory and not optional, in the context of both motor vehicle accidents as well as medical accidents (Ehrenzweig 1960-61:279-80).

⁵ However given that failure to recover in a prior tort action barred no-fault recovery, one can't help but think that this plan would not have worked particularly well as a 'safety-net', since people could still find themselves in the lurch. One can only presume that the reason why victims whose prior tort action failed would be barred from recovery, was to encourage no-fault settlements, but that would not have been likely given the low benefits of the no-fault option.

⁶ Szakats does not make it clear whether this would be a form of first party *self insurance* or third party *liability insurance*, or even a *combination of both*, but from his discussion it would seem that the third answer would be the closest to Professor Ehrenzweig's intentions (Szakats 1968e:91).

Due to the exclusive nature of one's benefits (i.e. either no-fault benefits or a tort action, but not both) both the earlier as well as the later systems would again be best classified as dual systems.⁷ The focus on the context that the losses were suffered in (only motor vehicle or medical accidents) makes these into limited rather than comprehensive schemes. The aim of providing compensation for the full extent of losses suffered under the original scheme means that the original scheme would have offered corrective compensation; whereas the aim of providing compensation on a tariff basis in the later version of this scheme would make it into a redistributive system (although benefits may have been generous). And finally, since compensation would not be offered for 'unmeasurable harm' in either system, these systems would therefore only provide equivalent compensation, but not substitute or solace compensation (Ehrenzweig 1960-61:288).

C. PARSONS' PROPOSAL (AUSTRALIA) — 1955

Professor Parsons' proposal is built upon the proposition that it is not appropriate to take considerations of fault into account in motor vehicle accidents, presumably because (like other commentators also argue) it is seldom the case that true fault is ever present in such accidents.⁸ Parsons suggests that if this proposition were accepted, then there would no longer be a place for liability and liability insurance in the sphere of motor vehicle accidents (which would have made this into a pure limited compensation scheme), and hence that these should therefore be replaced with an accident insurance scheme.⁹ Parsons suggests that by doing away with the costly infrastructure of tort law (confined to the sphere of motor vehicle accidents), such a scheme could afford to be more generous to victims than tort law. He envisaged that in addition to ordinary premiums, such a scheme would also be funded by 'supplementary premiums [and a proportion of] fines for highway offences, including fines paid by pedestrians, [which would] be paid into the fund' (Szakats 1968e:96). Although he originally envisaged that the fund would 'be administered through the existing Motor Vehicle Insurance Fund of Western Australia', this was not an issue that he felt particularly strongly

⁷ The exception to this exclusivity would be the case of victims of criminal negligence, who would have recourse to tort law, so as to allow the system to exert some punishment on negligent individuals and to give victims an outlet for feelings of revenge, but others would still be catered for in the event of the defendant's insolvency or un-insured status by an 'Uncompensated-Injury Fund' (Ehrenzweig 1960-61:283, 285-6 & 290).

⁸ This rationale is suggested by Parsons' discussion of the role of the fault criterion (Parsons 1956:233).

⁹ Parsons' intention was for this to be a first-party form of insurance which would replace tort liability for motor vehicle accidents, in a way not dissimilar to Patrick Atiyah's recently suggested first party insurance scheme discussed further below.

about, and he suggested that ‘if there [were] a preference for [it to be administered by] private enterprise’ then this should not pose any particular problems (Szakats 1968e:98).

Under this scheme victims would be entitled to redistributive compensation, calculated to some extent on the victim’s and their family’s needs, ascertained ‘either by reformed tort rules or according to a tariff scheme.’¹⁰ Benefits would initially be paid in the form of an annuity during the first two years, after which the insurance administrators would have the discretion to pay the beneficiaries out by offering a lump sum.

D. HOFSTADTER PLAN — 1956

Another plan, developed by a judge of the Supreme Court of New York, came out of two main observations. Firstly, upon examining the statistics, Hofstadter J. noticed that a majority of all court cases related to personal injuries in motor vehicle accidents. Secondly, he also noticed that the outcomes of such cases were largely dependent upon the precise composition of the jury, who recognized the failings and inequities of the tort system as a means of compensating victims, and so circumvented the rules whenever they felt that the system treated victims too harshly (Szakats 1968e:95). Given the failings of the tort system, Hofstadter argued that the jury trial based on negligence, as a way of compensating the victims of motor vehicle accidents, ought to be abandoned, which would push his system towards the pure end. Instead, he proposed its replacement with a compensation scheme similar to Workers’ Compensation, which paid victims according to a schedule of benefits based on a tariff system that outlined a pre-determined scale of payments applicable to various injuries, regardless of the presence or absence of fault.¹¹ This scheme could therefore be classified as a pure limited redistributive equivalent compensation system.

E. GREEN’S LOSS INSURANCE — 1958

Professor Leon Green’s proposal was built upon the principle that when someone suffers an accident, the effects of that accident are felt not just by the immediate victims, but by all of society including their ‘family, neighbors, creditors and the taxpayers’. He argued that ‘the strength of the group lies in the strength and security of the individual[, and hence that we

¹⁰ (Parsons 1956:287) Benefits paid would be partly determined by the degree of disability suffered, as well as ‘by the age of the victim and the size of [their] family’, which suggests the focus on satisfaction of the victim’s (and family’s) needs (Szakats 1968e:96-7). Surprisingly though, such payments would not be means-tested, which suggests that Parsons felt that victims should always be entitled to receive something if they were involved in an injury-causing accident irrespective of their needs.

