What is at stake in taking responsibility? Lessons from third-party property insurance.

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Hell hath no fury like a vested interest masquerading as a moral principle.

Abstract.

Third-party property insurance (TPPI) protects insured drivers who accidentally damage an expensive car from the threat of financial ruin. Perhaps more importantly though, TPPI also protects the victims whose losses might otherwise go uncompensated. Ought responsible drivers therefore take out TPPI?

This paper begins by enumerating some reasons for why a rational person might believe that they have a moral obligation to take out TPPI. It will be argued that if what is at stake in taking responsibility is the ability to compensate our possible future victims for their losses, then it might initially seem that most people should be thankful for the availability of relatively inexpensive TPPI because without it they may not have sufficient funds to do the right thing and compensate their victims in the event of an accident.

But is the ability to compensate one's victims really what is at stake in taking responsibility? The second part of this paper will critically examine the arguments for the above position, and it will argue that these arguments do not support the conclusion that injurers should compensate their victims for their losses, and hence that drivers need not take out TPPI in order to be responsible. Further still, even if these arguments did support the conclusion that injurers should compensate their victims for their losses, then (perhaps surprisingly) nobody should to be allowed to take out TPPI because doing so would frustrate justice.

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I

Introduction.

In 1998 there were a staggering 17,228 casualty-producing car accidents in the state of Victoria; this does not include car accidents which did not involve casualties, and it does not include car accidents within other states. Of those accidents, 2% were fatal and 29% resulted in serious injury, but just about all of them would have involved some sort of losses[1]. Losses and accidents go hand-in-hand, but since nobody likes to suffer losses, a question which comes up when accidents occur is: *who should bear the cost of the accident*[2]?

Some of the time the answer to this question seems relatively simple. For example, when a person backs their car into an inanimate object such as a tree or a boulder, and nobody cares about the damage to the inanimate object, then as long as the object did not find its way into that spot through someone else's negligence or malice, it would seem appropriate that the car's driver should be liable for their own loss since they were responsible for the accident. On the other hand, when one car is back-ended by another car whilst dutifully waiting at an intersection for the traffic lights to turn green, the appropriate thing would seem to be to make the injurer liable for the victim's compensation because the injurer was responsible for the accident[3]. In these cases it seems unproblematic to say that the costs of accidents should be borne by those who are responsible for causing the accidents.

However on other occasions the simple rule, that liability ought to fall on the party responsible for causing the accident, appears more problematic. Consider how this rule would fare if the second of the two above examples was modified so that instead of one car, there were *two* stationary cars waiting at the intersection, and when the second car was hit from behind, it was pushed into the car in front which would also have suffered considerable damage. Who should bear the costs of this accident?

There is little doubt that the damage to the car at the front of the intersection was *caused* by the car directly behind it, but is the driver of the second car also *morally responsible* for this damage? After all, none of this would have happened had the third driver shown a *duty of care* towards other road users. Although in a purely causal sense the driver of the second car is responsible for this accident, in another very important sense they were not really responsible for this accident because it was not their *fault*. So should the driver at the front of the intersection be compensated by the driver of the stationery vehicle directly behind them, or should both of these drivers be compensated by the driver of the moving vehicle which initiated this pile-up?

What becomes apparent in considering this example is that there is a lot more to the concept of responsibility than merely causation. The concepts of moral responsibility, fault and duty of care are also crucial in the determination of who should bear the costs of accidents. For this reason it is critical to understand what these concepts mean, and how facts about moral responsibility, fault and duty of care relate to conclusions about who should bear the costs of particular accidents.

Jonathan Glover suggests that when we say that a person is morally responsible for some state of affairs, what we mean is that they can be praised or blamed for that state of affairs[4]. Therefore when someone says "that accident was not my fault" or "I am not responsible for that accident", what they mean is something like "I am not to be blamed for that accident". Similarly, when they say "it was my fault that the accident happened" or "I am responsible for that accident", what they mean is something like "I am to be blamed for that accident". With this in mind, we could now say that although the driver of the second car was causally responsible for the damage to the car at the front of the intersection, it would appear that the driver of the third car is a better candidate for blame and

hence for fault and moral responsibility.

