
Book Section:
Merkin, Robert and Steele, Jenny orcid.org/0000-0001-7149-1896 (2014) Policing Tort and Crime with the MIB : Remedies, Penalties and the Duty to Insure. In: Dyson, Matthew, (ed.) Unravelling Tort and Crime. Cambridge University Press , Cambridge , pp. 22-57.

https://doi.org/10.1017/CBO9781107588820.004

Policing Tort and Crime with the MIB: Remedies, Penalties and the Duty to Insure

Rob Merkin and Jenny Steele

1. Introduction

The road traffic context is a special one for tort lawyers. This is for varied, perhaps competing reasons. First of all, road traffic accidents might be thought – indeed have been thought – to exemplify tort in its most 'conventional' form:[1] they often give rise to actions between strangers[2] for physical harm directly inflicted. Road traffic cases may seem to offer the best chance of observing tort law at its simplest. Though many complications can in principle arise in relation to a road traffic case,[3] the typical case exemplifies tort without issues of indirect causation, background contractual relationships,[4] omission to control third party intervention, exotic forms of loss potentially impinging on the terrain of the law of contract,[5] potential class actions, and so on. It is also perhaps the primary context in which the individual – who appear to be the main subject of tort theory – are genuinely likely to find themselves tortfeasors, outside vicarious liability cases.[6] As with vicarious liability cases however, even in this most apparently conventional of categories of tort cases, the individual tortfeasor is unlikely even to be named as the defendant. Since 2003 it has been possible to

[1] J. Stapleton, 'Evaluating Goldberg and Zipursky's Civil Recourse Theory' (2006-7) 75 Fordham L.Rev. 1529, 1530.
[2] This is of course not necessarily the case, particularly in passenger claims.
[3] See for example the knotty case of *Page v Smith* [1996] AC 155, where the sequence of events from minor collision to serious, if hard to categorise disease was out of the ordinary.
[4] Though see for example *Lister v Romford Ice and Cold Storage Ltd* [1957] AC 555, where the issue was contractual allocation of risk between an employer and an employed driver.
[5] Admittedly there is a wealth of recent complex case law on the recoverability by way of damages of hire charges for replacement vehicles, but that has been in large part a consequence of the growth of credit-hire, which facilitates the hiring of such vehicles at a cost far in excess of that where payment is up-front. See, most recently, *Pattni v First Leicester Buses Ltd* [2011] EWCA Civ 1384, [2012] RTR 17.
[6] Though, once again, there may be vicarious liability in a motor case (see for example the issues arising in *Lister v Romford Ice* [1957] AC 555).

sue the insurer directly without joining the assured, and that is what happens in virtually all cases.[7]

This last point brings us to the second reason why this is a special case. Road traffic is also a special context for the perhaps opposite reason: it is well known that insurance has had a particular significance in resolving the social problem of injuries caused by road traffic accidents. Since the Road Traffic Act 1930, the UK has required liability insurance to cover the use of motor vehicles on roads and, following legislative amendment, also in all other public places. The current legislation, the Road Traffic Act 1988, replicates some of the provisions of the original legislation, but the scene has been transformed in the last two decades by a series of EU Directives aimed at enhancing free movement of persons and their vehicles by harmonising compulsory insurance requirements. These Directives were codified in 2009.[8] One of the consequences of EU harmonisation has been a shift from insurance of the driver to insurance of the vehicle, so that a policy must insure against third party risks whoever happens to be driving the vehicle at the time, even a thief or other unauthorised person.[9]

In practice, an insured driver plays relatively little part in tort claims to which negligent driving gives rise, other than providing the victim with the name of their insurers and making a claim against those insurers. Prior to the implementation of the European Communities (Rights against Insurers) Regulations 2002,[10] s 151 of the RTA 1988 established that the defendant would be sued in his or her own name, but in practice the driver's insurers would defend the action and were required by law to pay the claim if the assured failed to do so.[11]

[7] See nn 10-14 and accompanying text.
[8] Directive 2009/103/EC of the European Parliament and of the Council. The cases discussed in this chapter were decided by reference to the earlier Directives, but for convenience we refer only to the Consolidated Directive, which did not effect any changes in the law.
[9] Road Traffic Act (RTA) 1988, s. 151.
[10] SI 2002 No 3061.
[11] RTA 1988, s. 151.

However, under the 2002 Regulations, the victim of a negligent driver has a direct claim against the driver's liability insurers and there is generally no need to join the defendant to the proceedings.[12] The driver is indeed often unaware of them. Of course if there is an associated criminal charge, the driver's experience will be considerably more direct. Liability limits are not permitted in claims involving personal injury or death; and in property damage cases, the permitted limit is a generous £1 million.[13] Superficially, it appears there is little space for residual personal responsibility in relation to civil remedies, unless there is a form of loss other than personal injury or property damage (the subjects of compulsory insurance) for which further insurance has not (voluntarily) been obtained by the negligent driver.[14]

In the UK, much is done to ensure that tort in this context genuinely does provide not only 'redress' in individual litigated cases, but also 'compensation' for the mass of individuals injured by the negligence (or worse) of another. The extension of insurance cover to any driver of the insured vehicle, and the restriction of policy exclusions and limitations, are clear examples of the desire to compensate, in these instances overriding contract. It is, therefore, not only the mandatory nature of insurance, which is employed to this goal. Other significant measures include control of policy terms[15] and the design of cheaper, more streamlined legal processes for motor claims.[16] Transaction costs are kept to a minimum, and the vagaries of

[12] The s. 151 procedure operates in parallel, and there are cases where it has to be used, one of which is where deliberate injury is inflicted on the victim: that is because the 2002 Regulations merely allow the third party to stand in the shoes of the assured, and the assured has by reason of the *ex turpi causa* doctrine no claim against the insurers in such circumstances.

[13] RTA 1988, s. 143; s. 145(4)(b). Given that contractual liability for property claims (in particular, those involving damage to goods carried for reward) is excluded from the compulsory insurance regime, the minimum figure is likely to be threatened only where the assured achieves the distinction of causing a multiple pile-up or careers his vehicle into a building.

[14] Replacement hire is an example of loss not covered by the 1988 Act, but in practice liability policies do provide cover for such claims against the assured.

[15] RTA 1988, s. 148 prevents an insurer from relying upon a variety of contractual defences, including failure to comply with restrictions on the use of the vehicle and breach of claims provisions. At the time of writing, there are cases pending before the CJEU raising the question of whether it is permitted to impose *any* limitations or exclusions on insurers' liability.

[16] Fixed costs apply to motor claims with a value below £25,000 unless they have certain specified features, which make them non-routine, and these are litigated through the 'RTA portal' (extended, in 2013, to

tort law are ironed out so far as possible to produce steady recoverability, provided the claims are straightforward. For these reasons, many road traffic accidents each year result in tort compensation,[17] and, if liability is established or accepted, compensation for personal injury, and almost full compensation for property damage, is all but guaranteed. These efforts have impacted not only on the regularity with which claims are met, but also the regularity with which they are made, and in this respect too, torts on the roads are genuinely exceptional: levels of claiming in this context are high and rising.[18] Again, insurance is centrally implicated in this exceptional quality to road traffic claims, namely that injuries frequently do result in claims.[19] At the same time, the role of fault is diminished: in principle the fault principle operates without revision in the road traffic context but empirical studies have suggested that in practice the routine settlement of claims by insurers generally leaves little space for questions of fault to be disputed, other than in exceptional cases.[20] This adds extra force to the core issue addressed in this chapter, which surrounds the relationship of, and

---

employers' liability and public liability claims whilst increasing the value of the claims subject to the process from their previous limit of £10,000).

[17] Road accidents are easily the largest set of personal injury claims compensated in the UK. R. Lewis, 'How Important are Insurers in Compensating Claims for Personal Injury in the UK' (2006) 31 *The Geneva Papers on Risk and Insurance,* 323, presented figures derived from the Compensation Recovery Unit, covering all claims where damages are paid for personal injury. Over 400,000 of 579,282 personal injury accident (as opposed to disease) claims met in 2004/5 were motor cases. More recent figures, n 18, show the pattern intensifying. Motor insurance is also the largest line of liability or accident insurance in terms of payments out: ABI News Release, 'Insurers Paying Out 200 Million a Day to Customers', 29 September 2012.

[18] R. Lewis and A. Morris, 'Tort Law Culture in the United Kingdom: Image and Reality in Personal Injury Compensation' (2012) 3(2) JETL, 230, 257-258, explain that road traffic accidents constitute the exception to the general rule in that here, there has been both a long-term and a short-term increase in the number of claims involving personal injury. Equally, road traffic claims constitute a very high – and increasing - proportion of all personal injury claims (in 2011-12, road traffic accounted for 828,489 of 1,041,150 claims involving personal injury).

[19] Lewis and Morris, ibid., 262, link this to the notion that '[h]ighly institutionalised remedy systems that are well known and readily available generally lead to higher rates of claiming' (drawing on R. Miller and A. Sarat, 'Grievances, Claims and Disputes: Assessing the Adversary Culture' (1980) 15 Law & Soc Rev 525).

[20] T Goriely, R. Moorhead, and P Abrams, 'More Civil Justice? The Impact of the Woolf Reforms on Pre-Action Behaviour', The Law Society and Civil Justice Council, Research Study 43 (2002), xxiii. Speaking of clinical negligence claims (rather than road traffic injuries), the authors suggest that: 'One problem is that, at the time of the letter of claim, insurers and claimant solicitors have opposite concerns. The insurer's priority is to put a valuation on the case, both for the purposes of their own reserves and to decide how the case should be investigated. Claimant solicitors are more worried about liability, and often postpone valuations until after the medical report has been received'. See also Lewis and Morris, 'Tort Law Culture in the United Kingdom'. 240. If fault is successfully denied, or no claim is made, any payments to the victim will depend upon any first party personal injury or motor damage policy that may be held. Equally, we should not discount the possibility that contributory negligence of the injured party may reduce the damages recoverable. In the fixed costs regime (n 16), an issue of contributory negligence will take the case out of the routine, fixed costs category.

possible hierarchy between two rather different duties, namely the *duty of care*, and the *duty to insure*.