¹¹ Szakats does not hint at how this system would be funded, what sort of losses would be covered by this system, nor does he explain how it would be administered (Szakats 1968e:96).

should] come to make more adequate provision for the victims of the luxurious lives we live' (Green 1958:60-1). Since the advances of technology and industry have resulted in a strong and prosperous society, Green felt that it would only be fair to ensure that everybody was adequately taken care of in their time of need, for this would in return foster a stronger society. Furthermore, significantly influenced by Marx J. of the Ohio Bar, Green also argued that the long delays involved in securing compensation by victims in a tort system – '[f]our years delay in New York[, and f]ive years delay in Chicago' – must also be resolved since they benefit neither plaintiffs nor defendants, and they only result in greater administrative costs to be borne by society (Green 1958:85).

Consequently, Green proposed a 'compulsory motor vehicle comprehensive loss insurance' scheme, funded by premiums charged at the time of registering a motor vehicle, which would cover compensation for bodily injuries and property damage on a no-fault basis (Green 1958:87-92). He suggested that such a scheme should cover all – or at least as many as possible – economic losses suffered in the context of the operation of motor vehicles on a no-fault basis, though that no payments should be made for pain and suffering. Finally, being a no-fault system, the only relevant issues to the compensability of a loss would be 'the facts of the accident, the extent of injury and the quantum of appropriate compensation', and the tort action based on negligence would be completely abolished (Szakats 1968e:93). Given that this scheme would abolish the tort remedy in the context of catering for the needs of victims of motor-vehicle accidents, it too would be classified as a pure limited system, though it would seem to offer corrective equivalent compensation.

F. MORRIS & PAUL SUFFICIENCY COMPENSATION — 1962

Spurred on by the alarming finding 'that in 52 percent of the cases studied court action yielded less than half of the 'tangible loss' incurred by the victims' of motor vehicle accidents, this plan, unlike most of the previously mentioned plans, aimed to cater specifically for the needs of grossly *under*-compensated victims (Szakats 1968e:94; Morris and Paul 1962). Professors Morris and Paul did not want to abolish recourse to the tort remedy, but they nevertheless felt that these cases of gross under-compensation presented a particular problem which should be catered for in some manner (presumably on humanitarian or moral grounds). To this effect, the scheme they suggested essentially involved the set-up of a supplementary insurance fund, to be 'financed by some sort of charge on the motoring public' (the specifics of which were not elaborated upon), which would not only aim to provide 85 percent compensation for the uncompensated portion of such victims' losses (with generous caps imposed onto the total amount that could be recovered by any individual), but it would also aim 'to prevent the wasteful use of money under the present system' by removing the

right to sue for pain and suffering for cases where the amount claimed for tangible losses fell below \$800.¹²

In principle, such a scheme could be financed not just by charges imposed on the motoring public, but by charges imposed on all of society, thus offering similar emergency compensation to all grossly uncompensated accident victims, irrespective of what sort of accident it was that caused their loss to come about (motor vehicle, medical, work related, etc). Had this been the funding model and eligibility basis, then this proposal would have been a mixed comprehensive corrective capped compensation scheme. As it stands however, the Morris and Paul Sufficiency Compensation plan was a limited scheme, with equivalent compensation, as well as substitute and solace compensation available to victims whose tangible economic losses exceeded \$800, and only equivalent compensation available to those whose economic losses fell below the \$800 threshold.

G. WILD SCHEME, THE DISSENTING COMMENTS OF MR H R C WILD, ACTING AS CHAIRMAN OF THE NEW ZEALAND COMMITTEE ON ABSOLUTE LIABILITY) — 1962-3

This scheme was the brainchild of the chairperson of the Committee on Absolute Liability, Mr H R C Wild Q.C., who elaborated its theoretical foundations and its details in a dissenting opinion published in the committee's report on 'the desirability of ... introduc[ing] some form of absolute liability for death or bodily injuries arising out of the use of motor vehicles' — i.e. this was a limited scheme.¹³ Wild developed this scheme partly because of considerations of the overt cost of the tort system, but also because of its utter unsuitability as a motor vehicle accident compensation strategy. He felt that the 'common law remedy requiring proof of negligence' should be abolished (as regards motor vehicle accidents), and that the State should compensate such victims on a no-fault basis from a scheme that would be funded from general taxation coffers, from special taxes on petrol, as well as from fines collected from driving offenders (Szakats 1968e:98-9). He argued that the common law remedy was inadequate for the task at hand because an award of damages was impotent without the institution of compulsory liability insurance (to assure that the defendant could always satisfy their legal obligation); that it was costly; that judges and juries were faced with having to make guesses at 'the imponderables of the future' when deciding just how much lump sum

¹² (Szakats 1968e:94-5) The imposition of such minimum claims would have the same effect that the imposition of an 'excess' has on the cost of insurance premiums — it reduces the otherwise large administrative cost associated with a huge number of small claims, which results in lower premiums.