Greg Pynt characterises the concept of a duty of care as "a non-delegable duty to ensure that care is taken" to avoid causing losses to others[5]. This raises such questions as under what circumstances do people have duties of care to one another, whether people should ever take any risks, if so then which risks is it reasonable to take, and to what lengths should one go to prevent losses from occurring. These issues are however beyond the scope of this paper; the present point is merely that a driver's duty of care is simply a duty to take reasonable care to avoid causing losses to others - to be a safe, careful and conscientious driver, which is apparently what the driver of the moving car in the third example did not do.

However if the concepts of fault, responsibility, and duty of care were defined as above, then what would force or even justify the conclusion that injurers should compensate their respective victims for their losses? Although the duty of care prescribes behaviour which is appropriate for road users, and the concepts of fault and responsibility tell us who should be blamed, neither of these concepts says anything about what (other than finger pointing) should be done when accidental losses come about. What should happen when someone's behaviour did not comply with their duty of care and when they are to blame for an accident? How do we move from the observations that a person's behaviour did not manifest a duty of care and that they are to blame for an accident, to the conclusion that they therefore ought to compensate their victims for their resulting losses?

Losses that come about in accidents can be very burdensome, but since placing burdens onto people is a form of evil, we should not shift losses from victims onto injurers lightly. If we believe that injurers should be liable for their victims' compensation, then we must offer reasons for why this burden should fall specifically on injurers rather than, for example, being left on victims. The next section of this paper will concern itself with the question of *how the conviction that injurers should be liable for their victims' compensation could be justified*, at least in those cases where the victim is innocent and the injurer is responsible (in all of the senses mentioned above) for the accident.

Why injurers should compensate their victims.

One might initially argue that the reason that injurers should compensate their victims is simply because it would be wrong to let innocent victims go uncompensated. Such an argument could draw on Joel Feinberg's principle of *weak retributive justice* which aims to protect innocents[6]. This argument would tender that if a victim's conduct was not dangerous or in some way deserving of their loss, and someone else was in fact responsible for causing this loss, then why should the victim have to be the one to suffer this undeserved burden? If a choice has to be made between either the victim or the injurer, then surely the injurer is a better candidate for carrying this burden?

But although it might indeed be wrong for innocent victims to be burdened with undeserved losses, this does not explain why *injurers per se* should be the ones to provide this compensation. It is not satisfactory to reply to this question by saying that injurers should bear this burden by default because it would be unfair to expect some third party to provide this compensation[7], because although that might show that everybody other than an injurer should not have to provide the compensation, it would still not explain why the obligation to compensate the victim should fall specifically onto the injurer. Placing such burdens onto injurers by default is unjust because ignorance of positive reasons for *abstaining* from this course of action is not a substitute for the provision of positive reasons for doing so. Furthermore, the above argument does not *show* that it is right for injurers to bear such burdens, but rather it merely assumes this, but since this is precisely what we are trying to justify, we should therefore avoid such assumptions since they are circular. Unless there are positive reasons why injurers per se should bear the burden of compensating their victims, then this burden should not be imposed onto them because it might just be the case that it is

unfair for *anyone whatsoever* to have to bear the burdens of accidental losses.

(i) Liability for consequences of one's actions is part of what it means to take responsibility.

One way of showing that injurers should be the ones to bear the burden of compensating their victims, is to point out that if `being responsible' had nothing to do with being liable for the consequences of our actions, then this would be a strangely empty sense of responsibility. People could say "Yes, sure I 'm responsible. So what?", and although they could be held in low regard or maybe even despised for their actions and for their indifference to the losses or suffering that they have caused, they could not be expected to compensate anyone. Isn't 'taking responsibility' all about being accountable for the consequences of our actions and liable for the reparations?