For some, there is no contradiction in the picture sketched so far. In fact, it is because individuals, only sometimes acting in the course of employment, are the likely perpetrators of road accidents that the need for compulsory insurance has arisen.[21] Without insurance, not only would tort's damages be typically unrecoverable (exposing claimants to unremedied losses),[22] but it has also been argued that tort's remedies could not have developed as they have – personal injury damages would be as intolerable as they are unrealistic if genuinely pursued against individuals who have been merely careless (a problem of exposure to risk of defendants).[23] The latter argument may not have so much appeal in the US, where insurance limits in auto cases are permitted[24] and may be very much lower than the full value of many personal injury claims,[25] so that personal exposure at least in theory is maintained. But it is a thought we would like to hold onto for the purposes of this paper, because it does capture the spirit of the UK system. It is plain that the concern of the legislators in 1930 and subsequently has been with securing compensation for torts. The area exemplifies a compensation objective; the question is whether it also signals a dilution of 'personal responsibility'. Responsibility, for some (of course not all), is the hallmark of tort itself, and what

[21] New Zealand is one of the few jurisdictions which does not impose an insurance requirement on motorists, but that is because the Accident Compensation Act 1972 abolished tort claims for personal injury and replaced them with no-fault state compensation benefits. That far-reaching solution has not found acceptance elsewhere, and the typical pattern is tort law backed by compulsory insurance.

[22] This was the primary concern which led to the UK's compulsory liability insurance regime in the Road Traffic Act 1930, as evidenced by the Royal Commission on Road Traffic, 'First Report, The Control of Traffic on Roads', 1929. The Commission, and the statute, dealt however with a range of issues, including drivers' licences and road safety generally.

[23] An argument of this type was outlined by Gleeson CJ in the High Court of Australia in *Imbree v McNeilly* [2008] HCA 40, [22], wondering who would dare to drive a car if liability insurance was not available. For a similar argument see R. Lewis, 'Insurance and the Tort System' (2005) 25 LS 85, suggesting that in the absence of insurance, tort itself would have to change.

[24] As already noted, under the UK compulsory insurance regime, no policy limits are permitted in respect of personal injury and death; and even for property claims the coverage must be a minimum of £1 million. But having said that, damages though considered high compared to other forms of support or redress are not assessed by juries and do not reach the levels seen in the US.

[25] Litigation is, it seems, often framed to fit within these limits: we note particularly J. Stempel, *Litigation Road: The Story of Campbell v State Farm* (Thomson, 2008); and T. Baker, 'Six Ways that Liability Insurance Shapes Tort Law in Action' (2005) 12 Conn Ins LJ 1.

distinguishes it from insurance.[26] But associated with this, does the presence of liability insurance come hand in hand with a decline in personal responsibility in relation to civil liability? Has the development of distributive mechanisms here led enforcement of responsibility to be shifted instead to criminal law, and criminal penalties?

It seems to us that a key, yet neglected feature of the legal landscape, which merits exploration in these respects, is the duty to insure itself. This duty appears to be treated by many tort scholars as simply the end of the story so far as tort is concerned, and perhaps the solution to a problem, namely how to make tort judgments effective. On this basis, it is not conceptually interesting, at least from the perspective of private law. There has been little exploration of this duty (as opposed to, the distributive mechanism of insurance) and of its implications for tort.[27] We would like to think about the implications of the duty to insure in relation to the more familiar – and still operative – duty of care; but also in relation to the comparison (and relationship) between tort remedies and criminal penalties. The duty is after all supported by criminal remedies; but at the same time, its purpose is to ensure compensation following tort judgments. We know that tort's compensatory damages are set at a level designed to repair or make good. The question is whether compensatory damages are also capable of additional meanings, when imposed directly on individuals – or, indeed, when denied to claimants for reasons associated with their own conduct, unrelated to tort

[26] Jane Stapleton has argued that personal responsibility and, particularly, deterrence are at the core of the law of tort: J. Stapleton, 'Duty of Care: Peripheral Parties and Alternative Opportunities for Deterrence' (1995) 111 LQR 301; equally, that the identification of tort with principles of personal responsibility helps to separate it from insurance: J. Stapleton, 'Tort, Insurance and Ideology' (1995) 8 MLR 820.

[27] We note however the illuminating discussion by J. Wriggins, 'Mandates, Markets, and Risk: Auto Insurance and the Affordable Care Act' (2013) 19 Conn Ins LJ 275. Wriggins' purpose is to show that the established auto insurance mandate is not only comparable to, but more stringent than, the new duty to insure embedded in the Affordable Care Act, which is intended to ensure that all US citizens benefit from medical insurance. The article is a reasoned argument in defence of the ACA mandate. While that purpose is not directed to tort, tort lawyers will learn much of interest from the discussion of the US auto insurance mandate, and its history. The article also underlines that a duty to insure, not involving liability, appeared at least initially to be the central issue dividing Congress and leading to the US government shutdown of October 2013.

defences. Can the interaction between various legal frameworks, with the intervention of various actors,[28] alter the 'meaning' of civil remedies?[29]

In order to explore the links between the duty to insure, duties of care, and criminal law, we will focus on what happens where the duty to insure has been breached. In particular, we will focus on the role of the Motor Insurers' Bureau (MIB), which satisfies tort judgments where this duty has been breached (and also where tortfeasors are untraced). The nature of the MIB is further explained below, but we start by explaining that it is not a state/governmental body in the sense of having any statutory basis. It is a creation of the insurance industry operating without state funding and through agreements with the relevant Secretary of State. It dates from 1946; but these days it is also the UK's means of satisfying the European requirement that victims of uninsured drivers should be treated no differently from victims of insured drivers: it is the UK's nominated 'compensation body' for this purpose.[30] We are not suggesting that the activities of the MIB in responding to uninsured driving are sharply different from those of other insurers intent on decreasing the impact of crime (here, primarily failure to insure). But there is a direct link between tort and crime through the compulsory insurance regime. The MIB only pays in respect of losses where liability insurance cover is mandatory.[31]

The issues raised in this introduction are amplified in four further sections of the paper. Section 2 raises some issues about the way that insurance and insurers promote the duty to insure in the context of road traffic, and affect the particular relationship between tort and

[28] Referring here principally to insurers.
[29] Possibly not all lawyers will be comfortable with the idea that 'meaning' and 'principles of calculation' of remedies could be distinct ideas, but see for example the titular question of A. Seebok, 'What Does it Mean to Say that a Remedy Punishes?' (2003) 78 Chi-Kent L. Rev 163. And see our comments at the close of this Introduction.
[30] It is not clear whether the MIB constitutes an "emanation of the state" so as to be susceptible to direct "horizontal" claims where it contravenes the Consolidated Motor Insurance Directive 2009, or whether the proper defendant in non-compliance cases is the UK government for failing to implement the Directive properly. See *Byrne v Motor Insurers Bureau* [2009] QB 66, [2008] Lloyd's Rep IR 705
[31] See section 2 on this interaction.

crime associated with this duty. Section 3 explores, briefly, the differences between various penalties and sources of 'compensation' (a term consistently used across tort and crime) in this context. Section 4 gets to the notion of responsibility and where it operates in relation to civil liability in this context, presenting instances where the personal responsibility of the claimant is enhanced, largely through insurer action, despite the compulsory insurance regime; and continues this theme with reflection on personal responsibility of uninsured defendants. These instances inevitably create notable exceptions to the protective (and distributive) nature of the compulsory insurance regime. Finally, in Section 5, we conclude by reflecting upon the implications of these instances for an understanding of responsibility in both tort and crime, and the nature or meaning of criminal sanctions and tort remedies (and again, how these interact to striking and not necessarily intended effect). In particular, do the very limited gaps in the regime simply allow exceptions to the distribution of losses, in which tort operates as it would without the support of liability insurance (perhaps, as it does in theory)? Or does the intervention of insurers here lead to the end result that responsibility is magnified? If so, then the duty to insure is an interesting addition to the tort armoury and may intensify the significance of its remedies, rather than signalling the 'end of the road' where tort is concerned – a point beyond which tort lawyers need not travel.

As Pat O'Malley has pointed out,[32] monetary remedies and penalties have become dominant, with strikingly little reflection, in both civil and criminal law. He draws attention to Bentham's support for fines and damages which were regarded as offering a 'tolerant and non-repressive' regime of coercion or governance. It is worth considering how 'tolerant and non-repressive' the picture looks, once we have sketched it. To some extent, this means taking up O'Malley's invitation to think about different potential 'meanings' of money,

[32] Though also noting US exceptionalism in its punitive use of fines and continued high levels of incarceration. See P O'Malley, *The Currency of Justice: Fines and Damages in Consumer Societies* (Routledge-Cavendish, 2009).

however the amount is formally calculated. This is a question, which might occur more easily to a sociologist than to a lawyer. Even so, the suggestion that there is more to the meaning of damages than quantum may not fall on deaf ears. We avoid the possibly more concrete (though still controversial) idea of the 'function' of remedies because the actual use of tort in these instances appears to us to be neither planned, nor particularly well known. We can compare our discussion of compensatory damages in this context with the literature on exemplary or punitive damages. English exemplary damages (when awarded at all) are set at a lower level than the sums, which appear to be encountered in the United States. In England, there is no expectation that they can be exactly calculated – they are regarded as conventional, and may appear modest. This makes it harder to consider them as pursuing a goal of deterrence in any direct sense, though they are designed to signal disapproval and are almost certainly uninsurable in any context, other than where liability is vicarious.[33] We raise exemplary damages only by way of comparison. Punitive or exemplary damages can only exceptionally feature in the UK road traffic context and there is no reported or known case in which they have. Rather, the question arises of how far compensatory damages themselves, or even the denial of compensation, may be directed to individuals as a sanction, not for pure carelessness (the basis of most negligence liability), but on the basis of some other form of irresponsibility. Further, does insurance, or the duty to insure, sometimes intensify, rather than weaken, the 'meaning' of compensatory damages, precisely by visiting the loss or liability directly on individuals? That would be a reversal of the ordinary perception of the compulsory insurance regime, but in general terms it might come as little surprise to scholars

[33] An insurer is, under the rules of public policy, discharged from liability to indemnify an assured for any sum payable by him by way of fine or sanction, and exemplary damages are just that. The position stated is that applicable in English law. See *Lancashire County Council v Municipal Mutual Insurance Ltd* [1997] QB 897, [1996] 3 All ER 545.

of insurance, who have long remarked on the connection between insurance and responsibility.[34]

2. Mingling tort and crime on the roads

A. Roads and Tort

Many jurisdictions have taken steps to distribute the costs of road accidents.[35] In the UK, tort principles of liability are retained almost intact, but a serious attempt is made to enhance (or even ensure) recoverability. Proposals for thorough reform, set out by the Pearson Commission in 1979,[36] were not supported by those otherwise inclined to seek change because the proposed solution (a no-fault compensation regime for road traffic accidents) related only to one particular set of risks, and was not universal.[37] The duty of care is unaltered, and though the standard of care is objective that is also the case throughout the law of negligence, despite well-known references to insurance on the part of Lord Denning in one of the key cases.[38] Little amendment to tort principles has been undertaken in respect of motor claims.[39] Compensation is secured through liability insurance, which as we have seen

[34] M.C. McNeely, 'Illegality as a Factor in Insurance' (1941) Colum L. Rev. 26; T Baker, 'On the Genealogy of Moral Hazard' (1996) 75 Tex. L. Rev, 237; R Ericson and A Doyle (eds), *Risk and Morality* (Toronto UP, 2003).