¹³ Quoted from the *Report of the Committee on Absolute Liability* (Szakats 1968d:80).

compensation to award; and that in the end it was only available to those who just happened to be ‘fortunate’ enough to be injured or suffer losses as a result of another’s negligence (Szakats 1968e:101).

Under this proposed pure limited compensation scheme, victims would be entitled to corrective equivalent compensation for lost earnings which would be paid in the form of an annuity. Substitute and solace compensation would be paid in a lump sum, but only to victims who suffered smaller though nevertheless permanent injuries. On the other hand, victims who suffered major permanent disabilities would only be entitled to equivalent compensation which would be paid in the form of an annuity. Finally, Wild did not commit to whether the scheme should be administered by the State or through some commercial venture, since he felt that this would ultimately be a political decision that should be made only after carefully examining the pros and cons of all the different options, and after consulting with all of the concerned parties (Szakats 1968e:101).

H. KEETON & O’CONNELL BASIC PROTECTION PLAN — 1964-8

Keeton & O’Connell preface their plan by acknowledging the numerous failings of the tort system including: the overly long delays involved in securing compensation, the injustice of some victims receiving too little compensation while others receive overly large amount of compensation, the injustice in the way that the burdens of accidents are eventually allocated, the general wastage involved with administering tort systems, and the fact that tort systems tend to encourage dishonesty in both victims and in injurers (Keeton and O’Connell 1968:40-3). In response to these failings, Keeton & O’Connell developed their Basic Protection Plan with two primary aims: firstly, to provide coverage for losses suffered by victims of motor vehicle accidents ‘regardless of fault [and] up to a moderate limit’, and secondly, to ‘eliminat[e] small negligence claims for injuries suffered in traffic accidents’.¹⁴

The resulting plan, which Szakats refers to as ‘the best and most detailed proposal to date’, was characterized by coupling ‘a new form of [compulsory first-party] automobile insurance’, with ‘a new law that would do away with claims based on negligence unless the damages were higher than \$5,000 for pain and suffering or \$10,000 for all other items such as medical expense and wage loss’ (Szakats 1968e:121; Keeton and O’Connell 1968:43-4). Under this mixed limited plan, victims of motor-vehicle accidents would be entitled to a (generously) capped form of corrective equivalent compensation for medical expenses, lost income, and some substitute and solace compensation for pain and suffering. The plan would

¹⁴ The significance of the latter aim is presumably linked to this plan’s removal of *tort* claims based mainly on pain and suffering — see next paragraph (Keeton and O’Connell 1968:48).

be funded principally out of compulsory first-party insurance premiums, collected as a prerequisite for registration of one's motor vehicle and for obtaining a driver's license, and they envisaged that it would be administered by private insurers (Szakats 1968e:121). Keeton & O'Connell argued that not only would this plan be cheaper to run in terms of administrative costs due to a reduction in doubled-up payments received by victims under incumbent tort systems, but also that it would provide more equitable compensation to a larger number of victims (Keeton and O'Connell 1968:44-5).

In addition to the compulsory Basic Protection Plan, they further suggested that tort law reform should also involve the provision of further protection to cover victims of motor vehicle accidents for property losses, most important of which would be damage to motor vehicles. To this end, they suggested that motorists should also be compelled to choose either to insure themselves against damage to their own vehicles on a no-fault basis 'along with [being granted] a corresponding exemption from tort liability', or to only take out third-party liability coverage for damage to others' property (but only for the benefit of those who also chose this second coverage option), which would then only entitle them to compensation for property damage in the event that their injurers were also at fault (adding to the reason why this system would be a mixed and not a pure system) (Keeton and O'Connell 1968:45).

I. THE REPORT OF THE ROYAL COMMISSION OF INQUIRY ON WORKERS' COMPENSATION IN NEW ZEALAND — 1967

In the Appendix of his book, Szakats provides an outline of a report, with lengthy quotations and citations from the original, compiled by the Royal Commission of Inquiry on Workers' Compensation in New Zealand. Three years following the findings of the New Zealand Committee on Absolute Liability, a Royal Commission was set up to investigate the status of the then current Workers' Compensation legislation. Although Alexander Szakats had already given much praise to Mr Wild's previously-mentioned no-fault compensation plan, he praised the proposed plan embodied in this latter report even more, when he described it as 'certainly the best, most advanced and most comprehensive [planned] compensation [system] in the world' (Szakats 1968a:158).

The inquiry, originally commissioned to investigate the extent to which there was a need for reform of Workers' Compensation legislation, came up with a much more comprehensive report than was originally expected, which recommended the abolition of tort rights with respect to compensating victims for their injuries, that the then current Workers' Compensation legislation be repealed, and that in its place a new comprehensive plan be introduced. The plan outlined in the Commission's report aimed to cover not just the usual losses that Workers' Compensation or Industrial Injuries Compensation schemes covered.