It was suggested earlier that responsibility was about taking praise and blame for one's actions, but when we apply this definition of responsibility in the real world, without further additions it seems to lack this more substantive component. For example, when laws state that drivers will be held responsible for their own driving, they don't just mean that law enforcement officials will praise good drivers and wave a disapproving finger at bad drivers. What they mean is something more substantial than that; they mean that drivers will be held accountable and liable for the consequences of their driving as well. So one way to justify the conviction that injurers should be liable for their victims' compensation would be to argue that part of what is meant by 'taking responsibility' is 'being liable for the consequences of our actions' because responsibility without the consequences just wouldn't be responsibility.

(ii) Concomitant rights and obligations.

Another way to justify the conviction that injurers should be the ones to bear the burden of compensating their victims, is to argue that there is a necessary link between a victim's right to be compensated, and an injurer's duty to provide that compensation[8]. Such an argument would rely upon the deontological position that rights exist in a framework of concomitant obligations[9]. For example, if it was agreed that everyone had a right to freedom, then the force behind this right would derive from the fact that it created a concomitant obligation in every person to not take another's freedom away, because in what sense could anyone be said to have the right to freedom if others were free to ignore that right. Similarly, it can also be argued that the reason that injurers should be the ones to compensate their victims is because a victim's right to compensation creates a concomitant obligation in someone to provide that compensation.

However without supporting arguments, the above deontological argument is incomplete. Whilst it might indeed be true that rights exist in a framework of concomitant obligations, how do we know *whom* the concomitant obligations fall onto - who should be the 'someone' that an obligation to compensate should obligate? All that we are told is merely *that* for every right there exists a concomitant obligation, but in order to attribute liability we also need to know whom that obligation should fall onto[10]. There are two supporting arguments for why the concomitant obligation to compensate should fall on injurers: one is drawn from considerations of *retributive justice* and the other is drawn from considerations of *deterrence*.

Firstly, it can be argued that the reason that the obligation to compensate victims ought to fall on nobody other than their injurers is because faulty conduct deserves punishment. Although on the one hand nobody should suffer undeservedly, on the other hand retributive justice requires that those deserving of punishment get their comeuppance - that they have some measure of pain or displeasure inflicted upon them[11]. According to this argument, an injurer's faulty conduct ought to be punished not because the punishment will somehow reverse the chain of events and recover losses that the conduct brought about (it won't do that), but simply because it is deserving of punishment[12]. Since faulty injurers ought to have complied with their duty of care, but didn't, they

should therefore be punished for not having done the right thing. So the first reason that the concomitant duty should fall onto injurers is because injurers should be punished for their faulty conduct; that is, because retributive justice requires it.

The second reason why injurers should be the ones to compensate their victims is because people need to be given an incentive to pay more attention when driving and hence to avoid causing accidents. Considerations of deterrence suggest that irrespective of how we deal with losses that have already occurred, we should also do something to prevent future losses from occurring[13]. Since human conduct is a significant contributor in more than 90% of the sort of losses with which we are concerned[14], injurers should therefore be liable for the losses suffered by their victims because this will deter them from engaging in risky or loss-causing conduct in the future. So the second reason why the concomitant duty to compensate should fall onto none other than injurers is because making injurers liable for their victims' losses will help prevent future losses from occurring by giving them a disincentive to disregard their duty of care, and an incentive to pay more attention.

This brings us to the conclusion that injurers do have a moral duty to compensate their victims for their losses. They have this duty, firstly, because being liable for the consequences of our actions seems to be part of what it means to take responsibility, and secondly, because considerations of retributive justice and deterrence lend support to the argument that there is a necessary link between a victim's right to be compensated and an injurer's duty to provide compensation. But why should the fact that injurers have a moral duty to compensate their victims mean that responsible drivers should take out TPPI? Isn't it enough to be a safe, careful and conscientious driver without also having to take out insurance? What has insurance got to do with taking responsibility?

