***Tort, Insurance, and the Resources of Private Law***

Jenny Steele[[1]](#footnote-1)\*

**Introduction**

Analysis of the relationship between tort and insurance, and particularly between liability insurance and what might broadly be called the branch of tort law relating to “accidents”,[[2]](#footnote-2) is of very long standing.[[3]](#footnote-3) The starting point for this chapter is a simple observation about the way that relationship has generally been debated, and what is typically missing from the debate. That is, the tort-insurance relationship has typically been explored without reflection on the legal structures associated with insurance, or (in other words) on the sizeable body of insurance *law*. [[4]](#footnote-4) This could be seen as curious, given the prevalence of contractual principles in the law of insurance, and indeed given the existence of parallel questions about the role of insurance in the interpretation of contracts. As in tort, so also in contract, there is a question about the relevance of insurance and insurability to interpretation of the duties between parties. Equally, the existence of insurance and extent of cover is itself a product partly of contractual agreement, and partly of legal regulation.

On the whole, tort lawyers considering the relationship between tort and insurance have glossed over the legal structure of insurance and the broader connections between insurance and private law, and have approached ‘insurance’ not in terms of the legal principles (including contractual principles) that constitute and regulate insurance in practice, but as a set of arrangements, and potential arrangements, whose importance lies above all in its distributive effects. This focus on the distributive effects of insurance is not confined to tort scholarship, though it is perhaps surprising to find it so strongly represented in tort scholarship since insurance could equally be approached in terms of party transactions and regulation. The identification of insurance with distribution has had a strong influence on the way that the important interface between tort and insurance has been debated. There are those who argue that the interface, in practice, between tort law and insurance has been wholly transformative, even to the extent of rendering the doctrinal structure of tort law a mere façade: tort is scarcely a part of private law any longer.[[5]](#footnote-5) I do not make this claim, and indeed I am centrally interested in the doctrinal connections (and what they imply) between tort and insurance law. On the other hand, in resisting the argument that tort has been transformed by its interface with insurance to the extent that its doctrinal structure is a facade, scholars who urge the independence of tort from insurance once again take the distributive character of insurance as key. This time, scholars urge that a concern with insurance is generally a concern with securing compensation by distributing the costs. Adopting such a concern will be self-defeating for the law of tort, since it is the job of the law of tort to determine in which circumstances compensation ought to be payable. Tort scholarship ought not to engage with questions about the availability of compensation, and to do so leads to circularity.

One of the most celebrated articles in this field, Jane Stapleton’s ‘Tort, Insurance and Ideology’,[[6]](#footnote-6) is distinctive in that it contrasts tort law (as a form of ‘restoration’ of victims) with two other potential approaches to misfortune, namely insurance, and the socialisation of risks. Given its continuing influence, it seems important to deal briefly with that article here in order to distinguish the questions I am addressing from those addressed by Stapleton’s article, and to explain why I am not motivated by the same concerns even though – on the substance of those concerns – I would hold a similar view. According to Jane Stapleton, both insurance and the socialisation of risks, but not the law of tort, require a ‘pooling or ‘collectivisation’ of risk’, while tort ‘restores’ the victim.[[7]](#footnote-7) Because these three responses are quite different, it should not be thought that the factual dependence of tort on insurance makes the need to reform or cut back tort, or to replace it with a more effective or proportionate compensation system, a matter of logic, rather than ideological choice. I firmly agree that ideological positions are engaged in debates about the reform of tort law, and if anything this has become increasingly evident.[[8]](#footnote-8) But I argue that if we broaden our perspective to include examination of the precise role of insurance in private law arrangements it will prove that there is a mingling of ideological elements and objectives behind the present arrangements in which tort liabilities themselves are secured largely through commercial insurance. The outcomes achieved by tort involve a combination of common law, statute, and commercial arrangement, and these three sources have mutually influenced each other both in the tort regime, and in various other (including earlier) legal frameworks.

Stapleton notes the existence of a range of ideological factors operating in the law of tort, cautioning against over-emphasis of certain of them (autonomy and dependency) at the expense of others. Nevertheless, I think she would reject the significance of the mixing of influences just outlined, since she argues strongly that the three responses she identifies are distinct, and uses the distinct nature of the responses to deny that insurance, or insurability, should be relevant to questions about tort liability in general. So for example Stapleton points out that tort cannot ‘be seen as insurance to victims’ because it sets compensation at a restoration level, not at a level chosen by the injured party (as she defines the insurance response) or determined by a social welfare scheme (as she defines socialisation).[[9]](#footnote-9) Since Stapleton defines the three approaches in terms of the reparation that they offer it follows that they cannot be a ‘form of’ one another. But to end here is both to adopt Stapleton’s definition of the approach she would like to resist (one which argues that tort is a form of insurance, or much more loosely is ‘about’ insurance), and also to accept her identification of three relevant responses in terms of the form of reparation made. One particular feature of Stapleton’s analysis in this respect needs to be underlined. Her article defines the “insurance” response in terms of cover taken out by the victim and at a level the victim chose. The core of her analysis therefore is confined to first party insurance, and to the influence of a first party insurance model in the reform agenda (for example, proposing a modelling of the level of tort damages on the level of cover for which parties would have contracted). This was the reform agenda which Stapleton was most concerned to counter, by showing that it raised matters of political and ideological choice, not of logic and rationality. Importantly, the “insurance” response defined by Stapleton does not describe liability insurance. Here the level of liability (the response to harm) is set by the law of tort and the level of insurance cover (the level of insurance) is set by contract, but with reference to the insured liability. To the extent that it is chosen it is not chosen by the victim. The insurance level may itself be subject to legislative constraints, for example in setting maximum excesses and affecting the legitimacy of exclusions. It is the potential of this present set of arrangements which is the focus of this article, not the choice between these present arrangements, and a first party insurance model.

I suggest that the key reason why Stapleton regards attention to insurance in general to be (as she puts it) “dangerous” is connected to her identification of insurance with pooling or collectivisation of risk. If tort is perceived to be simply a poor attempt at achieving such a pooling or collectivisation of risk, it will eventually be argued that it should be abolished or cut back and replaced with more direct and proportionate forms (and levels) of loss spreading. This in turn will have distributive effects which Stapleton properly regards as *prima facie* unfortunate: “[t]he tort-as-insurance argument also generates a reform strategy which is radically redistributional whereby business is enriched and injured individuals are stripped of protection”.[[10]](#footnote-10) It is my suggestion that the proposal to cut back tort and replace it with a better means of pooling or collectivising risk should not be allowed to displace a detailed analysis of insurance as an integrated feature of private law. Enhanced understanding of the integration of insurance into private law is likely to put that reform agenda in its proper perspective.

Interaction between different approaches to compensation for those suffering accidental harm in employment provides an example of the mixing of different approaches to reparation and of the way that their objectives have intermingled. This is also important since the latter part of this chapter considers the current arrangements, via tort and contract, for compensating the victims of occupational mesothelioma in the UK, with some reference to Australian law. In the context of occupational injuries, there has been considerable cross-fertilisation between workmen’s compensation schemes, and tort liability backed by insurance, even though there are fundamental differences between these approaches and they could certainly be labelled ‘ideologically different’. Insurance provides a common thread. In the UK, insurance was a familiar aspect of workmen’s compensation though it was not compulsory, and insurers were among the significant interest groups involved in the negotiation of its replacement after the Second World War, though insurance toward employees was not made compulsory until the commencement of the Employers’ Liability (Compulsory Insurance) Act 1969. Workmen’s compensation was not based on fault and benefits under the scheme were very low compared to those established by the law of tort.[[11]](#footnote-11) Indeed the relative generosity of tort payments for those injured on the roads during the same period (supported by the UK’s first compulsory insurance scheme) has been identified as contributing to the growing dissatisfaction of workers with the compensation schemes, and the growing interest of organised labour in the common law during this period – culminating in the Labour Government’s post-1945 repeal of workmen’s compensation statutes and the adoption of a twin track system of tort and social welfare payments.[[12]](#footnote-12) Clearly these changes were not free from an ideological – indeed strongly political - dimension. But equally, the various ways of compensating injured employees were not so ideologically distinct that they did not affect, inform, and influence one another.[[13]](#footnote-13) There has been a mingling of ‘ideologies’ over the long term. As a particular example of cross-fertilisation in both purpose and know-how, the provisions to protect injured claimants against insolvency of tortfeasors by providing recourse directly against insurers – which is hard to see as anything other than a clear and deliberate statutory link between tort claimants and insurance funds[[14]](#footnote-14) – was initially introduced in order to support the newly compulsory third party insurance in relation to road traffic. But it reflected practice developed in relation to non-compulsory insurance in the workmen’s compensation legislation.[[15]](#footnote-15) In other words, there have been important examples of cross-fertilisation both in broad policy objectives, and in legal techniques applied, between responses to misfortune which would, on Stapleton’s analysis, be regarded as distinct – including the law of tort.

Despite the importance of occupational injury, my core focus in this chapter is not specifically on compensation to employees, but more generally on the way in which insurance contracts draw tort liabilities into the domain of commercial law. I argue that the questions which tort lawyers ask themselves about insurance are (or should be) part of a much broader set of questions, about the resources available to private law in addressing the wide range of questions which are in issue in respect not only of individual party transactions, but also of the operation of markets in general. To start here is of course to start somewhere quite different from Stapleton’s point of departure, which is to identify different ways of responding to a particular instance of accidental harm and to identify the ideological nature of changes to the balance between them. Treating insurance as a question of ‘distributions’ makes it appear extraneous to the law of tort, and makes it easier to justify disregarding it, in favour of a narrower set of questions. Understanding insurance in general as raising problems of private law changes the picture considerably.