Instead it extended to covering all people who had an earning capacity (and not merely those who actualised this capacity) for income losses and medical and rehabilitation costs resulting from any cause whatsoever (Szakats 1968a:141-2, 144). However this scheme would not cover victims for deliberately self-inflicted injuries, against losses sustained as a result of just punishment for having committed a criminal offence, nor (surprisingly) against losses that resulted from disease or illness and some medical misadventures (Szakats 1968a:145-6). This relatively comprehensive extended coverage was based on the principle that 'workers do not change their status at 5 p.m. and if injured on the highway or at home they are the same men, and their needs and the country's need of them are unchanged' (Szakats 1968a:137). Thus, the new compensation scheme would provide coverage for accidents not just to victims of industrial or workplace accidents, but also to victims of motor vehicle accidents, and other accidents whilst (eg.) on holidays, thus effectively providing '24-7' coverage with only a few exclusions. Victims would also be covered for income loss not on a 'one size fits all' basis, but rather on the basis of trying to compensate people (up to a certain level) for the actual loss of earning capacity that they possessed (Szakats 1968a:142, 146, 148-50).

The inquiry noted all of the usual drawbacks of the tort systems as a means for compensating victims of industrial accidents, and they used this as a platform from which to build a new scheme. This scheme would be based on the principles of community responsibility, comprehensive entitlement, complete rehabilitation, real compensation, and administrative efficiency (Szakats 1968a:136-40). Furthermore, the report also argued that if a choice had to ever be made (for financial reasons) between either compensating some number of people whose losses were relatively small, or compensating fewer people though whose losses were relatively large, then preferential treatment should always be given to those in the latter group – i.e. those who suffered greater losses – but that similar losses should receive similar compensation (Szakats 1968a:141).

This proposal is best classified as a pure, and mostly comprehensive, no-fault compensation system. Compensation would be corrective and not redistributive, though there would be certain thresholds and caps placed on the precise amounts of compensation that anyone could receive (Szakats 1968a:149-50). Furthermore, not only would equivalent compensation be offered, but substitute and solace compensation would also be available (Szakats 1968a:146). Victims would usually receive their compensation payments in the form of an annuity, but in some cases (such as when their needs were particularly pressing, or when the injuries suffered were permanent though relatively small) lump sum payments would be allowed (Szakats 1968a:150, 153). The system would be administered by a sub-unit of the Department of Social Security, and it would be funded from four sources: compulsory industrial and workers' compensation insurance from employers, similar compulsory

insurance to be paid by the self-employed, compulsory insurance coverage imposed on motorists at the time of issuing drivers' licenses, and finally any shortfall would be made up by drawing on the general taxation coffers (Szakats 1968a:156-8). It was envisaged that the system would cost no more than incumbent tort law and other alternative strategies presently in use, and but that as a result of the savings made, there would be an extended range and level of coverage for victims.

J. THE AUSTRALIAN WOODHOUSE REPORT, THE NEW SOUTH WALES LAW REFORM COMMISSION'S TRANSPORT ACCIDENT COMPENSATION PLAN, AND MARK ROBINSON'S PROPOSED MODIFICATIONS OF THIS PLAN — 1974-1987

Following the report of the Royal Commission of Inquiry on Workers' Compensation in New Zealand in 1967, which was subsequently turned into an actual no-fault compensation scheme currently in operation, a similar inquiry was also set up in Australia. In 1974 the Australian National Committee of Inquiry published its findings in a report entitled 'Compensation and Rehabilitation in Australia',¹⁵ and its recommendations were surprisingly similar to the ones in the afore-mentioned report. Ten year later, this report and its recommendations were adopted by the New South Wales Law Reform Commission (NSWLRC), which used it as a basis to develop a Transport Accident Compensation plan, the details of which were published in its report in 1984 (NSWLRC 1984).

The NSWLRC's plan was a proposal for a New South Wales based no-fault motor vehicle accident compensation scheme. It was based on the same five principles as the ones mentioned in the New Zealand and the Australian Woodhouse Reports – i.e. community responsibility, comprehensive entitlement to compensation, complete rehabilitation, real compensation, and administrative efficiency – and, in summary, this would be a pure¹⁶ limited corrective capped scheme,¹⁷ that would provide both equivalent as well as some substitute and solace compensation.¹⁸ There is much overlap between these three plans – they differ very little from one another in practice – and so nearly nothing else needs to be said about them.

¹⁵ ... sometimes also referred to as the 'Australian Woodhouse Report'.

¹⁶ ... because the right of victims of transport accidents to TL action would be totally abolished ...

¹⁷ ... because it would aim to provide compensation for the full extent of one's income loss, though limits would be imposed on the maximum amount of compensation payable, and because it would only cover transport accident victims within New South Wales and not victims from other types of accidents or elsewhere in Australia ...

¹⁸ ... but the latter would only be available to those who were seriously and permanently injured ...

However one respect in which they did differ from one another, was in their treatment of ‘non-earners’, or those who suffered personal injuries while not actively engaged in paid employment. Robinson points out that while ‘the [Australian] Woodhouse Committee gave non-earners a [fixed flat-rate] notional weekly earnings figure payable after .. 21 days of incapacity, in addition to a periodic payment of 60% of average weekly earnings for permanent partial disabilities, and a lump sum ... for cosmetic impairments of real significance’, the NSWLRC’s plan proposed that ‘non-earners who are incapacitated for two years or more will be eligible to a notional earning capacity of 50% of the average weekly earnings’ (Robinson 1987a:75, 71). He argues that this huge difference in non-entitlement periods — three weeks versus two years — as well as the not insignificant 10% difference in the size of the eventual periodic payments received by non-earners, is evidence for the existence of a ‘fundamental tension’ present in all corrective compensation systems which is likely to prevent such systems from ever being expanded into fully-blown nation-wide schemes — a tension between restitution and care (Robinson 1987a:74). He also felt that if a no-fault compensation system were to be implemented as a nation-wide system rather than as a state-based system, then people should be provided with ‘earnings-related compensation ... for only a limited period’ of time such as six months, to eventually be replaced with ‘a set flat-rate payment’, because it would only seem fair that if everybody has made equal contributions to fund such a system, then all should receive equal treatment from it.¹⁹ Consequently, Robinson tried to develop a theoretical basis in principles of care rather than in principles of restitution, and what distinguishes his proposal from the NSWLRC’s proposed plan, was that compensation would be provided on a redistributive rather than on a corrective basis (Robinson 1987a:79).