Why responsible people ought to take out TPPI.

The reason that TPPI is relevant to the issue of taking responsibility is because it enables everyone to guarantee that they can meet their compensatory obligations in the event of an accident - it allows people to plan for contingencies. Generally speaking, an insurance policy is a contract between the insured party and their insurer, where the insurer agrees to indemnify the insured party against certain types of liability specified within the contract in return for the cost of a premium. Specifically, third-party property insurance is a contract in which the insurer agrees to compensate the insured party's victims (the third parties), for property losses suffered by the victim at the hands of the insured party. Thus come what may, insured drivers will always be able to compensate their victims in the event of an accident because their insurance policy will cover the cost of their victims' compensation.

In a similar vein, François Ewald writes:

> "insurance is a moral technology ... To provide for the future ... means [to] no longer resign ... oneself to the decrees of providence and the blows of fate, but instead, transforming one's relation with nature, the world and God so that even in misfortune, one retains responsibility for one's affairs by possessing the means to repair its effects."[15]

Consider what the world would be like if insurance were not available. Without insurance, whenever accidents would happen, injurers would have to compensate their victims out of their personal funds. However it is doubtful that injurers would always have sufficient funds available to compensate their victims; in fact, considering the price of new cars, people on low incomes or on welfare would often be unable to meet their compensatory obligation, or else they would be sent into financial ruin in an effort to do the right thing by their victims. If insurance were not available then many people would have to make a choice between either placing themselves in danger of

financial ruin in the event of an accident, or else resigning themselves to the fact that if an accident happens, they will not be able to do the right thing by their victims.

It might even be argued that if insurance were not available, then in order to drive a motor vehicle one should first be required to provide proof of being "financially responsible". In 1925 the American state of Connecticut did precisely this by introducing legislation "requiring drivers to prove ability to respond in damages for judgements rendered against them"[16]. The reason behind this legislation was apparently that if injurers really did have an obligation to compensate their victims for their losses, then people should not be permitted to place themselves in the position of becoming an injurer unless they could satisfy their compensatory obligations[17]. After all, we do not allow minors to enter into legally binding contracts because they are not able to fulfil their financial (and other) obligations, so shouldn't we likewise disallow people to place themselves in a position where they may not be able to meet their compensatory obligations to their victims?

If we agree that injurers do have an obligation to compensate their victims, then it seems inevitable that every driver should take whatever steps are necessary (within reason) to ensure that they can meet this obligation. How each individual does this is their own business - some may choose to put down a security deposit with the local traffic authority, whilst others may take out TPPI. But if an obligation to compensate does exist, then in light of the availability of relatively inexpensive TPPI, nobody should be allowed to have an excuse for why they couldn't compensate their victims in the event of an accident. It seems irresponsible to take to the roads without TPPI because apart from a few wealthy individuals, most people could not afford to compensate their victims out of their own personal funds in the event of a serious accident. If one recognises that they might fail to meet some duty, and there exists a cost-effective means of ensuring that this duty can be met, then it would seem flippant and irresponsible to ignore this means of ensuring that the duty is met. In light of these arguments, it would appear that most people should be thankful for the availability of relatively inexpensive TPPI, because without it they may not have sufficient funds to do the right thing and compensate their victims in the event of an accident.

Interlude

The first part of this paper argued that faulty injurers do have an obligation to compensate their victims for their losses, and in light of this obligation, that responsible drivers should therefore take out TPPI in order to ensure that they can meet this obligation. According to the above arguments, the relationship between TPPI and 'taking responsibility' is contingent. Firstly, the requirement to take out TPPI is contingent on whether injurers do in fact have an obligation to compensate their victims. Secondly, it is contingent on whether TPPI is an *appropriate* way of ensuring that one can meet one's compensatory obligations in the event of an accident.