[35] A microcosm is Australia where there are 8 separate regimes operated by the six states and two territories, ranging from conventional tort backed by compulsory insurance of varying strengths, to no fault compensation.

[36] Royal Commission on Civil Liability and Compensation for Personal Injury: Report, Cmnd 7054 (1978).

[37] Where insurance is concerned, resolving particular risks is the norm. But from a social welfare perspective, the needs of those suffering personal injury are equally important no matter what the cause.

[38] *Nettleship v Weston* [1971] 2 QB 691. The High Court of Australia has only recently abandoned the variable standard of care in a road traffic case– with a variety of views as to whether the role of insurance is significant, or not: *Imbree v McNeilly* [2008] HCA 40. It might be added that tort does not diverge from criminal law in relation to the objective standard. In *Nettleship v Weston*, the learner driver who understandably fell below the prescribed standard was nevertheless successfully prosecuted. We do not seek to suggest here (even though a case could possibly be made) that insurance provides the explanation for the objective standard, which has also been justified on other grounds.

[39] A notable intervention in principle is the removal of the volenti defence from passengers in the Road Traffic Act 1988, s. 149, but in truth volenti is of little significance in negligence claims in general these days. Contributory negligence principles were reformed in 1945 chiefly to achieve fair results in road traffic claims, but as is well known the reform is of general application. For the role of road traffic cases in the 1945 reforms,

is compulsory under the Road Traffic Act 1988. Where the duty to insure has not been discharged, where the insurers are able to deny liability or where the defendant cannot be traced, the MIB exists to meet the claim.

The present state of affairs in the UK developed in a number of stages. The original Road Traffic Act 1930 mandating compulsory insurance was accompanied by a 'rights of third parties' Act allowing direct claims against insurers where the tortfeasor is insolvent (a clear indication that the intention was to protect injured claimants, rather than insured parties).[40] Though, this was quickly superseded in the road traffic context by new provisions in the Road Traffic Act 1934 which remain in force as s 151 of the Road Traffic Act 1988 although, as noted above, are little used once the 2002 Regulations conferred a direct action. The Road Traffic Act 1930 did not however mandate the terms of compulsory insurance, nor protect claimants where there was no insurance, or where motor insurers were themselves insolvent. These defects were gradually taken in hand and the distributive intentions of the regime more fully achieved. The 1934 Act removed the right of insurers to rely upon non-compliance with claims conditions and certain other policy restrictions where the claim arose from third party injury,[41] and in 1937 it was proposed that there should be a 'fallback fund' to cover cases where the victim had obtained a judgment against the driver but the insurers had a defence to the claim or otherwise did not pay[42] – preferably not involving any public resources.[43] This

---

see J Steele, 'Law Reform (Contributory Negligence) Act 1945: Collisions of a Different Sort' in TT Arvind and J Steele, *Tort Law and the Legislature* (Hart, 2013).

[40] Third Parties (Rights against Insurers) Act 1930. This is of general application, and a refined version has been drafted, but not yet enacted: Third Parties (Rights against Insurers) Act 2010.

[41] Now RTA 1988, s. 148, referred to earlier.

[42] Insurer insolvencies were a key consideration that prompted the Cassel review and were dealt with by extension of solvency regulation, previously confined to specific sectors including life and workers' compensation, to motor insurance.

[43] Cassel Committee on Compulsory Insurance, 1937. The desire to avoid getting involved in running (or financing) the MIB may be slightly under-rated as a motivating factor in the eventual set-up. Contrast the need for direct state involvement in operating a Criminal Injuries Compensation Scheme, and criminal compensation

plan came to fruition in 1946, with establishment of the Motor Insurers' Bureau (MIB), a limited company resourced by insurers and operating through voluntary agreement between the industry and the state. The current version of the Uninsured Drivers Agreement was agreed in 1999. A further MIB Agreement was reached in 1969 to deal with the hitherto unaddressed problem of 'hit and run' drivers who could not be traced.[44] The current version was adopted in 2003.

Key features of the MIB are that:

(a) it is funded by a levy on motor insurance policies, without any (directly) 'public' money;

(b) it is operated by motor insurers, and any insurer who wishes to carry on motor business must, as a condition of receiving state authorisation to do so, join the MIB. The MIB takes seriously the need to keep the levy on motor insurance policies as low as possible, and charts its success largely in these terms (though also of course in terms of payments made to victims of uninsured and untraced drivers);[45]

(c) the MIB is considered an insurer of last resort[46] (though there are non-insurance sources of compensation of even more last resort)[47];

(in the latter, payments are received on a periodic basis via the court). These two forms of compensation are reviewed in the next section.

[44] Following the powerful judgment of Sachs J in *Adams v Andrews* [1964] 2 Lloyd's Rep 347, 351, who had described the lacuna as "lamentable".

[45] There has been some success in that, after rising sharply, the levy has fallen over the last four years.

[46] Although that does not mean that losses rest with the MIB, by virtue of its subrogation rights against uninsured drivers and policyholders who have authorised uninsured use of vehicles. See n 46 above, and our discussion in Section 4.

[47] Compensation orders cannot be made by criminal courts in respect of loss or injury where compensation is payable under the Motor Insurer's Bureau (MIB) Agreements. See Powers of Criminal Courts (Sentencing) Act 2000, s. 130(6)(b), mentioning 'any arrangements to which the Secretary of State is a party'. This is a reference to the MIB agreements as explained in Archbold, *Pleading, Evidence and Practice in Criminal Cases,* (Sweet and Maxwell, 2013) para 5-698)). 'Payable' does not require a judgment to this effect.

(d) the MIB operates according to a series of 'agreements' with government. This is significant because the agreements have been interpreted by the courts in much the same way as a statute. The agreements set the terms by which the MIB *agrees* to fund liabilities of uninsured and untraced drivers, and the fact that there is an underlying public purpose does not deprive these terms of effect. Indeed, the notion that the funds are in some sense 'public' has been deployed to support the setting of the limits to the agreements; and

(e) the MIB is not a statutorily created body.[48]

The UK contractual approach at first sight risks inconsistency with the requirement of the Consolidated Motor Insurance Directive 2009 for each state to create a 'Compensation Body' to provide cover for victims of uninsured and untraced drivers, but the UK structure has been held to suffice.[49] It is a core part of the UK's approach to road traffic and EU arrangements have boosted its significance.

As we have already hinted, it might be wondered whether loss-spreading schemes have a second and less obvious objective, namely to protect individual drivers from the potentially decimating blow of being liable in tort for personal injury to another.[50] This is more difficult to document as a motivating factor. It was mentioned as a secondary consideration behind compulsory insurance by the Cassel Committee in 1937,[51] which first proposed establishing a 'guarantee fund' such as the MIB. Today, the MIB's mission statement states reduction in the

[48] Contrast recent (2012) political machinations over the reform of CICA and the membership of the Delegated Legislation Committee (where those opposing the reforms were replaced and the changes narrowly adopted).
[49] By the CJEU in *Evans v Secretary of State for the Environment, Transport and the Regions* Case C-63/01, [2005] All ER (EC) 763; [2004] Lloyd's Rep IR 391.
[50] Evidently by no means, all road traffic defendants are individuals. There are many commercial vehicles on the road (not to mention emergency services), though private vehicles outnumber commercial ones. The point is that this is a substantial source of exposure to tort liability for most individuals – and far from typical, possibly unique.
[51] Report of the Committee on Compulsory Insurance, Board of Trade, Cmd 5528 (July 1937).

'level and impact of uninsured driving in the UK' as the first of its goals.[52] The MIB, the Association of British Insurers and government all make reference to the need to protect 'honest motorists' from the costs involved in uninsured driving.[53] Honest motorists may be taken to be those who maintain insurance and confine their use of motor vehicles within its terms. Today, the 'honest motorist' is at risk of taking the financial burden of damage done by uninsured and untraced drivers and those making trivial or fraudulent claims. Where the duty to insure is concerned, perhaps this raises a possible contrast between dishonesty and carelessness; but it is possible to be carelessly (and honestly) uninsured, as the duty to insure is a strict one. The key point is that the uninsured driver – or driver whose vehicle is used outside the terms of the policy – is not protected from the blow of liability, even if insurers initially meet the claim. There are a number of situations in which an insurer who indemnifies a third party can recover its payment from the person responsible for the loss: where the insurer is unable to rely upon an express policy exclusion or restriction on cover in the face of a third party claim which would apply to the insured;[54] where the insurer is entitled to avoid or cancel the policy but is nonetheless required to meet a third party claim;[55] where the accident is caused by a person not covered by the policy and the assured caused or permitted

[52] http://www.mib.org.uk/Company+Information/en/About+Us/Mission+Statement/Default.htm (last accessed January 2014). Its second goal is to compensate victims of uninsured and untraced drivers fairly and promptly; and its third to provide first class asset management and special claims services.

[53] See for example, Chairman's Statement, 'MIB Annual Report and Accounts 2012', 5, referring to the 'risks and costs facing honest motorists'. In the 'Notes for the Assistance of Claimants on the "Untraced Drivers Agreements"' appended to the Application Form for 'Compensation of Victims of Untraced Drivers', the MIB states that 'the cost of running the MIB ultimately falls on the honest motorist'. See also ABI, 'Lifting the Bonnet on Car Insurance – What are the Real Costs?', March 2013, 1:'Some people think that car insurers are profiteering from the honest motorist'. Government guidance for victims of uninsured or untraced drivers notes that the MIB is 'funded by honest motorists via their insurance premiums', <http://www.direct.gov.uk/prod_consum_dg/groups/dg_digitalassets/@dg/@en/@motor/documents/digitalasset/dg_068757.pdf. Numerous press items intended for the insurance consumer also feature the expression 'honest motorist': e.g. <http://www.honestjohn.co.uk/news/tax-insurance-and-warranties/2011-09/mib-reveals-uninsured-driver-hotspots/>, reporting that 'Ashton West, Chief Executive at MIB said, "We cannot stand by and let uninsured driving continue, otherwise the honest motorist will keep paying the bills for the injury and damage caused to people and property."'

[54] RTA 1988, s. 148(7).