The crucial point for this introduction is that once we understand insurance in terms of its legal framework, it becomes clear that it is not an alien transplant into the law of tort with a single monolithic and irresistible influence (toward loss distribution), and that it can be perceived as part of the core business of private law. This is a different way of resisting the idea that tort ‘is’ insurance, by reflecting the multi-faceted influence of insurance and its impact upon a range of features of private law. In particular, in exploring the role of torts in commercial law, the mutual influence between and shared characteristics of tort liability, and insurance contract law, are well worth considering. At present, the ongoing debate about tort and insurance has largely skipped over such questions, at least in the United Kingdom and Australia.It has been quite orthodox to interpret negligence law as entirely transformed by its engagement with insurance, to the extent that it is hardly a creature of private law at all any longer. And this has been taken to reflect broader trends toward public interest dominance in all forms of law.[[16]](#footnote-16) Given contemporary growth in advocacy of market solutions and private arrangements, it seems particularly important to attempt to redress the balance in this respect, and to consider more closely the interaction between tort and insurance law.

In summary, insurance *law* has been notably absent from too many debates about insurance and the law of tort. As already explained, insurance is underpinned by contractual principles, and to a significant extent by commercial contracting. Since tort law and insurance contract law are closely related, one might expect there to be parallels in the core theoretical questions applicable to tort liabilities, and contractual responsibilities, and some debate about their interaction. Yet such parallels hardly seem to be drawn. Instead, the proposed difference made to tort by insurance has gone straight to the root of the public-private distinction, treating insurance as introducing inherently collective elements to the treatment of risk, in contrast to responsibility-centred approaches in private law.[[17]](#footnote-17) The key goal of this chapter is to see if we can rebalance discussion of the relationship between tort and insurance to some extent, to reflect the contractual, indeed commercial nature of much insurance law, and to consider what adjustments to our understanding are suggested by this insight into the phenomenon (“insurance”) with which the law of tort is thought to be interacting. This is not to say that questions of distribution and public purpose will thereby go away. But they can be addressed in terms of the resources of the law of obligations in its core role of regulating interactions between parties.[[18]](#footnote-18)

In pursuing this goal, the chapter first tackles the question of what might lie beneath the failure to think about tort and insurance as engaging two bodies of private law, before moving on to explore whether a more symmetrical approach to tort law and insurance law can be achieved, once both tort and insurance are conceived of in terms of private law. It is suggested that the key is to “normalise” insurance, understanding it as connected to other elements in party transactions, where the location of risk between parties is in issue.[[19]](#footnote-19) Conceiving of both tort and insurance in terms of private law is in itself a deviation from either of the usual approaches to insurance (the one which holds that it has transformed the law of tort, and the other that it should be ignored), and its implications need spelling out. Finally, the relationship between tort and insurance law, and the difficulties in the way of achieving symmetry, are briefly illustrated with reference to the still unfolding story of asbestos litigation in the United Kingdom in particular.

**neglecting the contractual dimension**

A first task is to consider why the interaction between tort and insurance law (as opposed to the interaction between tort and insurance) has been so neglected. A number of overlapping reasons may be suggested. First, tort lawyers’ interest in the role of insurance has predominantly stemmed from empirical and contextual observation, rather than doctrinal analysis. Allied to this is the close connection between insurance and a reformist agenda. If, indeed, attention to insurance tends to shift the focus from liability to compensation, it is understandable that this should spark consideration of preferable mechanisms for achieving such compensation, without the gaps in cover, inconsistencies, and expense of the law of tort.

A second and rather different reason for the lack of focus on insurance law in the relationship between tort and insurance is that studies of contract and tort as closely related have become unfashionable. This might be related to the rise of interest in legal taxonomy and principled rather than functionalist analysis of private law more generally: from this point of view, it is thought important to separate legal categories, not to blur them, and tort and contract are perceived as two separate and distinct routes to the creation of legal obligations.[[20]](#footnote-20) It could be argued that there has been a surprising resurgence in defending traditional classifications, particularly against change brought about through the growth in state functions in every avenue of life, including of course economic life.[[21]](#footnote-21) This is important to the very question of what commercial law, or even private law, is for, and whether lawyers’ perception of the nature and role of these bodies of law in contemporary legal systems is appropriate.

A third, and much more basic reason, is the simple fact that in the United Kingdom and other comparable jurisdictions, there are not many academic insurance lawyers – and considerably more tort lawyers. This is partly because tort is a compulsory subject in legal education, and insurance law is not.[[22]](#footnote-22)On the other hand, much insurance law is a matter of contract, and contract, like tort, is a compulsory component of legal education in the United Kingdom and analogous jurisdictions.[[23]](#footnote-23)

It is therefore important to consider a final reason, which has nothing directly to do with tort. That is, although there are many academic contract lawyers, academic study of contract law has not typically extended to particular study of insurance contracts. There has been no very direct pressure to consider insurance in terms of applicable legal principles, rather than technical know-how. This might owe something to the very diversity of insurance contracts and of forms of insurance: general principles are hard to state, as the decisive issues in any given situation may be very much a matter of detail. John Lowry and Philip Rawlings have suggested however that this neglect is due to a more fundamental feature of contract scholarship: a perceived division between the law of “contract” (the domain of legal principles), and the law of ”contracts”, considered to be the domain of practical lawyering. In terms of private law theory, this has left the study of insurance law relatively isolated.[[24]](#footnote-24) This in turn can be related to the earlier observations both about “contextual” and reform-oriented study and about “resistance” to change, to the extent that the latter might also take the form of adherence to general legal principles organised into doctrinal categories. Practitioner-oriented studies of insurance contracts infrequently meet up with the theoretical studies of the field, and (equally importantly) might not share the same concerns when they do.

There are, of course, existing contextual studies of contracting, but individual contextual studies in their nature tend to be bounded in their range and scope and in that sense these too contrast with studies of broad underlying doctrinal principle. To date, their concerns have taken them to areas other than insurance.[[25]](#footnote-25) This creates a significant gap, not only from the point of view of understanding the relationship with tort liability, but also because of the much broader significance of insurance to transactions of various sorts (as one source of security) and to modern economies and societies, and therefore one would imagine to the contribution of private law as a whole.

In summary, for the most part, the preoccupations of private law scholarship have between them led to relative silence about the role of insurance contract law. The end result is that tort scholarship is preoccupied with insurance not insurance law, and is divided from contract scholarship; tort scholars in particular are not interested in the transactional or exchange questions surrounding tort liabilities (via the law of insurance contracts), and therefore tend either to embrace the “distributive” story (through which tort has been transformed), or to reject the relevance of insurance. A general consequence is that there is little analysis of the whole potential contribution, and limits, of private law in this context, taking into account its involvement both in creating the liabilities, and in enabling them to be met.

**Illustrating the connection**

Whether or not I am right about these suggested reasons, the interaction of tort liability and insurance contracts is underexplored at the theoretical level. In practice however, the interaction is undeniable, even if its true extent in any particular case is not always obvious. Given that tort liabilities are predominantly met by liability insurers, the satisfaction of tort liabilities is to a large extent underpinned by insurance contract law. But more precisely, a number of tort cases could not only be said to be loosely “about” insurance, but could be identified as concerned to test which insurance policy should cover a particular loss.[[26]](#footnote-26) First party insurance, therefore, is also of great importance in helping to determine the boundaries of liability, though this form of insurance is less widespread in personal injury and “consumer” cases. More generally, tort liability may also be used to “regulate” certain sorts of contractual arrangement in circumstances where there is no privity, or in circumstances of concurrent duties in tort and contract.[[27]](#footnote-27)

Illustrating the potential influence of tort over contract in certain cases, Hugh Collins has explored *Smith v Bush*[[28]](#footnote-28)as an example of the regulation of contracts via the law of tort.[[29]](#footnote-29) Collins uses the case to illustrate some of the shortcomings of private law as a means of regulation, although in the same chapter he also acknowledges certain potential strengths of private law as a mode of reflexive or responsive regulation (in this instance, of market transactions).[[30]](#footnote-30) The example is also particularly worth considering from the point of view of this chapter, not because it involves insurance arrangements (though it does), but because it has some parallels with the questions raised by liability insurance for the law of obligations. Here, it was held by the House of Lords that a surveyor owed a duty of care to a borrower when advising the lender in the course of a sale of domestic property, despite a disclaimer of liability to third parties. Expressing reservations about the decision, Collins takes what could appear to be a traditionalist line, focusing on what courts do not know about the impact of liability on the cost of insurance in a case like this. In the context of Collins’ analysis however, this exemplifies an outcome-based limitation which in his view undermines the regulatory capacity of private law. I am more interested here in those aspects of the reasoning of the House which focus on the transactional structure between the parties as a whole. Arguably, in focusing on this transactional structure, the House illustrates Collins’ more positive assessment of the potential of private law, and particularly his contention that consideration of ‘externalities’ has the potential to be channelled through the established categories of discourse employed by judges. Those categories are amenable to absorbing a range of factors given their open-ended nature in many instances. In this way, judges may be able to enhance the capacity of private law to regulate markets effectively by adjusting the content and interpretation of the categories applied.[[31]](#footnote-31)

In *Smith v Bush*, Lord Templeman, in particular, explained that lenders and surveyors, as professional and commercial participants in a particular market, were here agreeing to exclusion clauses directed to a vulnerable third party, the borrower. As Lord Templeman put it, “it is not fair and reasonable for building societies and valuers to agree together to impose on purchasers the risk of loss arising as a result of incompetence or carelessness on the part of valuers”.[[32]](#footnote-32) This responds to the different roles of the participants in this market. A parallel can be drawn with liability insurance contracts relating to personal injuries, where the contract between insurer and insured will clearly affect a vulnerable third party (the person to whom the insured is potentially liable). Collins argues that when legal reasoning examines contractual behaviour of individuals *within the framework of perceiving them as members of a class*, it “creates a tension within legal discourse”. This tension is created because “On the one hand, the private law of contract aspires to support the discrete communication system represented by the contract, but on the other, it is tempted to control the operation of the market system in order to reduce the harmful externalities which it produces”.[[33]](#footnote-33)

This may indeed capture some of the difficulties of reasoning involved in an important range of insurance cases, including for example the employers’ liability insurance case, *Durham v BAI*,[[34]](#footnote-34) where the non-contracting party is not merely a vulnerable consumer, but an injured former employee of one of the contracting parties. On the other hand, it is not entirely clear that such issues should be regarded as “externalities”, different from the core of contractual reasoning. On one interpretation,the nature of the relationship between the various parties is at the core of reasoning in both contract and tort. The question which arises is whether this is less easily recognised in both branches of law than it would be if the inter-relationship of tort and contract was more clearly recognised in the case of liabilities backed by insurance. *Smith v Bush* represented a contractual matrix case and this is clearly recognised in the reasoning of the House of Lords. But lifting the veil that currently shrouds the insurance position would indicate that many more negligence cases also involve contractual matrices.