K. SASKATCHEWAN, CANADA — CURRENT

Since 1946, the province of Saskatchewan in Canada has had some form of motor vehicle accident no-fault scheme in place. (Szakats 1968c) When he wrote his book in 1968, Szakats described the Saskatchewan insurance scheme as ‘[t]he only motor accident compensation scheme which has progressed beyond a mere blueprint and actually operates ... as a combination of: (1) Compulsory accident insurance (first party), and (2) Compulsory liability insurance (third party)’ (Szakats 1968c:68, 74-5). The system he described also gave people the option to purchase additional insurance to protect their own property against damage over and above the sufficiency levels provided for by the compulsory scheme. Although victims

¹⁹ However given that one of the sources of funding for a nation-wide system would likely be the communal trough of income taxes, which do vary significantly between individuals, it is not clear why a nation-wide system would have to be a redistributive system (Robinson 1987a:62, 57-9).

were taken care of under this scheme at a basic level of sufficiency, they also retained tort rights to sue those at fault in causing their losses for amounts exceeding these sufficiency levels. This made that system into a mixed redistributive equivalent compensation scheme with mixed sources of funding and administration.

Over the years, the precise shape of this system has evolved, and Szakats' account only provides details of the changes that took place up until 1968, and so an update might be useful. Essentially, the current scheme is still based around a system of compulsory first and third party insurance, and all victims of motor vehicle accidents are entitled to receive a package of benefits provided on a no-fault basis.²⁰ However where the system differs from the original 'one size fits all' no-fault system, is that instead of providing the same compulsory package of coverage to everybody, with the same basic level of benefits provided to everyone alike, the current system gives people a choice between two options named somewhat deceptively 'tort coverage' and 'no-fault coverage'. A level of basic no-fault coverage is still provided with both options, and victims can sue their injurers to cover real expenses not otherwise covered by their particular package of no-fault benefits (i.e. victims under both options can sue for equivalent compensation for excess losses that were not compensated by their no-fault package of benefits), however the particular level of coverage that is provided by each package is what distinguishes these packages from one another. Those who choose the tort coverage package receive very paltry no-fault benefit, however they are also allowed to sue their injurers for pain and suffering. On the other hand, those who choose the no-fault coverage option receive relatively generous no-fault benefits, but they can not sue for pain and suffering except in a few exceptional cases.²¹ Under the current Saskatchewan system, compulsory coverage is extended to everybody against injury arising from a motor vehicle accident under one of the two options, but the system is optional with respect to which coverage one chooses to protect oneself with. The Saskatchewan system is a mixed system, because everybody receives a certain level of basic no-fault coverage as well as having the

²⁰ ... with exclusions for special cases such as when the injured was intoxicated while driving, attempting to escape from law enforcement officers, or intentionally trying to injure another person ...

²¹ Although access to the tort remedy is retained under both packages, its utility is somewhat questionable given that compulsory liability insurance only covers people for \$200,000 worth of liability, which would barely scratch the surface of a tort claim for a lifetime's worth of lost income, let alone covering medical expenses and property losses. This might be thought to make the choice between these two options into a 'Clayton's choice' since the tort option involves a huge gamble — arguably, it involves an even greater gamble even than the one that exists under standard tort systems with traditionally high levels of compulsory liability insurance.

right to sue their faulty injurers,²² and it is limited because it only covers the victims of motor vehicle accidents. Equivalent and substitute/solace compensation are provided under both options (though those who elect the tort coverage option theoretically have greater access to substitute and solace compensation), and compensation for lost income aims to be corrective although caps are imposed under both of these packages. Compensation for income loss is provided in the form of an annuity and other (e.g. medical) costs are covered by the system as they arise, but some lump sums are also allowed for the pain and suffering components of the compensation that is payable to victims. Finally, the system is financed out of insurance premiums, and administered mainly by insurers, although where insurers and victims fail to reach agreement there is also recourse to the courts (SGIO 2002).

L. P S ATIYAH (SELF-INSURANCE) — 1997

Although Patrick Atiyah's proposal is not technically a no-fault system, the abolition of tort law and third-party insurance which it entails, and their replacement with a voluntary but semi-institutionalised scheme of first party insurance (which would usually provide coverage on a no-fault basis), would lead to results that are not dissimilar to that of a no-fault system.