[55] Ibid., s. 151(5)

uninsured driving;[56] and where the infliction of injury was deliberate.[57] These possibilities are referred to in more detail below. It may also be noted that a person who causes or permits uninsured use faces common law liability to the victim for breach of statutory duty.[58] That cause of action is rarely used by the victim, because his or her claim will be satisfied either by the insurer or, if there is no insurer at all, by the fallback cover provided by the MIB. However, the MIB has a subrogation action in such circumstances and it may also insist that the victim seeks to recover what it can in tort as a condition of making a claim against the MIB.[59] This simple example shows that personal responsibility for damage caused by torts on the roads does not stop with the compulsory insurance regime. Insurers are the source of compensation for claimants; but liability may be refracted back to those who had the responsibility to insure.

Therefore, we may summarise the arrangements in the following terms: a core part of the law of tort (in practice – and on some accounts in theory too) operates with the underpinning of compulsory liability insurance and, where torts are committed by uninsured and untraced drivers, with the support of an insurance industry body operating by agreement with government and without state funding but pursuing legislative objectives, to supply an insurance fund of last resort. This is plainly aimed at ensuring compensation for torts on the roads. That source of compensation has its limits, defined by the terms of the agreements. But insurance, even if the driver is uninsured, is plainly seen as the primary compensation fund where road traffic injuries are concerned.[60]

B. Criminality

[56] Ibid., s. 151(8).
[57] By implication, ibid., s. 151(7).
[58] *Monk v Warbey* [1935] 1 KB 75.
[59] Uninsured Drivers Agreement 1999, clause 14; Untraced Drivers Agreement 2003, clause 14(4). See, for these provisions in operation: *Norman v Aziz* [2000] Lloyd's Rep IR 52; *Norman v Ali* [2000] Lloyd's Rep IR 395.
[60] The exclusion of cases covered by the MIB agreements from the scope of criminal compensation orders is a case in point.

A further legal feature of the roads is that they are the scene of many criminal offences. These may relate to the quality of driving (ranging from careless to dangerous to deliberately murderous, or intoxicated). There are also examples of heinous purposes being pursued with the use of a vehicle,[61] and attempts to commit suicide by the use of a vehicle may themselves be acts of criminal damage or intent.[62] Criminal offences on the roads may take other forms however. They may relate not to the doing of harm, but to the state of the vehicle, or lack of MOT or licence.

Failure to carry liability insurance meeting the requirements of the mandatory regime is itself a criminal offence of strict liability (s.143 RTA), but is not as serious as many other motor offences. It is not, for instance, a recordable offence for the purposes of inclusion on the Police National Computer.[63] There is no universal quality to criminal action, and the evidence as to how breach of the duty to insure is regarded is mixed. Peter Cane, in *Atiyah's Accidents, Compensation and the Law,*[64] suggests that breach of the duty to insure is essentially a regulatory offence, akin to tax evasion. But such offences may be taken very seriously by governments. A very striking (perhaps unjustifiable) statutory elevation of the duty to insure came in recent legislation which makes it an offence to 'cause death' by driving *while* uninsured (or without a licence).[65] The addition of 'while' reflects the problem:

[61] An English illustration is *AXN v Worboys* [2012] EWHC 1730 (QB) (sexual assaults by a taxi driver – held not to be within the compulsory insurance regime), but a number of illustrations, unfortunately, can be found in other jurisdictions: see for example the analysis by E. Knutsen, 'Auto Insurance as Social Contract' (2010-11) 48 Alta L. Rev 715 (with a Canadian focus).

[62] See *EUI Ltd v Bristol Alliance Partnership Ltd* [2012] EWCA Civ 1267, [2013] QB 806, where an attempted suicide resulted in the assured vehicle rebounding and being propelled through a shop window. The property insurers obtained a judgment against the driver, but were unable to enforce it: the policy did not cover deliberate acts; and the MIB does not face liability in subrogated actions by property insurers. This makes the point that the MIB is an insurer of last resort. In the recent case of *Jones v First Tier Tribunal* [2013] UKSC 19, however, a pedestrian suicide on the roads which severely injured a driver was not considered a 'crime of violence' so as to trigger the possibility of Criminal Injuries Compensation – though the door is open for this in other cases. The Tribunal had carefully considered the state of mind of the deceased in this instance. Their finding was one of fact and other cases may be different. Pedestrians are under no duty to insure.

[63] But is endorsed on the licence (and see below).

[64] (Cambridge University Press, 8th ed, 2013). Pinpoint reference?

[65] RTA 1988, s. 3ZB, amplified by Road Safety Act 2006, s. 21(1): "A person is guilty of an offence under this section if he causes the death of another person by driving a motor vehicle on a road and, at the time when he is

absence of insurance does not itself cause death. Interpretation in the Court of Appeal gave this offence a breathtaking impact, as it was considered sufficient simply to be involved in a road traffic accident causing death, even if acting without blame in relation to the accident itself, while uninsured.[66] The UK Supreme Court has now ameliorated the position in a decision, which brought the issues into the brightest focus, *R v Hughes*.[67] The defendant here was driving, albeit uninsured, with all due care, and the deceased, who was under the influence of drugs and driving very dangerously, simply crashed into the defendant's vehicle. Noting that the s3ZB offence was one of manslaughter with significant consequences, the Supreme Court concluded that 'causing' must in this instance involve some greater involvement in the incident than simply *being on the road* (while uninsured, or unlicensed). Though causation is a malleable concept, there was enough backbone left in it to reject the idea of liability for 'causing' death in such circumstances (though partly because there was no clear legislative intent to go so far). There had to be something 'properly to be criticised' about the defendant's driving, which must contribute in more than a minimal way to the death. But the duty to insure is not a safety duty, it is a duty adopted to support compensation for torts. The oddity of the 'causing death while' offence is that it was a sledgehammer response to one facet of the problem of uninsured driving. The alternative – increasing the penalties for driving without insurance per se – was not taken up.[68] If it was thought that such

---

driving, the circumstances are such that he is committing an offence under- (a) Section 87(1) of this Act (driving otherwise than in accordance with a licence); (b) Section 103(1)(b) of this Act (driving while disqualified), or (c) Section 143 of this Act (using a motor vehicle while uninsured or unsecured against third party risks)." On conviction on indictment, this offence carries imprisonment for up to two years.

[66] *R v Williams* [2010] EWCA Crim 2552, [2011] 1 WLR 588. See the critical analysis by G. Sullivan and A. Simester, 'Causation without Limits: Causing Death While Driving Without a Licence, While Disqualified, or Without a Licence' [2012] Crim L.Rev 753.

[67] [2013] UKSC 56. The Supreme Court referred to the critique by Sullivan and Simester, ibid. pinpoint ref?

[68] Wriggins, 'Mandates, Markets, and Risk: Auto Insurance and the Affordable Care Act', 307 at n 134, sets out the criminal penalties for driving without insurance in the various US states. It can be seen that penalties for driving without insurance in the United States far outstrip the penalties in the UK and indeed driving without insurance per se is capable – one either first or second offence – of leading to imprisonment for a substantial term. In certain states, these terms may even be equal to the penalties for manslaughter in the UK. Note that O'Malley, *The Currency of Justice,* singles out the United States as having in no sense adapted criminal fines into the 'non-coercive' regime to which Bentham aspired. Pinpoint ref?

a change would not be justifiable, or perhaps socially acceptable, it is peculiar that the addition of a particular outcome should have been thought to change the picture so radically.

For the purpose of the relevant offences, what counts as 'uninsured' is in some circumstances a matter of use falling outside policy terms. Contractual interpretation, including interpretations pressed by insurers, therefore plays a part in defining criminality, because if the assured drives a vehicle in a manner which is required to be covered by a policy but is excluded by its terms, the assured commits a criminal offence.[69]

Breach of the duty to insure is not the sole criminal offence with which the MIB may interact. Breach of the duty to stop, remain and exchange details at the scene of an accident is also a criminal offence, as is breach of the duty to report to police after an accident.[70] These are likely to be committed in cases where there is an 'untraced driver', the subject of Untraced Drivers Agreements since 1969.[71] So the MIB covers tort liabilities where there are also other criminal offences although those offences are not the direct concern of the MIB. But we are less concerned with these offences. In these cases, it is less likely (though not impossible) that an individual tortfeasor will be identified and pursued; and it is in the treatment of individuals that we are interested.

A further category of criminal activity encountered on the roads is insurance fraud, including staged crashes and exaggerated claims featuring 'phantom' passengers ('cash for crash'). Fraud is a significant problem and one pursued energetically by the MIB.[72] Insurers are concerned that insurance fraud carries a surprising degree of social respectability. The

[69] This flows from the difficult suggestion of the Court of Appeal in *EUI v Bristol Alliance Partnership Ltd* [2012] EWCA Civ 1267, [2013] QB 806, that the duty to ensure that the policy covers all liabilities is on the assured, not the insurers, thereby allowing the insurers to escape liability for a deliberate act committed by the assured. For criticism see M. Hemsworth 'Insurance Obligations, the Road Traffic Act 1988 and Deliberately Caused Damage',[2013] JBL 354. The matter is currently before the CJEU.

[70] RTA 1998, s. 170.

[71] The most recent version applies to accidents on or after 14 February 2003.

[72] Together with the Insurance Fraud Bureau – also funded by insurance industry and not confined to motor insurance.

insurers' efforts may be compared with government emphasis on fraud in pursuing fiscal savings. Pursuing fraud is not at the core of this chapter, [73] but is an important feature of the MIB's campaign to increase attention to the duty to insure, and to combat various forms of what might otherwise be relatively 'respectable' criminality. This element of respectability, and the efforts to redress it, perhaps contributes to the mixed picture of the identity of insurance duties.

As we have seen, using a motor vehicle on a road or public place without insurance is a criminal offence specifically created in order to support the satisfaction of tort claims. The intention behind it is protective – like health and safety legislation, which also combines criminal and tortious features.[74] The core motivation behind the creation of the MIB was to protect against driver insolvency. However, the current focus is (apart from fraudsters) on the driver who does not carry insurance at all, or has invalid insurance, or who is untraced. In order to protect those who have properly insured the use of their vehicles against ever increasing premiums, and to protect the profitability of motor insurance, the MIB has set *reduction in uninsured driving* as a priority.[75] For completeness, it should be pointed out that it does not only do this in the ways outlined immediately below, but also sends reminders and fixed penalty notices, and aims to increase court appearances by drivers charged, in order to avoid the problem of uninsured tort claims before they happen.