To the extent that debates about tort liability and its relationship with insurance have overlooked both contractual litigation and the role of insurers in “tort” litigation, and treated insurance in terms of public purposes in the form of loss distribution, they have treated tort as “public law in disguise” rather than, say, an expedient extension of the law of contract in the regulation of private transactions.[[35]](#footnote-35) This is precisely the tendency that Stapleton was eager to avoid, because of where it would lead. In doing this, debates have tended to go straight for the broader nature and purpose of insurance itself, understood as a means of distributing risks and losses. The contrast with tort therefore appears very great, and considering insurance appears in and of itself to constitute a threat to the integrity of the law of tort. But I am seeking to approach the problem from a different and more symmetrical angle. I have tried to suggest that that the issues for the law of tort posed by its relationship with insurance are not so unusual, conceptually at least, compared to the general issues faced by private law as a whole in pursuing its various functions. This is not to deny the importance of insurance for the law of tort as a matter of detail. Rather, it is to normalise the sorts of issue raised by insurance and particularly by risk-bearing (including insurability) in the context of particular disputes. In the next sections, I try to press forward the understanding of this potential connection between tort and insurance law.

**Understanding the connection**

The next problem to deal with is uneasiness at the idea that tort might have “functions” beyond the correction of what it defines as “wrongs”. It is always possible to look at areas of private law either in terms of social and economic policy and function, or in terms of the legal techniques they embody, even if there are scholars who urge that the two have little relevance to one another. Though tort law is not necessarily conceived as being “about” compensation (it is more generally thought to be “about” liability), there is demonstrably a public purpose, strong or weak, of providing compensation for victims of tortiously caused harm.[[36]](#footnote-36) That purpose may be less than completely rational (why secure full compensation for *tortious* harm when victims of other harm get a lesser sum, aiming to provide support rather than restoration?), but as things stand this goal is equally demonstrably met in part by the law of tort, though to a large extent with the assistance of insurance.[[37]](#footnote-37)

Equally, there may be a societal concern with risk distribution. It is however the pricing and transfer of risks which is the most immediate goal of commercial insurance contracts in particular instances. Perhaps this is, therefore, the core function of insurance: making acceptable the undertaking of risks by enabling their transfer.[[38]](#footnote-38) Insurance is an important underlying feature of transactions for the sale of goods, for example, and could be said to be part of the underpinnings of exchange more generally, though it is but one potential mechanism of security. But potential liabilities also have another life in this respect, through the market in insurance (and reinsurance) contracts themselves. The extent to which insurance has the effect of distributing risks within a like risk pool (the classic model of mutuality), or of displacing them in some other manner, is determined by the eventual location of the liabilities.

Putting together not only the effects, but also the concerns of tort and contract law should help us to see more clearly what the issues are for each, and for private law as a whole in this context. The law of negligence, particularly as it relates to personal injury, is not usually thought about as an element of commercial law, whereas insurance contracts are (though typically not presented as occupying a key category of commercial law in their own right).[[39]](#footnote-39) The role of commercial law is typically thought to be to reflect the needs of commerce, which itself centrally involves transactions in the way of exchange.

In fact, the impact of conceiving of areas of private law in terms of their ability to reflect the needs of commerce is worth considering. Does *this* introduce external and “contextual” factors? Or does it reflect the inner structure and reasoning of these areas of law? If the latter, does this mean that “function” has always (or at least, since the emergence of commercial law) influenced the principles and that they are not, therefore, purely abstract, philosophical, and indeed general? Is it adequate to test them by their ability to reflect the needs of commerce? Whichever answer is given to these questions, they put in issue the relationship between private law, and collective purpose in the sense of properly functioning markets.

Commercial practice has, however, been said to have tested the traditional categories of legal thought both historically, and much more recently. In particular, markets have been said to arise independently of (or even despite) law in some instances,[[40]](#footnote-40) not only because exchange is likely to take place irrespective of law, but also as contracts of novel sorts are devised, escaping the reach of courts and legal regulation (including regulation through private law). Collins has presented futures contracts as a key example of this – giving rise to a market where contracts themselves (“contracts as things”) are the subject of trade. However, in a short passage he also draws an analogy with the insurance market and particularly the manner in which contractual risks are sliced and sold: “At Lloyds, the assumption of risk described in an insurance policy is subdivided into smaller parcels of risk that are then sold in the closed market to trustworthy dealers or ‘names’”.[[41]](#footnote-41) This is an intriguing and, it is suggested, a useful comparison. A difference between these cases and the futures contracts is that the original “thing” – the contract between insurer and insured – is made with a party outside the “club”.[[42]](#footnote-42) To the extent that the contract in question is a contract of liability insurance, this raises the question of the relevance of tort liability and its goals to the construction of a contract, which has in itself become the object of further market transactions. Even more vulnerable than the contracting party is the employee whose damages may depend on the value of an insurance policy.

A recent decision of the High Court of Australia, *Wallaby Grip Ltd v QBE Insurance (Australia) Ltd*,[[43]](#footnote-43) illustrates these issues. Though this decision dealt with a relatively narrow question – who has the burden of establishing the indemnity limit in a contract of liability insurance, and particularly whether it was higher than the statutory limit – the High Court related its decision (that the insurer bore the burden) to broader issues. As the Court explained:[[44]](#footnote-44)

“Looking to the policy in its statutory setting, it may be observed that conditioning a worker’s right to recovery to proof of the level of indemnity agreed between the employer and the insurer does not accord with the general purposes of the [*Workers’ Compensation Act 1926* (NSW)]. It creates an obstacle to recovery, when the statutory intention was to facilitate claims against insurers. The Act does not provide a means by which a worker is informed of the arrangements made by the employer. A worker may never have seen the policy.”

This was a case where there was compulsory insurance to cover liabilities under workers’ compensation legislation. But it is suggested that the parallels with *Smith v Bush*, discussed above,are clear. To what extent are questions of the interests of vulnerable third parties, and of public policy, relevant to the interpretation of contractual terms? To what extent do these issues arise where the relevant “policy” is embodied in principles of common law, rather than in legislation? The idea that the duty of care might protect certain “categories” of people just outside contractual arrangements does not necessarily raise issues external to the tort of negligence, but could be argued to be an inherent aspect of negligence under *Donoghue v Stevenson* itself.

**Applying the discussion**

In light of the questions explored above, the remainder of this chapter briefly outlines some dimensions of insurance which tend to be missed by tort lawyers given the general concentration on the distributive aspect of insurance. It then introduces the tensions within both tort and contract between what might loosely be called formalist, and contextual (or purposive) interpretation, in order to explore the connection between the two in the particular context of insurance of tort liabilities. How should one think about the context of a case where insurance contracts and tort are so closely inter-related?

**Insurance as “collective”, or transactional?**

Underlying the pursuit of a more symmetrical approach in this chapter is the idea that insurance of risks, while often seen in terms of public purpose, in terms of the applicable legal regime is largely governed through the law of private transactions. This does not mean that public purpose is absent, as we have just seen.[[45]](#footnote-45) But the predominance of the private law form reflects the fact that commercial insurance is at least as much about buying and selling liability risks as it is about spreading them within a “mutual pool”. In this section, I briefly explore the collective and transactional dimensions of insurance.

Most contributors to debates about the relationship between tort and insurance – and indeed many scholars approaching insurance in its own right – start with the collectivist, loss-spreading aspects of insurance as a technique or “technology”.[[46]](#footnote-46) Yet the core product – indemnity for the eventuation of adverse risk within the terms of cover sold – is provided by the insurance industry. As we have also seen, the law of insurance is not a responsibility-free zone, but raises questions of contractual responsibility. Equally, while security is the image promoted of insurance products, the kinds of insurance typically relied upon to underpin the law of tort would appear in practice to be limited in their collectivism – particularly when it comes to claims.[[47]](#footnote-47)

It is suggested that the depiction of social welfare and commercial insurance reflected by Jane Stapleton in her classic essay, “Tort, Insurance and Ideology”,[[48]](#footnote-48) may therefore need qualification as ideological balances shift. Stapleton argued that social welfare schemes (including some based on social insurance) do not pool like risks, because their risk pools are heterogeneous.[[49]](#footnote-49) By contrast, “… the most fundamental characteristic of insurance … is its pursuit of homogenous risk pools”.[[50]](#footnote-50) Both sides of this can be questioned. In their important work on changing ideas of risk in recent years, Baker and Simon point to a widespread shift from ‘spreading risk’ (analogous to Stapleton’s collectivisation) to ‘embracing risk’. The latter is a complex idea but they summarise it as including a cultural trend of reaction against the spreading of risks. This reaction ‘consists of various efforts to make people more accountable for risks’. In their analysis, the ‘embrace’ of risk (in this sense) is partly reflected in ideological changes at the political (governmental) level, and it is occurring in both public and private forms of insurance.[[51]](#footnote-51) As an example, Baker and Simon suggest that “private pensions, annuities, and life insurance are engaged in an historic shift of investment risk from broad pools (the classic structure of risk spreading through insurance) to individual (middle class) consumers and employees in return for the possibility of a greater return.”[[52]](#footnote-52) They make the very point that the “implicit background” for much sociological work on risk in the past has been a risk-spreading approach; while more recently “Insurance institutions that embrace risk push us to recognise that insurance can be about much more than risk-spreading”. Looking back, they admit, “we can see that risk was never completely tied up with either harm or probability”.[[53]](#footnote-53)

This shift away from “heterogeneous” risk pools could be said to be part of the same movement that leads to the “first party” insurance reform agenda addressed by Stapleton. What then of insurance more generally, beyond the immediate “insurance” response with which she was concerned? Arguably, contemporary commercial insurance is not altogether well encapsulated in the idea of risk-pooling within a mutual fund. Indeed it could be argued that this vision is itself a legacy of an “ideal-type” of insurance drawing on the ‘risk spreading’ approach.[[54]](#footnote-54) It is related to an “actuarial” model of insurance which rose to prominence in criminology thanks initially to work by Jonathan Simon.[[55]](#footnote-55) As we have seen, Simon, together with Tom Baker, has more recently emphasised that this is only one model of insurance, and has even argued that “the actuarial model of insurance has been so successful that many well-informed people would deny that it is a vision at all and assert, instead, that it is *the* model of insurance.”[[56]](#footnote-56) As we have also seen, Baker and Simon propose that recent evolution in the role played by insurance has begun to leave the collective risk pooling model behind.