Essentially, Atiyah argues that the ills of the tort system could be avoided if instead of basing accident law around a system of tort law coupled with compulsory third party (or liability) insurance, compensation was obtained by victims from their own insurance provider on a first party insurance basis. He points out that under the tort system only 1.5% of people who are in need as a consequence of circumstances that were beyond their control (such as is the case in accidents) will ever actually receive any compensation over the basic subsistence pensions and services provided by the social welfare system. Firstly, he suggests that only around 10% of people fall into this needy category as a result of an accident *per se*, which means that the other 90% will automatically not be covered by accident law systems since their needs do not arise in the right way for them to be a subject of interest to tort law. But since social costs often account for around 50% of the total cost of tort systems, just by switching across to a self-insurance system twice as many people could be covered at the same level of compensation (and 30% of all accident cases) (Harris 1991:307). Secondly, the tort system is currently overly generous to many victims — i.e. it provides some victims with very generous levels of compensation while others are left to the vagary of the social welfare system — and he suggests that if we were less generous to those few lucky victims, then perhaps another twice as many accident victims (i.e. 60% of all accident cases) could be

²² If the tort coverage option did not provide any no-fault benefits, then the system would best be described as a dual system, however since the tort coverage option is really a no-fault system, this system is best described as a mixed system.

provided for out of the same premiums that currently fund the third party insurance based system (Atiyah 1997e). Finally, the tort remedy is simply not available to all accident victims, despite the fact that their cases may in theory be eligible for damages claims.²³ But although a large increase in premiums would be required to extend this coverage from the current 15% of accident victims who benefit under the current tort system to cover these cases, only a relatively small increase in premiums would be required to go from the 60% coverage under Atiyah's system to 100% coverage of all accident victims.²⁴ Finally, Atiyah acknowledges that tort law may currently serve a deterrent and expressive function, but he suggests that these functions could be performed just as well if not better by the criminal law, and by special new forums that could be set up to serve this purpose.

The feasibility of Atiyah's whole plan will not be discussed here, but if his plan were followed and all tort rights to sue were indeed repealed, then since anybody could purchase such first party insurance (as long as they could afford it), this would mean that coverage under this system would be comprehensive and it would tend towards being a pure system. This system would be truly optional, since nobody would have the right to sue others for damages, and yet everybody could exercise complete freedom of choice over whether they wanted to purchase coverage for themselves, and over what level of coverage they wanted to obtain (as long as the state offered insurance to those who can't afford it). Its administration, as well as its source of funding would both be private, and the levels of compensation received in the event of an accident could again be chosen by the insured parties at the time of purchasing their insurance premium, which would give them access to both equivalent as well as substitute and solace compensation if this was desired. Compensation would presumably be corrective though capped, since this is often the case with other forms of first party insurance, and whether compensation would be paid in the form of annuities or in lump sums would presumably also depend on the particulars of the insurance policies.

²³ This is because accident victims are only compensated when they: (i) are sufficiently lucky to be injured through another's fault (as already mentioned); (ii) can establish fault in accordance with the esoteric requirements of the tort system; and (iii) can find a defendant who has sufficiently deep pockets to make it even worth while to initiate a law suit against them (Atiyah 1997e).

²⁴ Atiyah's argument at this point is particularly sobering, because he draws attention to the fact that a truly comprehensive system would need to cover ten times as many people as the number that would be covered under this self-insurance accident compensation scheme, because for every accident victim, there are nine others who are in similar need though not as a result of an accident (Atiyah 1997f). Essentially, this means that under the current system most people are simply not covered against such need, and so if we wish to cover everybody then a lot more funds will have to be allocated to this task. Also see Harris' comments to the same effect (Harris 1991).

M. SOCIAL SECURITY, WORK COVER, AND CRIMINAL INJURIES COMPENSATION SYSTEMS

Finally, a few additional comments are also due about social welfare, work cover, and criminal injuries compensation systems, which provide compensation on a no-fault basis.

Firstly, although there may be a tendency to think of social security systems as state-based safety nets, rather than as compensation systems *per se*, essentially what they provide is compensation, and they operate on the same basis as other no-fault systems. Coverage is usually comprehensive and compulsory, precisely because their aim is to provide a safety net that prevents the development of poverty, and they are funded out of general taxation coffers and administered by the state (though recently non-profit welfare organizations have also played some role in the administration of social welfare). Since they are designed as a fall-back safety net, they are essentially mixed systems, and they usually only provide redistributive equivalent compensation in the form of periodical payments.

Secondly, work cover systems differ from social security systems in that they are usually funded out of compulsory premiums paid by employers, and their scope of coverage is limited to those people who were engaged in employment-related activities at the time of the accident. They operate alongside other compensation systems and so these are mixed systems, and corrective equivalent compensation is usually paid in the form of annuities. The reason why they qualify to be classified as no-fault systems is because injured employees have access to them even if their injuries were a consequence of their own fault — i.e. compensation is paid without regard for considerations of fault.

Thirdly, Criminal Injuries Compensation Systems are of particular interest because although they do not require victims to identify or find their injurers, and compensation is provided by a distributive mechanism, technically the criterion which entitles victims to compensation is fault-based since the victims' injurers would definitely have been at fault if the event was classified as a crime. These hybrid systems offer coverage that is limited to losses sustained as a result of criminal activities, they are funded out of taxation coffers, and they are administered by state authorities. Another peculiarity is that compensation is usually corrective and not redistributive, despite the fact that they employ distributive mechanisms, and substitute and solace compensation is also often available.