[73] See A. Bugra and R. Merkin, '"Fraud" and Fraudulent Claims' (2012) BILA Journal, 3, on insurance fraud and the desirability of a more moderated approach than those in current Law Commission proposals. Fraud is of two types: the "cash for crash" fraud *against* the assured by "alleged" victims (see *Fairclough Homes v Summers* [2012] UKSC 26); and fraud *by* the assured in putting forward an exaggerated claim or false account of the loss. The latter is particularly problematic given the MIB's liability for property damage caused by an untraced driver, given the risk that damage to a vehicle caused by the assured can be blamed upon a phantom third party. For that reason clause 5(1)(a) of the Untraced Drivers Agreement excludes pure property damage claims where there has been no personal injury, on the basis that an assured is unlikely to self-inflict personal injury in order to present a fraudulent property claim.

[74] We pause to point out that in another context, the government has moved to remove civil liability from strict duties in relation to health and safety, in a reversal of around 150 years of legal development advancing such remedies: Enterprise and Regulatory Reform Act 2013, s. 69 (not yet in force, but very disruptive when it is). Duties to insure (and pay tax) are perhaps looked at more fondly than duties to ensure health and safety at work, by the present coalition. Perhaps this is because the public as a whole is the victim of failures to insure/ pay tax (not injured workers).

[75] This is derived from the MIB's on-line mission statement, above n 53.

One notable aspect of the MIB's war on uninsured driving lies in its links with the police. Driving without insurance is, not surprisingly, statistically linked with other criminal acts and harmful behaviour.[76] The MIB and the police therefore share a common purpose. In a twist on the observation that insurers provide resources for governance and control in the context of 'risk society',[77] the MIB works closely with the police in order to combat uninsured driving. The MIB has created a motor insurance database ('MID')[78] and provides telephone contact for police officers at the roadside suspecting uninsured use. The Police National Computer links directly to the MID and is used in Automatic Number Plate Recognition cameras. Uninsured 'hotspots' are identified by the MIB and on the basis of this information police patrols are concentrated. Powers on the part of the police to seize uninsured vehicles, together with these information systems, mean that lack of insurance is a useful proxy for other offences and is relatively detectable (thanks to insurers). The visible criminality of breach of the duty to insure is also much enhanced by this activity. The profile of the duty to insure and the criminal nature of breach of the duty are thereby raised.[79]

We can see that motor insurers do not only compensate. They help to combat criminality both directly in their relationship with other enforcement organisations and indirectly by means of the recourse actions against uninsured drivers identified above, and to some extent to define different styles of criminality: liability insurers work to classify driving without insurance as specifically irresponsible. The category of uninsured driver (in contrast to the 'honest

[76] For example, the uninsured are ten times more likely to have been convicted of drink driving, nine times more likely to be involved in a collision (source: MIB). Of course, having no licence means insurance is not available, and points – and youth – mean higher insurance. There are questions about the direction of cause and effect. Our point here however is about detectability.

[77] R. Ericson, A. Doyle and D. Barry, *Insurance as Governance* (University of Toronto Press, 2003); R. Ericson, K Haggerty, *Policing the Risk Society* (Oxford University Press, 1997)

[78] 'MID' was pressed into use as the UK's response to the EU requirement upon member states to establish a body with the function of providing information on the insurance position of any traced vehicle for the purpose of cross border claims. Cross-border claims may, under the 2002 Regulations, be brought against the insurer in the victim's home state even though the injury occurred elsewhere in the EU.

[79] The MIB's Annual Report and Accounts 2012 reports the seizure of the one millionth uninsured vehicle on UK roads in the accounting period.

motorist'), itself reflects a combination of tort, insurance, and criminal law. To what extent has driving without the means to meet tort liability become a more heinous sort of wrongdoing than driving negligently, other than rhetorically? From the perspective of criminal law, driving without due care carries 3-9 penalty points on the licence; driving without insurance carries 6-8 (they are overlapping– but note that driving without insurance starts higher on the scale, even if particularly blameworthy driving goes higher). Leaving aside the striking example of 'causing death while uninsured' discussed earlier, in Part 3 we suggest that there is ordinarily no straightforward hierarchy between the impact of criminal and civil remedies in this context. Tort remedies are focused on claimant loss while criminal penalties and compensation orders generally focus on the culpability of the defendant, taking into account the defendant's means. If a tort remedy is imposed upon the individual tortfeasor, it is not proportionate either to culpability, or to her means, an outcome triggered by failure in the duty to insure.

3. Remedies, penalties, compensation: criminal and civil

Here we sketch different responses of civil and criminal law in terms of penalties and remedies. In general we are interested in identifying comparisons between the burden of civil and criminal law, in terms of the consequences imposed on individuals and associated questions about the 'meaning' of the liabilities and penalties thereby imposed. Reflecting on the relationship between tort and crime offers a welcome opportunity to consider different compensation systems and the differences between these, and tort.

A. General

Criminal duties may be strict, and the duty to insure is one such strict duty. But penalties are generally affected both by the nature of the offence, and often by the means and culpability of the defendant.

Civil liabilities are aimed at restoring the victim to the pre-tort position, at least as far as money can achieve that aim. The level of liability is not affected by the means of the defendant nor the defendant's level of culpability. But of course such liabilities can be (must be, in this context) insured. As we have explained, it is plain that considerable efforts have been made to secure recoverability on the roads, and thus to ensure that liability results in compensation.

B. Criminal compensation orders

Compensation orders, made by criminal courts, can be called a hybrid: they are compensatory, but are also sensitive to the ability of the defendant to pay. Although they take priority, in theory, over fines, criminal courts are discouraged from assessing compensation in 'complex cases', which would include substantial personal injury claims.[80] One possible reason for this is that the victim has no standing to press his or her compensation claim as a party to the criminal process, and the criminal court is therefore not well placed to assess it.[81] Ambitions are apparently frustrated by practical constraints, therefore. But it seems likely that the attempt to make the burden compatible with the defendant's means will in any event frustrate the attempt to use this as a process for real compensation or redress in the civil sense. It is significant that such orders are almost inapplicable in road traffic cases: legislation

[80] M. Dyson, 'Connecting Tort and Crime: Comparative Legal History in England and Spain since 1850', (2009) 11 CYELS 247, 261-262.
[81] Powers of Criminal Courts (Sentencing) Act 2000, ss. 130-132.

provides that they are not to be made where sums are payable in accordance with the MIB agreements.[82] It is plain that legislation here is drafted on the basis that the distributive solution (compensation through insurance) takes priority over the responsibility of the defendant so far as compensation is concerned. Only if liabilities fall outside the agreements – for example if there was no duty to insure because the injury did not occur on a road, or not through use of a vehicle – might a criminal compensation order be suitable. It is striking therefore that in terms of civil liability (as opposed to criminal compensation), the responsibility of the defendant survives the existence of the insurance regime, as we will show. That is, insurance can bar a criminal compensation order, which is proportionate to the defendant's culpability and means, but will not prevent civil liability, which is proportionate to neither.

C. Criminal Injuries Compensation: a Parallel?

There is another notion of 'compensation' related to tort and crime: state compensation for criminal injuries. In the UK this operates through the Criminal Injuries Compensation Scheme, and was inspired by the remedies available through the law of tort. This scheme applies only to crimes of violence, which is apt to cover relatively few motor cases. It provides money from state funds and is state-run, in contrast with MIB. It is now on a statutory footing.[83] The scheme is generous in comparison with most state compensation schemes: most such schemes are not modelled even approximately on tort remedies. Its remedies were initially modelled on tort but there has been revision, with a lower tariff

[82] Ibid., s. 130(6). Where a policy 'excess' of £300 applies to property damage, this is recoverable through a compensation order. This "specified excess" is excluded from coverage under the MIB Agreements: Uninsured Drivers Agreement 1999, clause 16.1; Untraced Drivers Agreement 2003, clause 8(3).
[83] Criminal Injuries Compensation Act 1995.

system now in place (primarily in order to control its costs).[84] The existence of the scheme shows that there is a policy (albeit controversial)[85] in favour of compensating the victims of certain wrongs. The most interesting point for comparison is that the terms of the Scheme make plain that it exists only to assist 'blameless victims' of crime. Certain unspent convictions unrelated to the injury will themselves debar the victim from the scheme, others will lead to reduced compensation.[86] That is not how the law of tort operates. The 'ex turpi causa' (or illegality) defence only bars claims in quite narrow circumstances and these must be causally related to the harm for which a claim is being made.[87]

The shift to a tariff system illustrates the tensions always felt by state schemes funded from general taxation, or by levy on particular activities: the cost of the scheme will always be a matter of public scrutiny and political debate. Here too the presumption is that individuals will be compensated through other mechanisms, and by the CICS only as a last resort.[88] Scrutiny of the hierarchy in sources of compensation shows that the MIB is not the last line of defence for those injured by torts on the roads, but a preferred compensator in comparison both with the state (where torts are also crimes of violence); and the individual criminal wrongdoer.

The hesitant use of criminal compensation orders, and their exclusion from cases covered by the MIB agreements, suggests that distribution in this context is sufficiently well established

[84] This shift was made possible by the 1995 Act. For discussion, see D Miers, *State Compensation for Criminal Injuries* (Blackstone Press, 1997). Pinpoint reference?
[85] For a sense of the controversy see Miers, ibid,.Pinpoint reference?
[86] Criminal Injuries Compensation Authority, 'A Guide to the Criminal Injuries Compensation Scheme 2012' (June 28, 2013), 28: the presence of unspent convictions which attract a custodial or community sentence will mean no payment is made; unless there are exceptional circumstances, the presence of convictions attracting a sanction other than a custodial or community sentence will lead to compensation being reduced.
[87] See the discussion by Graham Virgo in this volume.
[88] CICS generally is a scheme of last resort. Claimants should seek compensation elsewhere and will have to repay the amount of CICS to the extent successful in other claims. This is stated in the most recent, amended guidance (2012).

to take priority over financial responsibility on the part of criminal wrongdoers. It is therefore pertinent to consider the role of the MIB in ensuring that individual responsibility re-enters the frame.

4. The return of responsibility

A. Tainted claimants

If an injured claimant falls outside the MIB agreements, the consequences are potentially severe. The risk that compensation will not be recoverable arises if a tortfeasor is found to be uninsured *or the relevant insurance policy is invalidated, or does not cover the event*. There is a double process of interpretation at work: insurance policies must be construed to determine whether the manner or purpose of use was insured and, if not, the terms of the relevant MIB agreement will then determine whether there is to be compensation. At this second stage, attention may turn to the quality of the claimant's conduct.