In what way is the actuarial model, taken as the only model, misleading? In the commercial insurance market, risks are underwritten, sold, and resold, and premiums are invested, reflecting the acknowledged uncertainty of pricing of risks and the increased role in the insurers’ diverse portfolio of “riskier” (less predictable) risks. This is in turn reflected by the prevalence of reinsurance and of retrocession (reinsurance by reinsurers), where there is little of the homogeneity that is said to characterise insurance. As one example, the relatively high price of “ATE” (after the event) insurance partly reflects its *ex post* character;[[57]](#footnote-57) and partly also its commercial unattractiveness, since there is no opportunity to invest the premium pending a claim. As a very different example, major ongoing litigation seeks to identify the location of important liability risks implicated in the extensive losses at Lloyd’s in the 1980s, given that no entirely sound technique can be agreed upon for distinguishing properly paid sums from erroneously paid sums through the London Market Excess of Loss reinsurance “spiral”, illustrating how far liabilities will travel from the idea of “like risks”.[[58]](#footnote-58) Employers’ liability insurance brings us close to these aspects of insurance, since we are dealing with the potential for long-tail risks of uncertain size, and with little “reciprocity” of risks.

In summary, in addition to the use made of insurance by the parties (which is generally, to shift or moderate risks), the actuarial, mutual model also does not fully reflect the economic role played by insurance.[[59]](#footnote-59) This is because of the complex structure of the insurance market; the absence of homogeneity in agglomeration of risks; and the fact that the insurer too is increasingly exposed to risk. Insurers are major financial institutions and although not as exposed to credit risk as banks, their exposure to “systemic risk” from involvement in credit risks and the banking sector is increasing. This form of risk has been estimated to far outweigh the impact of rises in legal liability.[[60]](#footnote-60) Regulation of the market and its participants, securing appropriate response to all risks, rather than simply liability risks, might therefore be considered a more significant response than tinkering with liabilities. And indeed the insurance market is subject to significant regulation. Why has this sort of response had so little emphasis in legal studies of the area? For lawyers, it is equally far removed from the traditional concerns of commercial law as focused on exchange and commercial practice, and from the received view of insurance as a potential solution to the “problem” of risks, rather than playing a part in their creation. For some governments, it perhaps does not suit their purposes to focus on regulatory questions – or perhaps these questions are simply less easily comprehended or managed. We return to this in the last section.

In principle, the questions raised for tort law by insurance are not so different from other questions surrounding responsibility for risk, and displacement of risk. This is all the clearer when it is realised that, as just argued, insurance is as much about the selling or transfer of risks as it is about their distribution across a collective risk pool.

Before illustrating the connection, we can show the parallel nature of the issues for contract and tort by considering the role of liability insurance in each of them, and their interaction, in terms of competition between formalism and contextualism, or legal principle and awareness of legal function. Indeed, one of the key questions is to what extent the contractual or tortious position features as part of the context of decision-making in the “other” branch of obligations, and what the other influences on each may be (such as compensation, or commercial security).

**Formalism and contextualism in contract and tort: the case of liability insurance**

***Tort***

In tort law, as we know, a recurrent question has been perceived to be how far insurability (or insurance) is or should be a relevant concern. Such factors were touched on in the Introduction. I have suggested that insurability is relevant in broadly the same way that other questions about responsibility for risks are relevant. Whether it is fairly D’s duty to prevent the harm is to some extent a question of whether P is able to deal with the risk aptly him or herself,[[61]](#footnote-61) and/or of whether D is the right person to pick out as owing the legal duty to take care for P (for example in omissions cases, particularly against police authorities, local authorities, occupiers, or people thought to have “non-delegable duties” to particular plaintiffs). These are questions whose answers can be expected to be dependent on the context of a particular relationship. The ability to deal with risks, and responsibility for risks, are therefore relevant to the law of tort, but insurability is only one feature of these considerations. The existence of “no duty” situations in circumstances where insurance is available does not disprove the influence of insurance, and is consistent with the complexity of that influence.

***Contract***

I have said that the approach here is intended to be more “symmetrical”. If the status of insurability and the impact of liability are debated as relevant factors (or not) in respect of tort, what is the status of tort liabilities (their role and purpose) when it comes to interpreting insurance contracts? Since the relationship between tort and insurance *law* is not generally the subject of analysis, this question has not been much discussed. In interpreting insurance contracts, is it relevant to consider the purpose of the liabilities covered, in the same way that tort may be affected by availability of the cover itself?

If there is to be any chance of achieving symmetry rather than futility in this regard, this will be because the ability to handle risk, relevant to many features of tort, is much broader than the “insurance” question. But it is by no means clear that the nature and function of the liabilities covered by a contract are recognised to be relevant in this way to the law’s response to insurance disputes. This state of affairs is at its most unattractive where there is a statutory duty to insure. Even a tort action for breach of a statutory duty to insure has been held not to be actionable on the part of the injured party in an employers’ liability context.[[62]](#footnote-62) If even *statutory* duties on the part of the insured (accompanied by requirements as to the terms of the cover) are considered irrelevant to interpretation of the purpose of the insurance contract, is insurance law likely to be interpreted in such a way that it remains more closed to tort than tort is to insurance?

A further possibility is that a purposive approach to contractual *interpretation* may be adopted. Here, the question is not (ostensibly) about legal policy or goals, but about the commercial purpose of the initial insurance *contract.* In this route, more clearly than in the first, no stark binary divide between cases of compulsory insurance and other cases can be drawn; and as the present position in *Durham* shows,[[63]](#footnote-63) the idea that in areas of compulsory insurance, cover is necessarily thereby “guaranteed” is not correct. It is “required”, but this is a different matter.[[64]](#footnote-64) As Gleeson CJ has put it, “insurance is not cover”: insurance cannot simply be presumed to supply a rational solution to problems of responsibility for risk, even where it is compulsory.[[65]](#footnote-65) The question is how far private law has the resources to complete the purpose of such insurance – or is apt to do so.

**Exploring tort and contract interaction: asbestos litigation**

This section seeks to illustrate the interconnection of tort and contract claims concerning liability and insurance, and to explore their nature a little further. It should also help us to consider contextualism in tort and contract in the sense just outlined, the role of insurers, and the limits of private law. “Limits” is not necessarily a pejorative term here. In this particular saga, we can observe a litigation strategy on the part of insurers, underlining their status as the key repeat players in both the law of insurance contracts, and the law of tort generally.[[66]](#footnote-66) Plaintiff lawyers may themselves be repeat players in the tort cases, but it does not always follow that the same plaintiff legal advisors will appear in the contractual cover cases, because these are brought by insured parties (namely former employers, in this instance). The unifying theme is the insurer, who controls both tort and contract litigation through the ability to contest cover. Indeed the source of law in either contract or tort is probably immaterial to the insurer much of the time.

***Tort cases***

Much has been written about the leading cases, interpreting tort principles applicable to historic asbestos exposure and liability for mesothelioma. For present purposes, they are largely background material. The House of Lords in *Fairchild v Glenhaven Funeral Services Ltd* was willing to extend the “material contribution” test to overcome a problem of lack of of evidence.[[67]](#footnote-67) Whilst insurers had tried to settle the case at a very late stage, the industry response to the judgment was for organised settlements between insurers which, in effect, delivered a rough and ready division of responsibility between those on risk without impairing the likelihood of settlements.[[68]](#footnote-68)

After *Fairchild* came *Barker v Corus (UK) Ltd*.[[69]](#footnote-69) On the one hand, this decision interpreted the impact of *Fairchild* broadly, so that it applied where there was a potential cause of the harm which was non-tortious.[[70]](#footnote-70) On the other, it restricted the amount recoverable by a plaintiff against any particular defendant to reflect their contribution to the risk. The means of doing this was to suggest that if causation could be shown only in the sense of contribution to risk, so also the liability must be for that risk.[[71]](#footnote-71) Thus the liability principles now seemed on the surface to put into effect, as a matter of fairness, what had happened previously through an inter-insurer understanding.[[72]](#footnote-72) The real impact was to switch the location of risk (in particular, of insolvency, or of gaps in the traceable employment history). The impact on plaintiffs was however considerable because they now had to pursue all of their relevant former employers in order to obtain full compensation. The attempt to be more precise with the justice of the response led to less likelihood that the *end result* would reflect a fair division, in the sense that the plaintiff could not hope to pursue all relevant former employers and would therefore not recover in full.[[73]](#footnote-73) This was very different from the position in the United States and Australia. The legislative response in s 3 *Compensation Act 2006* (UK) has been criticised, but could be said to reflect a desire to reinstate a practical means of being fair to all parties, beneath the surface even if not on the surface, while placing the risk of unmet liabilities with insurers, rather than plaintiffs.[[74]](#footnote-74)

In *Barker*, the defendants’ legal advisors had not argued for the risk-based division. The reason why not is presumably that some of the same defendants would need to resist risk-based reasoning in the forthcoming appeal in *Rothwell v Chemical & Insulating Co Ltd*.[[75]](#footnote-75) It must have appeared difficult to win both of these cases, once *Fairchild* had been decided to apply despite a period of non-tortious exposure. But in the event, *Rothwell* was decided by the House of Lords in formalist style. A condition which merely signified an increased future risk of disease is not itself material damage for the purposes of an action in negligence. Causing risk is not actionable in negligence, except within the bounds of the *Fairchild* exception, and there it is actionable only if the harm itself has occurred. This is (at least apparently) a reassertion of orthodoxy. To some extent, this might cheer the purposive lawyer – not because the orthodoxy is necessarily what it seems, but because it is always possible after a purposive decision with uncertain or potentially unwelcome consequences to reassert orthodoxy elsewhere.