GENERAL COMMENTS ABOUT NO-FAULT SYSTEMS

It should be apparent from even this cursory survey, that apart from their common use of the loss distribution mechanism applied in accordance with a policy specified by a non-fault

APPENDIX. A BRIEF SURVEY OF NO-FAULT SYSTEMS

criterion,²⁵ no-fault systems may in fact actually differ greatly from one another. However, at the same time there are also certain significant and undeniable trends which can be used to further characterize no-fault systems, and these are summarised in the following diagram:

	Scope	Voluntariness	Source of Funding	Administration	Exclusivity	How much compensation?	What is compensable?	Calculation & payment of compensation
A Mazengarb	limited (cars)	compulsory	public (insurance levies and taxes on sale of petrol)	state admin body	dual	redistributive (12 mth time cap)	equivalent	annuities
B Ehrenzweig	limited (cars)	optional	public (insurance)	private insurers	dual	corrective	equivalent	annuities
	limited (cars & medical)	compulsory				redistributive		
C Parsons	limited (cars)	compulsory	public (insurance premiums, fines, levies, taxes)	state-based insurer or private insurer admin body	pure	redistributive	equivalent?	annuities (w/ option of lump sum payout)
D Hofstadter	limited (cars)	compulsory	?	?	pure	redistributive	equivalent?	?
E Green	limited (cars)	compulsory	public (insurance levy at time of car registration)	state admin body	pure	corrective?	equivalent	?
F Morris & Paul	limited (cars)	compulsory	public fund?	state admin body	mixed	redistributive (generous thresholds and caps)	both (equivalent as well as substitute and solace)	?
	comprehensive							
G Wild	limited (cars)	compulsory	public (taxation, fines)	state-based insurer or private insurer admin body	pure	corrective (caps on substitute and solace compo)	mainly equivalent (also some substitute and solace)	annuity (for lost income) & lump sum (for substitute and solace)
H Keeton & O'Connell	limited (cars)	compulsory for income loss & medical costs	public (insurance levy at time of car registration and driver licensing)	private insurers	mixed	corrective (caps)	both (equivalent as well as substitute and solace)	?
I New Zealand	comprehensive	compulsory	public (compulsory insurance and taxation)	state admin body	pure	corrective (caps and thresholds)	both (equivalent as well as substitute and solace)	annuities (mainly)
J Woodhouse	limited (cars)	compulsory	public (compulsory insurance and taxation)	state admin body	pure	corrective (caps)	mainly equivalent (also some substitute and solace)	annuities
						redistributive		
K Saskatchewan	limited (cars)	optional	public (compulsory first and third party state insurance)	private insurers	mixed	corrective (caps)	mainly equivalent (also some substitute and solace)	annuities
L Atiyah	comprehensive	optional	private (first party insurance)	private insurers	pure (b/c abolish TL)	corrective (caps)	both (equivalent as well as substitute and solace)	either annuities or lump sums
M Social Security	comprehensive	compulsory	public (taxation)	state admin body	mixed	redistributive	equivalent	annuities

Eight features of No-Fault accident law systems

limited compulsory public bureaucratic administration (state or private) mainly pure (some also mixed and dual) redistributive (in practice) mainly equivalent annuities

No-fault systems are therefore best characterized as limited compulsory systems, though sometimes they are optional. They are usually publicly funded²⁶ and either state or privately administered, and although they tend to be pure, sometimes they co-exist alongside tort law systems and so they might also be mixed or dual. Finally, compensation is usually paid in the form of an annuity, and often only redistributive compensation is offered. But even when corrective compensation is offered, caps and thresholds will often be imposed to limit the maximum amount of compensation that can be recovered by any one individual, and the norm is that no-fault systems do not usually offer substitute or solace compensation.

²⁵ ... with the exception of the Criminal Injuries Compensation System ...

²⁶ If *everyone* is compelled under state legislation to take out compulsory third or first party insurance, then although private individuals will operate the compensatory scheme, the scheme will function as if it were a public scheme since rather than ‘out-sourcing’ the operation of the scheme to a private organization, the state could just as well set up its own state insurance office.

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ⁱ Few people would deny that materially identical losses can result from many different causes — for instance, one's vehicle can sustain more or less the same sort of damage either as a result of *another's* negligent driving, as a result of *one's own* negligence, or even because of a freak lightning strike (i.e.

because of *nobody's* negligence). But conservatives believe that just because these three losses might all be materially identical, this does not necessarily mean that they should be treated as identical for compensatory purposes. On their account, the moral assessment of a loss as regards its compensability is not a matter of *what* was lost, but rather it is a matter of *how* that particular loss came about — that is, what should determine whether a loss will be treated as wrongful or as merely unfortunate on their account are facts about whether the *process* that led to that loss' occurrence involved injurer fault – or, under a strict liability system, whether the losses were caused by another's actions – and they believe that additional facts about such things as the value of whatever was lost by the victim or about its impact on them (i.e. facts about the *outcome*) should be treated as largely irrelevant to the compensatory inquiry.