The courts might have taken the view that in interpreting the MIB agreements they should give effect to the intentions of the legislature and the policy of compulsory insurance, thus interpreting coverage widely. But a significant recent decision, *Delaney v Pickett*,[89] shows a less pro-compensation approach to the MIB agreements than this would suggest. Here the claimant suffered very serious physical injury in a car accident. He was a passenger, and brought proceedings against the driver, his friend. This became an MIB claim because the tortfeasor's insurer invalidated the policy for failure to disclose the driver's drug use (which

[89] [2011] EWCA Civ 1532, [2012] 1 WLR 2149

had not, however, caused the accident).[90] This was of course not a matter that was within the claimant's control. The claimant's own involvement in wrongdoing was indicated by the fact that he had a quantity of cannabis in his jacket, at the time of the accident. The judge concluded this was intended for supply, and that supply of drugs was the purpose of the journey (a finding of fact disputed by one member of the Court of Appeal, who thought it plausible that the quantity discovered was purely for personal use[91]). Under Clause 6(1) of the 1999 Agreement, the duty to satisfy a judgment does not apply where C 'knew or ought to have known' a series of things, one of which is that 'the vehicle was being used in the course or furtherance of a crime'. The majority of the court thought this criterion was satisfied. Though the injuries were severe and life-changing, and there was no link between the crime and the accident sufficient to support an illegality defence in tort, the claimant could recover no damages.[92]

This decision (perhaps counter-intuitively) was actually reinforced by a suggestion that the funds administered by the MIB are 'public money'.[93] Simply put, this means that it is legitimate to restrict the availability of that money. The situation bears comparison with Criminal Injuries Compensation, where claimants must qualify for the scheme in the senses already explained – for example, by not having relevant unspent convictions. When we compare the claimant's position in tort in relation to illegality or *ex turpi causa*, with the position under the MIB agreements, the approach in *Delaney v Pickett* appears particularly demanding. It applies an approach something like the disqualifier in the Criminal Injuries

[90] There was no evidence that he was under the influence of cannabis at the time, nor that (if he was) this would have been evident to the claimant (Ward LJ, quoting the judgment below, ibid., [6]. The only cannabis found in his possession at the scene was stuffed into his sock ([7]).
[91] Ward LJ, who referred also to the relatively low street value of the substance: see, ibid., [9] and [28]. He also noted that although Pickett was convicted of dangerous driving and of possession of cannabis he was not charged with possession with intent to supply ([12]).
[92] It is arguable that this is inconsistent with the UK's obligation to ensure equal treatment between victims of insured and uninsured drivers. The dissenting judgment of Ward LJ has much to commend it.
[93] *Delaney v Pickett,* [2012] 1 WLR 2149, [74] (Tomlinson LJ).

Compensation Scheme (the applicant is not 'blameless') to deny recovery where the tort defence not only would fail, but had actually failed on the facts. The claimant was 'good enough' for tort and liability was established; but was not 'good enough' for the MIB scheme, and recovery was denied. The reasoning equates compulsory insurance with a distributive scheme where only the deserving qualify for distribution of scarce goods. The less deserving may nevertheless have a good claim in tort, against a defendant, but a claim that will typically go unsatisfied. A distributive sensibility may be more judgmental than the private law equivalent.

B. Claimants Who Ought to have Insured

It may not be a surprise in the light of earlier discussion that there is evidence that the MIB places particular emphasis in litigating cases on the responsibility of parties who fail to insure. Indeed, a claimant who should under the Road Traffic Act 1988 have been, but is not, insured, has no claim against the MIB for property damage caused by an uninsured or untraced third party.[94] However, the consequences may be slightly more surprising, given the general impression that responsibility is largely evacuated from the process of compensation via insurance. It is worth considering a type of case which for technical reasons did not involve the MIB, but which is closely related to the themes.

[94] Uninsured Drivers Agreement 1999, clause 6.1(d); Untraced Drivers Agreement 2003, clause 5(1)(f).

As in *Delaney v Pickett,* in *Wilkinson v Fitzgerald; Evans v Cockayne*,[95] the Court of Appeal has gone a surprising distance to restrict tort rights and support insurers' rights to limit their liability by contract. Here, the owner was also a passenger who had allowed use of the vehicle that was not covered by the insurance policy. By s 151(5) of the Road Traffic Act 1988, the insurer is required to pay the victim of a tort where permission for uninsured use has been given by the assured. For that reason, this is not an MIB case. By s 151(8) the insurer is also allowed to reclaim the amount from an assured who has caused or permitted uninsured driving. This could be a draconian measure in any event,[96] but on facts like *Wilkinson* the assured is also the injured party so they will be deprived of their award. The Court of Appeal noted that the statutory provision must be compatible with duties under the Consolidated Motor Insurance Directive 2009. They therefore decided that further conditions must be placed on the operation of s 151(8), namely that recovery by the insurer 'must be proportionate and determined on the basis of the circumstances of the case'. The parties had not asked the Court of Appeal for substantive resolution of the case, but only for a statement of principle. However, it is unclear precisely how the wording of this condition – which was largely as proposed by insurers – will operate. Relevant factors may be degree of culpability in permitting the use, and degree of injury suffered. If so, then the introduction (via the need to be compatible with the EU Directive) of proportionality will ameliorate the impact of falling outside the MIB agreements on uninsured motorists who are themselves personal injury claimants.

C. Actions Against Tort Defendants Who had Failed to Insure

[95] [2012] EWCA Civ 1166, [2013] 1 WLR 1776.
[96] The level of personal injury damages is capable of far outstripping any penalty that would be attached for such a failure per se, as we discuss in the final sections.

Where defendants are concerned, the governing principles the insurers' right to seek recovery from a tortfeasor who has breached the duty to insure. Arguably, it is through civil liability, rather than criminal liability, that breach of this duty is likely to strike hardest at individual tortfeasors since satisfying the liability will usually prove much more onerous than the low level criminal offence of failing to insure. Not only that, but the presence of insurers has the capacity to increase the chances of recovery from a malefactor in this way, enforcing 'responsibility'. One example is the right of recourse just described, but that is not all.

A further possibility to be considered here is that uninsured drivers may be pursued by the MIB with a view to recovering payments made, or, as we have seen, the victim may be required to pursue the tortfeasor in the first instance, as a condition of recovery from the MIB. Here it is plain that liabilities would be personally borne (as would the costs of defending the claim for reimbursement). Does this final, and simplest possibility have the effect of turning civil compensatory damages into a punitive instrument, based upon the outcome of driving while uninsured? We might compare the limited financial impact of criminal prosecution (where fines are tailored to the defendant's means and the gravity of offence), with the consequences of a major organisation seeking recovery in a determined and professional fashion.

For MIB, this is a matter of playing the long game: of profit and loss accounting over a period of years. They have the capacity to be more patient than a tort claimant who needs compensation soon, and must determine whether the costs of the claim make it worthwhile. Often being uninsured is a good protection against tort claims: this is the idea of being 'judgment-proof'. But it is much harder to be judgment-proof if the pursuit is not from a tort claimant, but from insurers who have satisfied the judgment. The reasons could be

summarised as 'persistence' and 'resources'; but it should also be noted that the necessary legal process is much simpler, since insurers will already have settled or contested the tort claim. When the logic of insurance and responsibility to insure are added to the law of tort, then is compensatory the new punitive?

A further factor puts defendants at even greater risk: not only is the duty to insure strict,[97] but according to the Court of Appeal in *EUI v Bristol & Alliance Partnership*,[98] the burden of ensuring that insurance covers all relevant potential liabilities lies on the assured, rather than on the insurer. According to Maggie Hemsworth,[99] this could mean that there is a duty to have in place a form of policy that may not even be available. It would be rare for a driver to have the capacity let alone take the time to identify shortcomings in a motor insurance policy. This provides a counter-weight to the potential argument that the duty to insure may be less demanding than the duty of care, because decisions about insurance are not made 'in the heat of the moment'. On the other hand, it might be suggested that administrative errors on the part of individuals are reasonably commonplace.

How much do MIB use the approach of seeking recourse against individuals? It appears that they do so routinely. The approach reflects the logic of accounting, the mission to reduce the costs of uninsured driving, but also the associated censorious approach, which we have noted throughout, to those who are not 'honest motorists'. In December 2006, MIB publicised the fact that it had secured two landmark bankruptcy orders against uninsured drivers. An MIB press release of 5 December 2006 was forceful and left little doubt that this was part of a

[97] Its strictness is illustrated by *Osman v J Ralph Moss* [1970] 1 Lloyd's Rep 13 – here the uninsured party had been prosecuted for failure to insure and sued his insurance broker in tort for failure to secure such insurance. The claim was not barred ex turpi causa, though there has been some discussion of its continued viability after *Gray v Thames Trains* [2009] 1 AC 1339, in *Safeway Stores v Twigger* [2010] EWCA Civ 1472, [2011] 2 All ER 841, (Pill LJ concluding that the decision remained correct, as intuitively it should be).
[98] [2012] EWCA Civ 1267, [2013] QB 806.
[99] Hemsworth, 'Insurance Obligations, the Road Traffic Act 1988 and Deliberately Caused Damage'.

concerted campaign, like the prosecution of those without insurance: their press release was titled 'MIB turns up heat on uninsured drivers with landmark bankruptcy ruling'.[100] It continued by noting, 'this case is only the first of a series of actions the MIB is taking against rogue drivers to recoup many thousands of pounds'.[101] It would appear therefore that the practice was new. Most detail was provided about a defendant by the name of Harrison. This case gives us a good opportunity to compare criminal penalties with the civil 'sanction'. Mr Harrison had been charged with driving while uninsured. He was fined £50 and disqualified from driving for two months. Disqualification is of course a significant sanction; but here it was relatively transient. The MIB on the other hand pursued him for £15,000 damages and secured his bankruptcy. Nor do matters end there. There is a saving in s 281(5) of the Insolvency Act 1986 for payments due to the MIB – they are not discharged by the bankruptcy order to the extent that they relate to a claim for personal injury. This cannot be directed at helping tort claimants who are (subject to our comments above) compensated by the MIB.

This was plainly a strategic move. A 2006 report by MIB featured an item on its 'recovery department'.[102] Through bankruptcy orders, MIB was aiming for 'more control and better visibility of defendants' debts'. Recovery agent performance had been improved and agents who did not perform adequately would be removed from the panel. The organisation had collected £863,000 in March, and were looking towards recovery of £7 million in 2006. They have certainly been making progress, though 2010 accounts show the slightly lower figure of £4.77million had been achieved in that year.[103] This may be made up of numerous smaller sums, of considerable significance to the drivers from whom they are obtained – and

[100] http://www.mib.org.uk/NR/rdonlyres/60941C32-F0F4-483D-BB8E B7ABFD27350F/0/BankruptcyPressReleasefinal5December2006.pdf
[101] Ibid.
[102] MIB, *The Road Ahead*, Issue 10, 2006, 3.
[103] MIB, Annual Report and Accounts 2010, 9.

considerably higher it would seem than many criminal penalties. Recall, once again, that the availability of compensation through the MIB ousts the availability of criminal compensation orders. The impression may be that the objective of compensation through insurance takes priority over compensation premised on criminal responsibility. But the truth is that responsibility for compensating to a higher level than would be contemplated in making a criminal order is brought back home to the uninsured driver in this way.