Which, though, is the more troublesome case, the “rough justice” of *Fairchild*, or the attempted rationalisation in *Barker*? There is reason to think that the attempt in *Barker* to arrive at a more forensic attribution of responsibility has caused the greater difficulty. Courts have subsequently found it hard to be sure what “injury” is for the purposes of insurance cover, as *Durham*[[76]](#footnote-76)attests. Here, Rix LJ would have treated the time of exposure as the time of injury (in the form of increased risk) had it not been for the binding authority to the contrary of *Bolton Metropolitan Borough Council v Municipal Mutual Insurance Ltd*,[[77]](#footnote-77) decided after *Fairchild*, but before *Barker*. In *Sienkiewicz*, there are signs that at least some members of the Supreme Court would not seek to rationalise *Fairchild*, as *Barker* did, but would confine it to mesothelioma and – within this context - apply it to its full, irrespective of doubts about the justice of the effects. Arguably though, the most important feature of *Barker* and (to a lesser extent) *Rothwell* is not their attempt to articulate general principles, but their policy dimension: they appeared to give weight to a new policy concern in the context of personal injury, namely the need to restrict the size of the liabilities being brought home to insurers. Even so, it is highly relevant that this change in concern was expressed in terms of legal principle. Is it necessarily helpful to qualify “rough justice” with new attempts at precision?

***Subsequent litigation strategies***

The tort cases have been swiftly dealt with because they are the most familiar to tort lawyers, and are among the most discussed private law cases of the last few decades. Even so, their principles have been debated more than their actual impact in practice. Some insurers responded to their success in *Rothwell* and their partial success in *Barker* with a challenge to Scottish legislation reversing the effects of *Rothwell* in that jurisdiction.[[78]](#footnote-78) The very formalism of the House of Lords’ judgment in *Rothwell* – its presentation as a matter of the most basic common law principle – was a key aspect of the insurers’ arguments. Similarly, the existence of a detailed dissent from Smith LJ when the Court of Appeal decided *Rothwell* was in turn a reason why an attempt to prevent the legislation from entering into force eventually failed.[[79]](#footnote-79) One may speculate however that the doctrinal detail of *Rothwell* is only one factor influencing this rather bold strategy of judicial review. Could it be that the insurers were responding also to signs of sympathy for their position, not just from courts, but also from public, government, and media discussion of “compensation culture”?[[80]](#footnote-80)

***Contractual developments***

Being repeat players, insurers were able to exploit the material provided by the House of Lords’ decisions. Just as insurers began to resist claims in respect of pleural plaques which they had previously consistently settled (resulting in victory in *Rothwell* and maintained through the judicial review proceedings in Scotland), so they also began to deny cover to insured parties in other circumstances, including eventually the very circumstances of *Fairchild* and *Barker* themselves. Was it conceivable that where the House of Lords had laboured to create liabilities despite insufficient evidence of causation, and Parliament had intervened to ensure those liabilities remained joint and several for the protection of defendants, the same courts would deny cover of the liabilities through a much more formalist approach to contractual interpretation? Neither the Court of Appeal nor the Supreme Court was sufficiently tempted to take a similar step and apply a formalist approach in *Sienkiewicz*, a tort case. But in *Durham*, a contract case concerning insurance cover, this is what occurred.

An important step on the way to the interpretation of relevant employers’ liability policies so as to exclude cover for some of the *Fairchild* liabilities was *Bolton*.[[81]](#footnote-81) This case concerned public liability (“PL”) policies, rather than employers’ liability (“EL”) policies, and the underlying issue was not whether the claim was covered at all, but which insurance policy should respond – a familiar question in insurance cover disputes (and, less obviously, some tort cases). The Court of Appeal may well have been concerned that its decision would have implications for EL policies, since the parties in turn appear to have persuaded the court that this was not the case. The policies were written on the basis that they covered liability for injuries which “occurred” during the period of cover. Longmore LJ observed that employers’ liability insurers “usually offered cover in respect of ‘injuries caused during the period of insurance’”, and it would therefore (“at least arguably”) cover the time when employees were exposed to asbestos.[[82]](#footnote-82) Thanks to *Fairchild*, each such exposure can be regarded as a cause of the injury. The Court decided that the policy which would respond was the policy in place at the time that injury was suffered in the sense that it would be actionable, and where the plaintiff would have been able to secure substantial damages.

The successful arguments in *Bolton* have turned out to be very useful to the losing insurers in that case in the more significant context of EL. Reflecting the fact that insurers are classic repeat players whose interests may vary from cases to case, the losing insurers in *Bolton*  began to decline cover in certain EL cases and prepared to use the same arguments to resist liability. This was despite the fact that the Court of Appeal in *Bolton* had been persuaded by Counsel for the same insurer that the issues arising in EL insurance would be quite different. The result was the unsatisfactory decision in *Durham*.[[83]](#footnote-83) The startling result of this decision (an appeal against which to the United Kingdom Supreme Court is pending) is that there is no insurance policy that will respond to a significant number of the *Fairchild* liabilities,[[84]](#footnote-84) despite the widespread practice and, in some instances, requirement of liability insurance in the employment context.

A quite separate problem acknowledged byRix LJ to stand in the way of his conclusion, in addition to his view that the conclusion was both unfortunate, and uncommercial,[[85]](#footnote-85) surrounded the definition of “injury”. He considered himself bound by *Bolton* to hold that “injury” meant actionable injury. But he did not agree with this view, preferring to think that “injury” within *Barker* should be taken to be caused when the risk of injury was created – in other words, at the time of exposure.

A similar solution to policies written with “injury sustained” wording has been adopted in New South Wales, but here there is no recourse to the idea that the harm caused by a defendant is the increase of risk. Rather, the idea of “injury” is treated as distinct from the idea of actionable harm – quite consistently, one might add, with *Rothwell*, but potentially causing a problem over the definition of *which* “injury” is covered by the indemnity in the policy. In the recent decision in *Commonwealth Steel Company Ltd v Certain Underwriters at Lloyds*,[[86]](#footnote-86) it was accepted by the parties that the inhalation of asbestos dust “was personal injury”, and that the personal injury (in this sense) “materially caused or contributed to” the contraction of mesothelioma. The version of this approach preferred by Rix LJ (but barred by *Bolton*) adopts the interpolation of “risk as damage” in *Barker*: if the risk of harm is the relevant damage, then the injury arises at the time of exposure, not later.

Either of two alternative routes – a purposive commercial interpretation of the contracts, or a rethinking of “injury” in terms of risk creation – would suffice to reverse the outcome in the Supreme Court. So too would the path provided by the New South Wales jurisprudence, which is to recognise that injury for one purpose need not be the same as injury for another. If anything, *Rothwell* –which emphasises the need for actionable damage – can be used to emphasise that “injury” is *not* the basis of actionability in negligence. The broader difficulties of concern to this chapter are illustrated however by the step from the conclusion in *Bolton*, to the litigation in *Durham*. In *Bolton*, the Court of Appeal may have convinced itself that no significant policy issues were in play other than those already resolved by *Fairchild.* But elsewhere, rationalisations of policy in terms of legal principle can lead to renewed difficulties, as the principles (not the policies behind them) are used in different contexts. It seems that delivering the promise even of compulsory insurance requires far more legal resources than might be expected; and that the fissure between contract and tort in this instance is not easily bridged.

**Finally: tort and insurance ideologies in their context**

In the litigation timeline explored above, insurers seem to have taken heart from the fact that they may even be attracting political support. How can this be explained? Although Stapleton referred pejoratively to certain welfare-based distributive solutions as exemplifying “extreme versions of a communitarian idea of economic interdependence”,[[87]](#footnote-87) economic interdependence seems to be common wisdom in times of financial crisis. In these circumstances, it seems to be accepted that risks covered by insurance are risks shared – and seems to be thought that this may ultimately mean risks magnified. The potential vulnerability of insurers themselves (perhaps)[[88]](#footnote-88) is taken to indicate that insurance can sometimes increase the size of liabilities and concentrate risks. This is, however, a form of observed “collectivism”, which is deployed more readily to restrict liabilities than to enhance collective solutions to individual problems: a collective demand for individual responsibility, in fact, even if this means leaving vulnerable parties uncompensated.[[89]](#footnote-89) Imposing limits on tort liability is a more attractive option than increasing the work of government to regulate financial institutions – even if the impact is puny. It is of course far more popular with financial institutions, but it also sells better on a popular level, playing to ideas of “individualism and common sense”, as opposed to “red tape”.[[90]](#footnote-90) So a link is made between over-extensive liability, and excessive bureaucracy.

Underlying the cases just reviewed is the question of responsibility for errors and their effects. These errors include not just under-estimation of the dangers of exposure to asbestos, but also under-estimation of the scale of the risks in financial terms. As presently conceived, the location of these unexpectedly high financial risks is a matter of contractual responsibility. This is not the denial of societal responsibility, but the chosen (or perhaps the default) mechanism of transferring risks, requiring considerable legal resources.