To see why I characterize the conservatives' position in this manner, consider the compensatory decisions made under tort law systems from the previously-used examples, and compare these to the decisions that would be made under no-fault systems. Firstly, that is after all why the dancing man was compensated for his losses (i.e. because those losses were allegedly a consequence of the floor polisher's fault), whereas the little girl's loss of both legs was seen as a mere misfortune (i.e. because it was allegedly not a consequence of anybody else's fault), despite the fact that the latter's loss was undeniably much more serious. That is also why the damage inflicted on the owner of the Rolls Royce Silver Seraph (see §2.2.1.(iii).) would be treated as a wrongful loss under tort law, whereas the damage to the cheap 'rust bucket' would only be seen as a mere misfortune — i.e. because while the former was a consequence of another's fault, the latter is allegedly a consequence of the injurer's own fault. Finally, all of Hazel's losses would most probably be treated as wrongful and hence as compensable under tort law, because they were after all a consequence of Bob's faulty actions; but since Bob's losses were a consequence of his own faulty actions, his losses would probably be treated as mere misfortunes and hence as not compensable.

Now compare this to the decisions that would be made under no-fault systems. Firstly, Hazel suffered only minor bruising or if she already had sufficient wherewithal to not gain any appreciable benefit from being compensated by the no-fault system (e.g. if she were a millionaire), then irrespective of the fact that her losses were a consequence of Bob's faulty actions, it is conceivable that under a no-fault system her losses might still be treated as if they were only mere misfortunes. On the other hand, if Bob suffered particularly gruesome injuries or if his losses were particularly burdensome to him (e.g. perhaps because he was already poverty-stricken), then irrespective of the fact that his losses were a consequence of his own faulty actions, those losses might still never the less be treated as wrongful and hence he might still be compensated for them under a no-fault system. Secondly, it is conceivable that while the Rolls Royce Silver Seraph driver may only be compensated for a small portion of their losses under a no-fault system – that is, if they get any compensation *at all*, because their wealth may be thought to make them ineligible for receipt of any compensation at all; or it might even be thought that their choice to drive a Rolls Royce Silver Seraph on public roads was a folly and that the state is not obliged to compensate them for such frivolities, which is why they might only receive compensation for a small portion of their loss, equivalent to how much they would have lost if they had driven an

average-priced car – their faulty but poverty-stricken injurer may be fully compensated for their losses, despite the fact that the former's losses were a consequence of the latter's actions whereas the latter's losses were a consequence of their own actions. Finally, it is also likely that a no-fault system would not have been as generous to the dancing man as the tort system was, and that the little girl would have received better treatment, despite the fact that the dancing man's losses were a consequence of another's faulty actions whereas the little girl's losses came about due to natural causes.

Similar sentiments are also embodied within strict liability systems, where losses are treated as wrongful not only when they were a consequence of another's *fault*, but also when they were simply *caused* by another's actions. For example, Epstein argues that the mere fact that somebody else is responsible for our losses is sufficient to warrant treating those losses as wrongful in the context of the compensatory inquiry, because 'the causal condition ... should be at the centre of any moral defence of tort law' (Epstein 1980; in Coleman 1982:378). Holmes has also argued that from the victim's perspective it makes little difference whether the loss was a result of another's fault or not, and hence that even mere causality (and not just the presence of another's fault) is sufficient to make a loss wrongful — i.e. because while an accident caused by 'a man who is born hasty and awkward [is] no less troublesome to his neighbours than if [it had] sprang from guilty neglect,' an accident for which nobody else is responsible or which is the victim's own fault, can be seen even by the victims themselves as a misfortune rather than as an injustice (Holmes 2000:108). Klepper (1990) has also argued a similar point in the context of discussing 'torts of necessity' cases, which he broadly takes to be exemplified by Joel Feinberg's 'backpacker' example, which is also discussed by Judith Jarvis Thomson (1980) and by Phillip Montague (1984). In this imaginary example, Feinberg asks us to 'suppose that you are on a back-packing trip in the high mountain country when an unanticipated blizzard strikes the area with such ferocity that your life is imperilled. Fortunately, you stumble onto an unoccupied cabin, locked and boarded up for the winter, clearly somebody else's private property. You smash in a window, enter, and huddle in a corner for three days until the storm abates. During this period you help yourself to your unknown benefactor's food supply and burn his wooden furniture in the fireplace to keep warm' (Feinberg 1978:102). Despite recognizing that the back packer's actions were justified, Feinberg and Thomson never the less suggest that the back packer should still compensate the cabin owner for their losses (e.g. Feinberg 1978; Thomson 1980). On Klepper's account, the reason why the backpacker should still compensate the cabin owner, despite the fact that their actions were not faulty, is because it is only reasonable for injurers to transfer risks onto their victims in such 'necessity cases' when they are also prepared to compensate their victims for any subsequent losses — that is, on his account although it may not have been wrong for the backpacker to do what they did, it would be wrong if they were not prepared to compensate their victims once those risks materialize into harms (Klepper 1990:227-9). Thus, Klepper's 'weak wrongful loss principle' states that the mere absence of fault on the injurer's part need not mean that a victim's loss was merely unfortunate and hence as not compensable, because he believes that the fact that it was caused by another person (as opposed to being a consequence of another's *faulty* actions) is also sufficient reason to treat that loss as wrongful and hence as compensable. Richard Wright develops a similar argument

to defend his interpretation of Aristotle's discussion of corrective justice; he argues that 'injustice is manifested ... in the deliberate choice, by the responsible person(s), not to rectify the unjust loss once it has occurred' (Wright 1992:698).