More recent MIB Annual Reports do not offer discussion of this strategy. Perhaps it is now seen as less likely to build public support than public information campaigns, for example, particularly if individuals begin to argue that they *did not know that they were uninsured*. In light of cases such as *Evans* and *EUI*, this is not as far-fetched as we might be tempted to assume. However, the 2011 Report contained a straightforward statement of the policy of referring **all** settled claims to the Recovery Department to assess the feasibility of recovering losses. The MIB would seek to work with appointed recovery agents to 'agree a settlement structure with the uninsured driver'.[104] The 2011 Annual Accounts showed £7.5million recovered in this way.[105] The 2012 Annual Report and Accounts reports further progress in this regard, noting that 'MIB has an obligation to not only compensate innocent victims of uninsured and untraced drivers, but to also do what it can within its power to seek reimbursement from those drivers who cause such accidents'.[106] It is imperative that those people who choose to drive without insurance realise that there are consequences to their actions and that MIB will seek recovery from them. In 2012, £8.2 million was recovered,

[104] MIB, Annual Report and Accounts 2011, 38.
[105] MIB, Annual Report and Accounts 2012, 9.
[106] Ibid.

greater even than their target of £7.6 million, which in turn was £0.7 million more than 2011 recoveries.[107]

It is notable that for the MIB, which has already been involved in settling or resisting a tort claim, the recovery process appears to be cheap and simple. This would not necessarily be the case for a tort claimant. The MIB can afford to pursue a proportion of the sum paid out – it is worthwhile, partly because it is not complex. But a proportion of a personal injury claim may be a weighty 'penalty' (if that is the right way of approaching it) for an individual. Is it, then, a penalty? The rhetoric applied to uninsured driving, set out in Section 2, suggests that this is indeed part of the intention behind seeking recovery. An alternative is to accept that this merely pursues actuarial logic, the efficient pursuit of a healthy balance sheet, and a reduced cost for the practice of motor insurance overall. The absence of any degree of proportionality, in contrast to criminal compensation orders, which are a response to criminal wrongdoing causing loss, is a striking feature.

Despite the general understanding that insurance, backed by the MIB, is the end of the matter where tort liability is concerned, it is plain that the MIB operates compensation and recovery, not just compensation. Equally, as we have seen in earlier sections, it will resist compensation when claimants are tainted in some relevant way. Legal structures support and enable this pattern, but it is not necessarily one that has been planned, or intended, by governments or legislators even if courts have – in relation to claimants – lent their support. This is not a process that has yet attracted attention.

[107] Ibid. The reference to 'innocent victims' mirrors the references to 'blameless victims of crime' in the CICS, noted above. Notably, 'fraud savings' were stated (ibid.) to be worth £16 million, nearly double the recovery figure.

5 Conclusions

We can see that the MIB does more than compensate. It also helps to elevate the status and impact of a legal duty whose intention was to support the tort system by guaranteeing recoverability so far as possible. Individual responsibility for compensation turns to a large extent on breach of the duty to insure. For claimants whose tortfeasors are uninsured, failure to insure may also trigger a responsibility to bear the loss themselves. Irresponsibility in relation to duties to insure exposes both claimants and defendants to the risk of bearing the costs of tort. In the move to ensure that tort compensates in this context, responsibility to bear losses has not altogether gone away, and insurers are among its most influential proponents.

Where tort damages are recovered directly from individuals to the greatest extent possible, the impact of those damages is capable of being more far-reaching than compensation orders or fines in the criminal process. Insurers facilitate this. The role of insurers in relation to tort is not solely aggregative, distributive, and diluting of personal responsibility. Uninsured status may change all this, and allow intensification of the burden of compensation, since insurers have the capacity to pursue individuals over time and for whatever share of compensation can be secured. In this sense, our answer to the question of whether the duty to insure may sometimes intensify personal responsibility through civil processes is yes.

Some challenging questions remain. First, is there anything wrong with this picture, and if so what? Second, what kind of 'personal responsibility' is associated with the duty to insure? And finally, what light does this shed on the 'meaning' of remedies and penalties in this context?

Turning to the first of these, what, if anything, is wrong with the picture that we have sketched? After all, if the costs of accidents are placed with those who can insure, then they

will in theory be encouraged to do so. Certain problems, we suggest, can be identified. One of these is that no consistency exists in relation to the identity and significance of the duty to insure. If we were indeed to approach the issues through a functional lens, it would certainly seem a disadvantage that of the heaviest 'penalties' for failure to insure – the chance of personal liability for civil damages, and of a manslaughter conviction should death come about – one is not widely appreciated, and the other could be described as so remote a possibility that it will not be effective in changing behaviour. It may also appear injurious to any ambition of changing behaviour that claimants whose behaviour is relevantly imperfect will only suffer the consequences in relation to refusal of compensation if their injurer should turn out to be uninsured. After all, had Mr Delaney been the victim of an insured driver, his possession of cannabis would have counted for naught; the fact, beyond his control, that the defendant was uninsured, seemingly imposes an unnecessarily harsh outcome in a system, which is designed to overcome the absence of insurance in terms of compensation. Unless the injured party is also the uninsured party, this is a matter of chance from the tort claimant's point of view. Inconsistency and unpredictability are features of the current landscape, based as it is on a variety of judgments and logics, and achieved through the medium of insurer action rather than judicial or legislative design.

If regarded instead in terms of fairness and appropriateness, then the key concerns will change. These concerns include a lack of proportionality in the impact of civil remedies or their denial, and possibly a lack of transparency in relation to the applicable processes.[108] Where compensation and distribution are the norm, and appear to be premised on breaches of tort duty, we predict that many will share our intuition that the refusal of compensation to a

[108] N. Bevan, in a two part article, offers a sustained criticism of the MIB, arguing that the agreements are outdated and one-sided and the constitution of the organisation excludes any representation or involvement in decision-making on the part of non-insurers. While serving public functions, the MIB clearly maintains its private nature: N. Bevan, 'Reforming the Motor Insurers' Bureau: Part 1' (2011) JPIL 39; 'Why the Uninsured Drivers' Agreement 1999 Needs to be Scrapped: Part 2' (2011) JPIL 123. Despite his critique, Bevan acknowledges the admirable efficiency of the organisation, which also appears to be appreciated by government (see the comments on conduct of the MID, and on extension of the RTA portal, above).

claimant in the position of Mr Delaney is disproportionate compared to his wrongdoing, and indeed virtually irrelevant to the kind of injury and loss with which he is burdened. This is perhaps a consequence of approaching his case as a tort claim, rather than through the perspective of a public distributive scheme such as the Criminal Injuries Compensation Scheme. This in turn may reflect the general expectation, associated with the compulsory insurance regime in combination with tort remedies, that we will not be at risk of bearing the financial consequences of road traffic accidents caused through the fault of another. At the same time, when compared with the penalties imposed by criminal law, the burden of civil damages is not lightly to be imposed on individuals, despite the impression to be gleaned from tort theory. Perhaps particularly problematic is the absence of any process for determining the degree or nature of the defendant's wrongdoing in relation to their failure to insure. Rather, a simple process for the recovery of a debt is required, in which the degree of culpability either in the breach of the strict duty, or of the degree of negligence, will have no place. Indeed, to the extent that insurers are generally not minded to dispute liability when settling tort claims,[109] there is a chance that failure to insure will expose individuals to at least some of the burden of tort remedies in circumstances where their fault in relation to the damage caused is disputable.[110] In these ways, the tort remedy is visited upon individuals as a consequence of breach of a criminal duty whose own penalties are, in most cases, relatively modest. When looked at in this way, rather than 'simply' in terms of allocation of a risk,[111] elements of inconsistency, unpredictability, disproportion, and absence of clear process, are the concerns we raise.

[109] See Introduction, n 20 and text.
[110] As we have seen, a chance of exposure to serious *criminal* sanction was created on a grand scale by the offence of causing death while driving without insurance (etc) – but that was the creation of legislation and has been refined by interpretation in the courts.
[111] We will explore shortly the possibility that this way of thinking is not unique to insurance but also appears within the law of tort.

Our second and more difficult question is how to understand the nature of the personal responsibility associated with the duty to insure? This is a considerably more wide-ranging question. We have identified the various penalties and other consequences associated with breach of the duty, and the uneven treatment of it in criminal law. We have also explained that it offers reinforcement to tort duties, and does not necessarily undermine those duties nor (certainly) evacuate personal responsibility from the domain of tort on the roads. In fact it may be one of the key mechanisms for restoring such responsibility. We have also contemplated, but remained sceptical about, a possible hierarchy based on the nature of the culpability involved in breach of the two duties. Not only can the duty of care be breached deliberately, but the duty to insure can be breached honestly. Equally, while the duty to insure might not be thought particularly demanding (it does not demand an inhuman degree of perfection in controlling machinery at speed, for example), administrative inefficiency and ineptness are also frequently encountered aspects of the human condition. Though failure to insure may not be considered inevitable in the same way that 'simple negligence' in completing a task is inevitable from time to time, nevertheless failure to insure through error, rather than design, is by no means beyond belief. At the same time it is hard to define breach of the duty to insure as *less* blameworthy than breach of the duty of care given the ample opportunities to fulfil it. However, it is not a safety duty but a financial duty, and so a view that it is less significant than the duty of care may be encountered. If that were the correct view, then the picture just sketched is still more suspect than we have proposed. These are questions about whether the duty to insure can realistically be considered either higher on a hierarchy of duties than the duty of care, or lower. Whatever the right answer to that (and we lean towards the answer 'neither'), is it nevertheless different in type?

Arguably, the addition of a duty to insure invokes a distinct form of responsibility, associated with the policy of grouping and distributing losses that pervades the compulsory liability

insurance regime. In other words, the duty to insure may be interpreted as a social duty, or a 'solidarity' duty, akin to duties to pay tax. On this view the duty forms part of a collective solution, in which each individual has a duty to participate.[112] This view of responsibility is easy to identify in the campaign to heighten awareness of the duty to insure, and to link failure to insure with other criminal offences, as well as to link it to policing operations on the roads. In other words, insurers work to promote the idea of the duty to insure as an aspect of social responsibility, and to link this with other forms of social irresponsibility (such as drug use). It is plain, in particular, that 'insurance' is not conceptualised as a private matter between defendant and insurer, where there is a duty to insure. This version of responsibility appears to be very different from the form of responsibility generally thought to exist within the law of tort, even if the relationship between tort and distribution (or between duty of care and duty to insure) in this context is symbiotic, and each influences the other.