My preferred solution to the *Durham* appeal is for a more “commercial” interpretation of the contracts, which could itself be expected to achieve some consistency with the purpose of the tort liabilities themselves, while also (via the need to comply with statutory obligations) reflecting legislative purpose indirectly. Tort and contract could operate more harmoniously, but are also capable of being exploited through accidents (or strategies) of litigation. But more broadly, I wonder if the high profile of this case will succeed in bringing to the attention of tort lawyers the closeness of their subject not just to “insurance” as a non-legal institution, but to insurance contracts as a close private law relation, equally focused on transactions, and sometimes on the very same transactions as tort. Noting this particular, more pervasive feature of the “tort-insurance” kinship does not necessarily lead to the thought that tort should be transformed or cut back. What it does suggest though is that both tort and contract here should be interpreted in light of their context (which is not to say that insurance should lead to liability, nor that tort should be abolished and replaced by insurance, since insurance is already perceived as transactional), and then in turn evaluated in terms of what they can and cannot achieve.

I have suggested that a distributive, loss-spreading paradigm of insurance has dominated investigation of its interaction with the law of tort. This has led to the creation of embedded positions, and contributed to a widely held belief that insurance is not a relevant factor in tort reasoning. I have argued that this is unfortunate and that insurance in any case rarely presents a single factor. Given the contemporary decline in a loss-spreading paradigm of insurance and the increasing emphasis on markets and private arrangements, it is particularly important to attempt a fuller examination of the scope for interaction between tort law and insurance law.

1. \* I would like to acknowledge the generous assistance of the British Academy in supporting my attendance at the *Torts in Commercial Law* conference. I would also like to thank Harold Luntz and TT Arvind for comments on an early draft, and Rob Merkin for advice and support. It is particularly difficult to identify the boundaries of the latter’s influence on this piece given that we have recently embarked on work towards a much more detailed exploration of the integration of insurance into private law: R. Merkin and J. Steele, *Insurance and the Law of Obligations* (Oxford University Press, in preparation). Errors however remain my own. [↑](#footnote-ref-1)
2. Although liabilities for accidental harm provide the core instance, there is much more to the relationship than this. For example, insurance is also at work in relation to intentional harm, particularly where there is vicarious liability. At the same time, liability insurance is not the only form of insurance involved. First party insurance is often an alternative source of funds in a particular case: see the discussion below around n  below. The role of insurance in litigation *funding*, rather than only in providing a source of compensation or indemnity, has also come to the forefront of recent policy discussions in the United Kingdom, particularly through the *Jackson Review*: Sir Rupert Jackson, *Review of Civil Litigation Costs: Final Report* (The Stationary Office, London, 2009). The present Government has signalled support for the Jackson proposals, instigating a consultation, and commissioning the *Young Review*: Lord Young, *Common Sense, Common Safety* (HM Government, London, 2010). This stated a “firm belief” that those proposals should be implemented (at 22). Through its role in litigation funding, insurance has a very broad impact on the development of civil law, including areas such as invasion of privacy (and defamation) which are far removed from “accidents”. [↑](#footnote-ref-2)
3. Fleming James, writing about the relationship in 1948, could draw upon decades of practice: F James, “Accident Liability Reconsidered: The Impact of Liability Insurance” (1948) 57 *Yale Law Journal* 549. Kenneth Abraham, *The Liability Century: Insurance and Tort Law Reform from the Progressive Era to 9/11* (Harvard University Press, Cambridge, 2008) traces the relationship to the reform of employer liability in both the United Kingdom and the United States in the 1880s, prompting the emergence of a market in employers’ liability insurance. [↑](#footnote-ref-3)
4. Significant counter-examples in the United States are the work of Kenneth Abraham (above n ) and Tom Baker (below nn , ). These works include detailed consideration of insurance cover and insurance practice. Among the possible reasons for greater detailed attention in recent United States scholarship to the link between tort, contract, and insurance, are the significance of class action mechanisms and mass claiming, in which the availability and distribution of funds is a key issue; and (perhaps less obviously), the relative weakness of state welfare and earlier acceptance that private mechanisms (especially insurance) have a key role in delivering important goals such as loss distribution. As to the former, see the contributions to J Steele and W van Boom (eds), *Mass Justice: Challenges of Representation and Distribution* (Edward Elgar, Aldershot, 2011). [↑](#footnote-ref-4)
5. This is, for example, the line of argument developed by Pat O’Malley, *The Currency of Justice: Fines and Damages in Consumer Societies* (Routledge, Abingdon, 2009), and O’Malley is able to draw from a deep well of tort scholarship. It is particularly notable that he regards contract as still concerned with individual responsibility, and indeed he describes individualised social arrangements – in contrast to the arrangements now typified by the law of tort – as essentially “contractual”. Tort on the other hand, he suggests, has become a matter of distributions through its liaison with insurance. [↑](#footnote-ref-5)
6. (1995) 58 *Modern Law Review* 820. [↑](#footnote-ref-6)
7. Ibid at 823. [↑](#footnote-ref-7)
8. See the discussion in the final section of this chapter. [↑](#footnote-ref-8)
9. Stapleton, n. 5, at 823; also at 843-4: tort liability is not a stand-in for insurance. We can see this since insurance is not a necessary response where there is tort liability; and “the measure of damages is restorative”, not at the insurance level. Though not suggesting that tort is a stand-in for insurance, I do suggest that this adopts a narrow definition of insurance and leaves no scope for exploring liability insurance as part of the underlying legal structure of the restoration response. [↑](#footnote-ref-9)
10. n.5, at 847. Proposals to shift to first party insurance, in particular, were the focus of this criticism. [↑](#footnote-ref-10)
11. The Departmental Committee on Alternative Remedies (Chaired by Sir Walter Monckton) received impassioned evidence from Mr W. H. Thompson, who had “acted for many years as solicitor for injured workmen”, and who pointed to the “misery and injustice inflicted upon the workman by the grossly inadequate weekly payments”: Memorandum dated 12 March 1945, The National Archives, 3779 LCO 2. [↑](#footnote-ref-11)
12. P. Bartrip, *Workmen’s Compensation in the Twentieth Century Britain* (Aldershot: Avebury, 1987), at 223, explains the Unions’ rising interest in common law (the ‘alternative remedy’, in the language of workmen’s compensation) as being partly due to progressive relaxation in the barriers to common law claims (including the important decision in *Wilsons & Clyde Coal Ltd v English* [1938] A.C. 57), but ‘perhaps, also because of the publicity given to a number of road accident cases, in which awards far in excess of those obtainable under the Workmen’s Compensation Acts, were made’ . [↑](#footnote-ref-12)
13. A much broader discussion of cross-fertilisation between workmen’s compensation legislation, and the common law of tort, is to be found in S. Deakin, ‘Tort Law and Workmen’s Compensation Legislation: Competing Models?’, in TT Arvind and J. Steele (eds), *Tort Law and the Legislature: Common Law, Statute, and the Dynamics of Legal Change* (Hart Publishing, 2012, forthcoming). In particular, Deakin identifies the idea of ‘enterprise risk’ later adopted in common law as having been developed through workmen’s compensation under statute, and identifies the role of widespread insurance in making this workable. Deakin proposes an influence on the doctrinal development of the law of tort, particularly through the idea of enterprise risk in vicarious liability. [↑](#footnote-ref-13)
14. Third Parties (Rights Against Insurers) Act 1930. Neither is this purely a matter of history. Parliament in 2010 enacted an improved version of the 1930 Act, following Law Commission recommendations: Third Parties (Rights Against Insurers) Act 2010. [↑](#footnote-ref-14)
15. The provision was proposed by the Royal Commission on Transport in its First Report, *The Control of Traffic on Roads*, 1929-30 [Cmd. 3365], 1929 at [39], with the observation that: “The principle that the insurance money should be earmarked for the sufferer is not a new one, as the principle has been accepted in respect of insurance under the Workmen’s Compensation Act, 1925”. [↑](#footnote-ref-15)
16. For an interesting argument that the law of obligations ought not to bend too readily to the “public interest”, whilst still positioning the law of obligations within the context of the rise of the regulatory state, see D Campbell, “Gathering the Water: Abuse of Rights After the Recognition of Government Failure” (2010) *The Journal Jurisprudence* 487. [↑](#footnote-ref-16)
17. As we have seen, Jane Stapleton has argued that insurance requires “a pooling or ‘collectivisation’ of risk” (n. 5, at 821). Indeed this is a central thread in scholarship more generally relating to insurance. Francois Ewald, inspired by Foucault, famously discussed insurance “technology” (irrespective of its mode of delivery) as challenging the existing juridical framework and reducing the emphasis on blame and responsibility, and this has influenced socio-legal studies of risk and insurance: F. Ewald, *L’Etat Providence* (Paris, Grasset, 1986). [↑](#footnote-ref-17)
18. In developing this theme, I draw on the work of Hugh Collins in *Regulating Contracts* (Oxford University Press, Oxford, 1999): see particularly the section on ‘Illustrating the Connection’, below. [↑](#footnote-ref-18)
19. Hugh Collins, op cit. at 4, uses the idea of ‘insurance’ very loosely to refer to mechanisms by which (on one view of the role of the law of contract) parties can be confident that their interests are protected and which will therefore build the ‘trust’ that markets require: ‘On this view, it is not so much trust that enables transactions between strangers to occur, but rather an extensive system of sanctions that can be imposed against those who breach the rules of the game. Trust is built upon insurance.’ Insurance here is a wide enough idea to capture the availability of legal remedies. This emphasises both the idea that commercial insurance is part of a continuum of factors which will ‘assure’ the parties that their interests are adequately protected; and the important idea that this sense of security is fundamental to market activities. [↑](#footnote-ref-19)
20. It has been suggested that this is partly a means of making space for an autonomous law of ‘restitution’ (or more likely now, unjust enrichment): S Hedley, “Contract, Tort and Restitution: Or, On Cutting the Legal System Down to Size” (1988) 8 *Legal Studies* 137. [↑](#footnote-ref-20)
21. In the terminology used some time ago by Nigel Simmonds, this would be a strategy of “resistance” to fundamental change in the character of modern law in response, in particular, to the growth of the regulatory state: NE Simmonds, “The Changing Face of Private Law: Doctrinal Categories and the Regulatory State” (1982) 2 *Legal Studies* 257. As Simmonds argues (at 259 (footnote omitted)):

“[T]he majority of legal scholars continue to work within a framework that took shape between the seventeenth and nineteenth centuries and received its most coherent expression in the works of the Victorian treatise writers. Indeed, it is precisely the existence of a firm doctrinal base provided by this tradition that has enabled most English lawyers to proceed in their work without deliberately confronting problems of legal theory.” [↑](#footnote-ref-21)
22. Abraham, above n at 6, explains that he spent 30 years learning insurance law in order to develop his understanding of its precise impact on liability. The difficulty lies in the same detailed character of insurance law, and its diversity, which is identified immediately below. [↑](#footnote-ref-22)
23. In light of the point about the regulatory state just made, it is important to note that not all of insurance law is contract law, and that the dominance of a transactional model of commercial law is in any case one of the themes touched on by this paper. Both J Lowry and P Rawlings, *Insurance Law: Doctrines and Principles* (2nd ed, Hart Publishing, Oxford, 2005), and J Birds, *Birds’ Modern Insurance Law* (8th ed, Sweet & Maxwell, London, 2010), introduce regulation of insurance business in their second chapter. The title of M Clarke, *Policies and Perceptions of Insurance Law in the Twenty-First Century* (Oxford University Press, Oxford, 2005), includes a punning reference to the role of policy in insurance law. [↑](#footnote-ref-23)
24. J Lowry and P Rawlings, “Insurers, Claims and the Boundaries of Good Faith” (2005) 68 *Modern Law Review* 82. They cite J Beatson, *Anson’s Law of Contract* (28th ed, Oxford University Press, Oxford, 2002) at 20 as symptomatic of a general view in this regard. [↑](#footnote-ref-24)
25. For example “relational contracting” studies have tended to focus on issues of trust and to emphasise the relative unimportance, within continuing relationships, of reliance on express contractual terms. A widely cited early study is H Beale and T Dugdale, “Contracts Between Businessmen: Planning and the Use of Contractual Remedies” (1975) 2 *British Journal of Law and Society* 45. For emphasis of the point that “relational contract theory” is a means of analysing relationships and that there is no one type of relationship that is assumed by this school of analysis, see IR Macneil, “Reflections on Relational Contract Theory After a Neo-classical Seminar” in D Campbell, H Collins and J Wightman (eds), *Implicit Dimensions of Contract: Discrete, Relational, and Network Contracts* (Hart Publishing, Oxford, 2003) at ch 7. [↑](#footnote-ref-25)
26. It is not always possible to state clearly whether this is the case. A probable example is *Stone & Rolls Ltd v Moore Stephens* [2009] UKHL 39; [2009] 3 WLR 455; [2009] 4 All ER 431. Here, the two relevant insurance policies are likely to have been the professional indemnity insurance of the defendant auditors (covering negligence liability), and the bank’s “Banker’s Blanket Bond” insurance, concerned with protecting the bank against first party losses in respect of loss of property or fraud. If the bank did have such insurance (as is likely), then the action may well have been instigated by its insurers exercising subrogation rights. This is not reflected in the reasoning of the House, but the question of who is exposed to loss in the event of liability or no liability might be considered highly relevant to an area of law (*ex turpi causa non oritur actio*) in which public policy and unconscionability are thought to be engaged. Or, if it is not considered relevant, some of the reasoning to which tort law can incline is rendered “fictional” (a point made by Kirby J in *Imbree v McNeilly* [2008] HCA 40; (2008) 236 CLR 510 at 554 [112]. [↑](#footnote-ref-26)
27. Some writers dislike the existence of concurrent liability and see it as unprincipled. Peter Cane for example has argued that “Concurrency of causes of action, to the extent that it allows different remedial regimes to apply to identical ensembles of protected interest and sanctioned conduct, should be abolished”: P. Cane, *The Anatomy of Tort Law* (1997, Hart Publishing), at 200. It is important to note that the incentive for concurrent duties to develop, and for claimants to seek to establish tort liabilities in what appears to be a contractual context, is sometimes to be found in insurance structures and not solely in technical legal factors such as the rules of limitation (as, for example, in *Henderson v Merrett* [1995] 2 A.C. 145). In particular, professional liability insurance contracts typically exclude cover for breach of contract, but include cover for tortious liability for negligence. This is an important reason why negligence duties in the context of professional negligence are so significant, and shows the influence of contractual structures between insurer and insured on claims brought by a tort claimant, against the insured. [↑](#footnote-ref-27)
28. [1990] 1 AC 831 (HL). [↑](#footnote-ref-28)
29. n.17 at 73-74. [↑](#footnote-ref-29)
30. n. 17 Chapter 4, ‘The Capacity of Private Law’. [↑](#footnote-ref-30)
31. Stapleton, n.5, also discusses *Smith v Bush*. She is not concerned with the potential of private law for regulating transactions, but suggests that the presentation of inflexible standard terms to the claimant removes a policy reason against liability (broadly, ‘free-riding’): at 840. This exemplifies her core concern with first party insurance and associated ideologies. It is worth mentioning that realistically, alternative routes to security for the claimant here would take take the form of independent advice and therefore potential access to another source of liability insurance. [↑](#footnote-ref-31)
32. Above n at 854. It might be noted that *Smith v Bush* slightly predates the introduction of the *Caparo* test with its adoption of a ‘fair, just and reasonable’ criterion: *Caparo v Dickman* [1990] 2 A.C. 605. Fairness and reasonableness are however key terms in the Unfair Contract Terms Act 1977, which was also in issue in *Smith v Bush*. Even in this case, where the idea of ‘assumption of responsibility’ was treated as irrelevant, the link between duty of care concepts, and contractual concepts, is close. [↑](#footnote-ref-32)
33. Collins, above n 17 at 23-24. [↑](#footnote-ref-33)
34. [2010] EWCA Civ 1096; [2011] 1 All ER 605. This litigation concerns the date at which such policies are “triggered” in respect of *Fairchild* liabilities, and will be heard by the United Kingdom Supreme Court in December 2011. [↑](#footnote-ref-34)
35. The expression “public law in disguise” is taken of course from L Green, “Tort Law Public Law in Disguise?” (1959) 38 *Texas Law Review* 1. Green however was not uniquely or even centrally concerned with insurance, and certainly not with the idea that tort “is” insurance, though he did incorporate a wide-ranging discussion of risks and responsibility for them. Cases raising insurance issues were among these, but the focus of his attack was pure doctrinal exposition. The difference between Green’s approach, and Collins’ consideration of private law as a means of regulation, could be said to lie in Collins’ acceptance that private law discourse must have closure rules; but that these closure rules may be developed so that they are sufficiently flexible to allow the absorption of much outcome-focused reasoning. [↑](#footnote-ref-35)
36. This purpose can be demonstrated by the sequence of legislative interventions aimed at securing or extending compensation for tortiously caused harms. [↑](#footnote-ref-36)
37. I notice the terms of reference of the Australian *Ipp Report* (Commonwealth of Australia, *Review of the Law of Negligence: Final Report* (Canprint Communications, Canberra, 2002), which were set by a Committee of Ministers: these begin with a statement that “The award of damages for personal injury has become unaffordable and unsustainable as the principal source of compensation for those injured through the fault of another” (at ix). Apart from starting with a conclusion (a feature shared with the *Young Review* in the United Kingdom (above n ), judging from the Prime Minister’s Foreword), this also illustrates acceptance, at a political level, of the goal of compensation. [↑](#footnote-ref-37)
38. Note the loose use of “insurance” as underpinning trust by Collins, n. 17. [↑](#footnote-ref-38)
39. Although insurance is discussed as playing an important role in the support of sales contracts and international sales, insurance contracts are not dealt with as a separate category in E McKendrick (ed), *Goode on Commercial Law* (4th ed, Penguin, London, 2010). Insurance appears in the interstices of commercial law, and thus as a practice rather than a set of principles. [↑](#footnote-ref-39)
40. Collins, above n 17 at ch 9. [↑](#footnote-ref-40)
41. Collins, above n 17 at 217. [↑](#footnote-ref-41)
42. Even within the club, there is potential for duties of care: a number of the risk-bearers at Lloyds in the 1980s were themselves inexperienced investors – leading to well-known over-exposure of individuals, and allegations of professional negligence (most conspicuously litigated in *Henderson v Merrett Syndicates* [1995] 2 AC 145 (HL)). [↑](#footnote-ref-42)
43. *Wallaby Grip Ltd v QBE Insurance* [2010] HCA 9; (2010) 240 CLR 444. [↑](#footnote-ref-43)
44. Above n 37 at 459 [37]. [↑](#footnote-ref-44)
45. For a suggestion that regulatory concerns explain the interpretation of contractual terms in *Wasa International Ltd v Lexington Insurance Co* [2009] UKHL 40; [2010] 1 AC 180 (though not satisfactorily), see R Merkin, “Wasa International Insurance Co Ltd v Lexington Insurance Co: Commercial Certainty in the Reinsurance Market” (2010) 126 *Law Quarterly Review* 24. [↑](#footnote-ref-45)
46. The idea of insurance as a “technology” is derived from the work of Francois Ewald, n 16. This is one aspect of the influence of insurance derived from Ewald’s work and discussed by T Baker and J Simon, “Embracing Risk” in T Baker and J Simon (eds), *Embracing Risk: The Changing Culture of Insurance and Responsibility* (University of Chicago Press, Chicago, 2002) 1, in their attempt to initiate a sociology of risk and insurance. The other dimensions are institutions, forms, and visions: at 7. [↑](#footnote-ref-46)
47. See T Baker, “Risk, Insurance, and the Social Construction of Responsibility” in T Baker and J Simon (eds), *Embracing Risk: The Changing Culture of Insurance and Responsibility* (University of Chicago Press, Chicago, 2002) 33, contrasting the imagery of insurance advertising with disputes over insurance cover. The insurer can argue to be protecting the fund (collectivity) by disputing cover in a particular case. [↑](#footnote-ref-47)