But this is not the only possible way to approach the type of responsibility in issue. The duty to insure could alternatively be conceptualised as expressing a responsibility incumbent upon individuals to ensure that they can meet the consequences of harms that might occur in the course of their activities. In this instance, the principle is that the duty extends only to harms caused through breach of the duty of care.[113] In practice, as we have said, the intervention of insurers may operate to decrease the significance of fault in relation to the duty of care, while heightening the significance of the insurance duty. On this alternative view, the duty to insure could be described as a 'prudential' duty, or in other words, a duty to make provision; but even so it is important that the beneficiaries of insurance in this instance are third parties who

[112] Indeed this perception of coerced collectivism explains the hostility of right wing US Republicans to the ACA insurance mandate. In a similar vein, Wriggins, 'Mandates, Markets, and Risk: Auto Insurance and the Affordable Care Act', also recounts the history of constitutional challenge to US compulsory auto insurance legislation.

[113] One thing, which all drivers should know from experience – even if they often forget – is that they will be negligent. Whether they will cause injury is the part that is uncertain.

might be injured by one's actions. [114] It may further be argued that the responsibility is owed not just collectively or to the state, but directly to those parties. Such a form of responsibility has been identified before as existing within the law of tort itself, although its existence is controversial. Most significantly, it has typically been associated with justifications for strict liability, rather than with the operation of the tort of negligence.[115] Does the duty to insure merely make concrete in a particular context this idea that one should cover the costs to others of one's own activities or (perhaps more convincingly) make provision for the possibility of those costs – even in a case where the relevant costs are in principle only those which are a product of breaches of the duty of care? The intriguing possibility is that on this logic, the duty to insure could be claimed as an element of tort, as it can be conceived as owed directly to potential claimants. Equally, that the common law could have developed something like the duty to insure on its own, and arguably has done so. Not everyone, of course, accepts the existence of such a duty in the law of tort, and some might doubt its coherence, as it appears to dispense with the primary duty (for example, of care; or, in the case of *Rylands v Fletcher* liability, to 'keep in').[116]

The 'duty to insure' in the guise just explored is very different from the duty to insure discussed in this paper. The key to the difference is that in the approach just set out, it may be more precise to say that the defendant is held to 'act as insurer'. Equally, it is on this basis that the defendant is held liable at all:[117] the duty to 'act as insurer' is argued to be a reason

[114] Rather than oneself, or one's dependants (through sickness or in the latter case life insurance).
[115] See the discussion by K. Simons, 'Jules Coleman and Corrective Justice in Tort Law: A Critique and Reformulation' (1992) 15 Harv J.L. & Pub. Pol'y, 849, 880. Simons here draws on R. Keeton, 'Conditional Fault in the Law of Torts' (1959) 72 Harv L. Rev 401 to discuss 'conditional fault': the idea that engaging in a risky activity is not culpable unless there is a failure to make good the losses that are caused. Such cases would typically be identified by tort lawyers as engaging strict liability since there need be no fault in the causation of the harm; fault would enter the picture should there be no reparation.
[116] We are not suggesting here that strict liability necessarily dispenses with primary duties but that the 'conditional fault' analysis of strict liability may do so. There are numerous strict duties, for example those imposed on employers to take care of their employees' safety in various ways.
[117] Though of course, in some instances rationales for liability may overlap.

for making the defendant liable in tort.[118] The duty to insure we have discussed on the other hand is a duty to 'secure insurance' to cover liabilities which would in any case exist. A comparison with Workmen's Compensation can be used to illustrate the point. The history of Workmen's Compensation has been frequently discussed in terms of the evolution of an 'insurance' idea.[119] Workmen's Compensation differed from tort because the employer was liable to compensate workers where they suffered injury, irrespective of whether there had been fault or other breach of duty on the part of the employer (nor was carelessness by the employee generally relevant). In this sense the strategy was to require the employer to spread the risk of injury across its undertaking. That is an insurance-like technique. Of course, most such employers secured insurance of the liabilities, and a liability insurance market was born to meet the demand. In the UK however, there was no requirement to insure these liabilities, other than relatively briefly in the coal industry (from 1934 until the post-War repeal of the Workmen's Compensation Acts).[120] That particular duty to insure was precipitated by insolvencies and resulting hardship in the coal industry: the employer could no longer be relied upon to *act as insurer*. Nor can the ordinary individual motorist. Workmen's Compensation generally involved no duty to insure in the sense discussed here, namely a duty to ensure that money to compensate is actually available. What we have sketched in this chapter is inevitably rather different from these proposed common law strict duties to 'act as insurer', as we are suggesting that the duty to insure in the road traffic context reinforces the duty of care, rather than replacing it; and that it operates in this context in support of the tort of negligence, rather than amounting to a justification for (strict) liability in its own right.

[118] That is broadly the rationalisation of *Rylands v Fletcher* liability embraced by Pollock: F. Pollock, 'Duties of Insuring Safety: the Rule in Rylands v Fletcher' (1886) 2 LQR 52.
[119] Notably by P. Bartrip and S. Burman, *The Wounded Soldiers of Industry, Industrial Compensation Policy 1833-1897* (Oxford, Clarendon Press, 1983).
[120] Workmen's Compensation (Coal Mines) Act 1934.

Another way of addressing the compatibility of duties to take care and duties to insure, without falling back on conditional fault or absorbing the duty to insure into the law of tort itself, is to suggest that tort duties themselves often express the proper location of risk. That is the approach we prefer. This notes a certain kinship between negligence duties, and insurance logic, without seeking to make them identical. The observation is at least as applicable to negligence duties as to any other tort duties. This approach regards negligence duties not as simple instructions to take care, but as duties owed to particular individuals to take care to avoid harming their interests; or where applicable to take care of their interests. In other words, at least some such duties allocate the risk of harm arising through negligence of one of the parties. On this view, a statutory duty to insure may operate as a particularly clear signal as to the proper location of risk, which is not to say that it replaces a duty of care (justifying 'strict liability'), but that it signals that the existence of such a duty, with attendant liabilities, is justified. Negligence duties, not just strict liability, require justification, and it is important to know where to set their limits. For example, discussion of the scheme of compulsory insurance as indicating a societal decision as to where risks should lie – and thus as limiting an attempted expansion of tort duties – can be found in relation to a road accident in *Stovin v Wise* (where it was an insurer who attempted to place a part of the risk with a local authority).[121] At the same time, and in a different context, the courts have not been afraid to point out those circumstances in which the claimant is regarded as the appropriate party to 'take' a risk (which is to say, to bear its consequences), taking into account the existing practice of insurance and the normality of a hazard.[122] If this is right, we can expect some complexity in the relationship between tort, and insurance – and in relevant forms of duty and responsibility. In particular, from this perspective, it may be argued that the law of tort has

[121] [1996] AC 923.
[122] *Stannard v Gore* [2012] EWCA Civ 1248, [2013] 3 WLR 623; *Transco v Stockport* [2004] 2 AC 1: these involved attempts to place *strict* liability with defendants, rather than leaving claimants to insure (as is habitual).

evolved to share some of the language of insurance,[123] particularly in identifying injuries in terms of their financial consequences, and locating those consequences with tortfeasors or claimants. For example, the identification of injuries with financial consequences was encouraged by the contributory negligence legislation of 1945, which in its wider implications has been described as one of the most important developments in the law of tort in the twentieth century.[124] The same may be said of the Fatal Accidents Acts from 1846 onwards, which focus on the financial consequences of death.[125] Similarly, the present authors have argued that concern with how to allocate the risk of loss between parties has played an integral part in many of the most significant cases in the development of today's tort of negligence.[126]

But while tort on this outlook shares some of the concepts of insurance, we must be careful what we conclude from this. Neither tort, nor individual responsibility, has been swallowed up by insurance in the road traffic context; but nor can the operation of tort be completely understood without a steady look at its association with insurance. Here we have addressed some aspects of the responsibility 'dynamic' associated with insurers and their intervention. We have identified the duty to insure as an additional duty, reinforcing the duty of care in some respects, potentially altering the 'meaning' of tort's remedies in other respects.

Finally, and returning to the question of remedies, how should we understand the 'meaning' of the compensatory remedy in these contexts where it is denied or recovered as a reflection of personal responsibility, or in some contexts perhaps as a reflection of personal fault? We

[123] A point generally made by O'Malley, *The Currency of Justice,* though we do not entirely share his depiction of the nature of the connection. See also J. Steele, 'Satisfying Claims? Money, Tort, and "Consumer Society"' (2011) 20 Soc & Leg, Studies 516.
[124] J. Goudkamp, 'Rethinking Contributory Negligence', in S. Pitel, J. Neyers and E. Chamberlain (eds), *Tort Law: Challenging Orthodoxy* (Hart Publishing, 2013). Making similar points about the wider significance of the reform but with particular attention to the maritime experience and the insurance of losses, see Steele, 'Law Reform'.
[125] For a recent discussion of the statute see D Nolan, 'The Fatal Accidents Act 1846' in T. Arvind and J. Steele (eds), *Tort Law and the Legislature* (Hart Publishing, 2013).
[126] R. Merkin and J. Steele, *Insurance and the Law of Obligations* (Oxford University Press, 2013, Chapter 8).

have suggested that insurers may play a role in changing the 'meaning' of compensatory damages, not only by distributing them, but also by seeking to place them with those who are so 'irresponsible' as to neglect to insure, or to behave in some other antisocial fashion. Any potential deterrent objective in this process is hampered by the low profile of the process itself. Nor has the process been in any real sense 'designed' with that function in view. Perhaps then deterrence is not the key. Rather, it might be argued that claimants who are denied compensation, and defendants who find themselves on the receiving end of recovery proceedings, are being held to take the consequences of their own irresponsibility in failing to insure. It seems to us that this embodies an interesting set of features: a form of irresponsibility (including, centrally, the failure to insure) is the trigger for personal responsibility in the form of taking the relevant consequences, which is the 'meaning' of the tort remedy (or its denial) if we follow a logic which is associated with risk allocation. Here the duty to insure is being championed by insurer action rather than by legal design. It seems to us that the nature of this duty, and its relationship to tort duties, merits further reflection.