48. Above n 5. [↑](#footnote-ref-48)
49. Above n 5 at 821. [↑](#footnote-ref-49)
50. Above n 5 at 821 quoting K Abraham, *Distributing Risk: Insurance, Legal Theory and Public Policy* (Yale University Press, New Haven, 1986) at 64. [↑](#footnote-ref-50)
51. Baker and Simon, above n 47 especially at 1-4, describing exploring aspects of the shift from “spreading risk” to “embracing risk” in a number of fields including social insurance programmes, workers’ compensation (in the US), and public welfare programmes. See also A Giddens, *The Third Way: The Renewal of Social Democracy* (Polity Press, Cambridge, 1998), extolling the positive virtues of risk, more highly than security derived from spreading it*.* [↑](#footnote-ref-51)
52. n.45at 4. [↑](#footnote-ref-52)
53. N.45 at 2. [↑](#footnote-ref-53)
54. Baker and Simon above n 45 at 10 describe this “ideal type” in terms of “premiums paid in advance, guaranteed indemnity in the event of a covered loss, and risk-based premiums based on the best available information regarding the expected losses of the individual insured”. [↑](#footnote-ref-54)
55. J Simon, “The Ideological Effects of Actuarial Practices” (1988) 22 *Law and Society Review* 771. This article made express connections between tort and criminology. [↑](#footnote-ref-55)
56. Baker and Simon, above, 45. Interestingly, Simon (in earlier work) has described workers’ compensation as the “blueprint for the government of maturing industrial society”: J Simon, “Driving Governmentality: Automobile Accidents, Insurance, and the Challenge to Social Order in the Inter-war Years, 1919 to 1941” (1998) 4 *Connecticut Insurance Law Journal* 521 at 524. [↑](#footnote-ref-56)
57. ATE insurance is bought when litigation is commenced and covers the chance that a plaintiff will become liable for a defendant’s costs. [↑](#footnote-ref-57)
58. *Equitas Ltd v R & Q Reinsurance Co (UK) Ltd* [2009] EWHC 2787 (Comm), holding that actuarial modelling would provide a “reasonable representation of reality” in order to trace these liabilities. The losses concerned arose from the Exxon Valdez oil spill, and the damage to Kuwaiti aircraft during the Iraqi invasion. [↑](#footnote-ref-58)
59. See the description by T Baker, “Liability Insurance as Tort Regulation: Six Ways that Liability Insurance Shapes Tort Law in Action” (2005) 12 *Connecticut Insurance Law Journal* 1 at 9: “Liability insurance shifts the liability of the particular defendant to an entity for which that liability is simply one among an enormous portfolio of contingent financial obligations.” [↑](#footnote-ref-59)
60. F Baluch, S Mutenga and C Parsons, “Insurance, Systemic Risk and the Financial Crisis” (2011) 36 *Geneva Papers on Risk and Insurance* 126. Underlining this point, Zurich’s recent guidance to Public Authorities on holistic risk management and “resilience” in the post-crisis economy makes no specific mention of legal liabilities, despite repeated concerns (amongst lawyers and politicians) over public authority liability: Zurich Municipal, *Building Resilience: Developing a “Whole Risk” Approach to Managing Risk and Uncertainty* (Zurich Municipal, Farnborough Hampshire, 2010). [↑](#footnote-ref-60)
61. See the earlier discussion of *Smith v Bush* above n 25: this need not mean insurance. It may mean entering into a contract for advice on the transaction – itself backed by indemnity insurance. In *Smith v Bush* however, the plaintiffs would then have needed to pay twice – for advice to the lender, and for advice to themselves – in circumstances where the purpose of the advice was connected with the intended purchase. [↑](#footnote-ref-61)
62. *Richardson v Pitt-Stanley* [1995] QB 123 (CA). Stuart-Smith LJ at 131 took the formalistic view (itself contrasting with the approach in *Smith v Bush*) that “Insurance is normally taken out for the protection of the insured” – the *Employers Liability (Compulsory Insurance) Act 1969* (UK) therefore did not pass the actionability tests for breach of statutory duty. This does not fit with the purposes behind Parliament’s actions in passing this Act – which were undoubtedly aimed at protecting the employee. [↑](#footnote-ref-62)
63. Above n 29. [↑](#footnote-ref-63)
64. Rix LJ thought that some of the employers in *Durham v BAI* had unknowingly failed to “maintain” insurance cover as required by statute for some of the liabilities, despite paying premiums in each year of employment, as a consequence of his own interpretation of the policies. He did not consider that an insuperable objection to that interpretation. This does seem rather narrow, as a way of interpreting the influence of the statutory duty to insure. [↑](#footnote-ref-64)
65. *McNeilly v Imbree* above n 25. This was a case involving third party personal injury insurance, and Kirby J was at pains to underline the importance of its compulsory nature to his decision that the standard of care was not variable. [↑](#footnote-ref-65)
66. Baker, above n 58 at 9 makes this point with the support not only of experience and observation, but also of qualitative empirical studies: “liability insurers have an interest in the development of tort law rules and settlement norms that goes far beyond the interests of any ordinary defendant.” [↑](#footnote-ref-66)
67. [2002] UKHL 22; [2003] 1 AC 32. The House accepted that the approach in *McGhee* (by which it was sufficient to show material contribution to risk of harm) could be applied in these circumstances. [↑](#footnote-ref-67)
68. Association of British Insurers, *Guidelines for Apportioning and Handling Employers’ Liability Mesothelioma Claims* (Association of British Insurers, London, 2003). [↑](#footnote-ref-68)
69. [2006] UKHL 20; [2006] 2 AC 572. [↑](#footnote-ref-69)
70. This proved decisive in *Sienkiewicz v Greif (UK) Ltd* [2011] UKSC 10. This is a single employer case where the intensity of exposure was far lower than in *Fairchild* and *Barker*, and where the background environmental risk was held, at first instance, to be greater than the occupational risk. [↑](#footnote-ref-70)
71. *Barker* has therefore been seen by some as creating a new tort, in which the increase in risk is itself actionable, rather than loosening the requirements of proof of causation to fit a general sense of rough justice (as appeared to be the case with *Fairchild*). This interpretation was preferred by Rix LJ in *Durham v BAI* above n 33, in particular. The status of this interpretation of *Barker* must be very dubious since the decision in *Sienkiewicz v Grief* above n 69, where several members of the Court expressed doubts over the possibility of using epidemiological evidence as evidence of causation. [↑](#footnote-ref-71)
72. I have been unable to trace a post-*Barker* version of the Guidelines referred to in n 67, despite the legislative intervention to reinstate the full effect of *Fairchild*. Could this signify an intention on the part of some insurers to contest cover, as below? [↑](#footnote-ref-72)
73. Was this an attempt to protect those who were over-exposed due to the insolvency of other potential parties? It is not easy to say, but this is in principle now possible through recourse to the Financial Services Compensation Scheme. [↑](#footnote-ref-73)
74. Section 3 as a whole ensures that *Fairchild* liabilities for mesothelioma will be joint and several. By s 3(7), regulations may be made in respect of parties who would seek contribution in respect of harm against another party, but that party is unable to pay their contribution. [↑](#footnote-ref-74)
75. [2007] UKHL 39; [2008] 1 AC 281. [↑](#footnote-ref-75)
76. Above n 29. [↑](#footnote-ref-76)
77. [2006] EWCA Civ 50; [2006] 1 WLR 1492. [↑](#footnote-ref-77)
78. *Axa General Insurance Ltd, Petitioners* [2010] CSOH 2; 2010 SLT 179, seeking judicial review of the *Damages (Asbestos-Related Conditions) Act 2009* (Scotland). [↑](#footnote-ref-78)
79. *Sub nom. Grieves v Everard* [2006] EWCA Civ 27 [↑](#footnote-ref-79)
80. Particularly boldly, they even made use of another public demon, the *Human Rights Act* 1998 (UK). [↑](#footnote-ref-80)
81. Above n 70. [↑](#footnote-ref-81)
82. Above n 70 at WLR 1497 [3], mentioning that counsel had advised to this effect. Longmore LJ also specifically mentioned that a “triple trigger” theory like that applied in the United States might conceivably be applicable to EL insurance policies – but not to the PL policies in issue in the case in hand (at WLR 1504 [24]). [↑](#footnote-ref-82)
83. Above n 29. None of the members of the Court of Appeal will have been satisfied with the outcome: Rix LJ and Stanley Burnton LJ expressly so, though they were reluctant about different points, and Smith LJ because she disagreed with the conclusions of both of the other judges as to the “sustained” wording. [↑](#footnote-ref-83)
84. Six sample claims were pursued in the litigation, but there may have been as many as 6,000 claims depending on the outcome: this is however, as Rix LJ put it, a disputed figure. [↑](#footnote-ref-84)
85. The “commercial purpose” of the contracts was, he thought, frustrated by his interpretation. [↑](#footnote-ref-85)
86. [2010] NSWCA 31. [↑](#footnote-ref-86)
87. Stapleton, above n 5 at 842 n 77, referring to some particular proposals endorsed by Sir Owen Woodhouse and others. [↑](#footnote-ref-87)
88. The collapse of a major insurer in Australia led to two separate official reports. One of these, the the Report of the Royal Commission on the collapse of HIH Insurance (Commonwealth of Australia, *The Failure of HIH Insurance* (National Capital Printing, Canberra, 2003), was asked to identify the causes of the collapse. The Report of the Royal Commission did not identify excessive liability risks, but remained preoccupied with issues of financial management. The low pricing of policies, and lack of action to address over-exposure to risk, we significant factors. The other, the *Ipp Report* (above n 36), started with an assumption that tort liabilities needed to be controlled because of affordability issues. [↑](#footnote-ref-88)
89. Or more pertinently, “to take responsibility for their own risks” – though in the tort cases considered here, for the most part they could not hope to have done so. [↑](#footnote-ref-89)
90. *Common Sense, Common Safety*, above n 1, and particularly the Foreword by David Cameron, which actually uses the expression (and mixed metaphor) “businesses are drowned in red tape”. [↑](#footnote-ref-90)