However because of the contingent nature of this relationship, if it can be shown that we are not justified in demanding that injurers compensate their victims for their losses, or that TPPI is not an appropriate method of ensuring that one can meet one's compensatory obligations, then the conclusion that drivers should take out TPPI in order to be responsible will no longer be justified. The remainder of this paper will try to show that the arguments presented above do not justify this contingent relationship between 'taking responsibility' and TPPI.

II

Two arguments were presented in support of why injurers should be the ones to bear the burden of compensating their victims. The first one argued that 'being liable for the consequences of our actions' is part of what it means to 'take responsibility', and the second one argued that a victim's

right to compensation creates a concomitant obligation in the injurer to provide that compensation. Let us examine each argument in turn.

Liability for the consequences of our actions ought not be part of the definition of 'taking responsibility'.

Although it was argued earlier that 'being liable for the consequences of our actions' is part of what it means to 'take responsibility', there are good reasons to reassess whether this is indeed what we *ought* to mean by 'taking responsibility'. Once again, let us consider some examples:

(i) you lose concentration whilst driving and your car ploughs into the back of a stationery car causing considerable damage to both cars.

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

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

(iv) same as above, except that the other car's owner placed their Stradivarius violin into their car's trunk. The trunk crumples in the rear-end collision, and the Stradivarius is reduced to splinters.

Without looking at each case individually, something that becomes apparent when we consider these examples side-by-side is that fairly trivial faults on the injurer's part can often lead to consequences that far outweigh the extent of the injurer's fault. The first reason for this is simply because the consequences of our actions are often the results of mere chance. Usually trivial faults such as losing concentration whilst driving will seldom result in any losses, but on other occasions luck is just not on our side[18]. Secondly, trivial faults can also lead to consequences that far outweigh the extent of the injurer's fault, because *victims* and not injurers are often in a better position to lower the extent of the losses. After all, if only the Rolls Royce Silver Shadow driver had instead driven a cheap car, then the extent of the losses (and hence our liability for compensation) would have been minimal, but because they drove an expensive car, our lapse in concentration resulted in a huge loss.

It is a fact of life that people's actions sometimes result in accidental losses; however the *extent* of those losses is no more determined by those people's actions, than it is by chance or by other people's choices. However since the consequences of people's actions are just as much determined by chance and by other people's choices, as they are by their own choices, it would seem unfair to expect injurers to be liable for all the consequences of their actions. Being liable for the consequences of our actions ought not be part of what it means to 'take responsibility' because the consequences of our actions are too often beyond our control, and nobody should be held liable for things which are beyond their control. If, in spite of this argument, we still wish to maintain that liability for accidental losses should be what is meant by 'taking responsibility', then it should come as no surprise when we find that people shrink away from taking responsibility in a wide range of circumstances, because there may simply be too much at stake in taking responsibility.

Considerations of retribution do not justify placing the concomitant obligation to compensate onto injurers.

The second argument in support of the existence of a compensatory obligation argued on deontological grounds that a victim's right to compensation creates a concomitant duty in the injurer to provide that compensation. Assuming that victims do in fact have such compensatory rights, this argument was then supported by a further two arguments. The first supporting argument drew on considerations of retributive justice, while the second supporting argument drew on considerations of deterrence to justify why the concomitant duty to compensate ought to fall specifically onto injurers. How convincing are these arguments?

To begin, it should be noted that when a retributivist says that principles of retributive justice dictate that those deserving of punishment ought to be punished, what is implicit in this statement is that the conduct deserving of punishment should be *wrongful* in some sense[19] because it would After all be unjust to punish conduct that is not wrongful. Thus in order to be justified in placing the concomitant compensatory obligation onto injurers, an injurer's conduct must be faulty in a moral sense. So the question which now arises is whether the faulty conduct which we ascribe to accidental injurers is faulty in the right sense?

Jules Coleman argues that the reason that a faulty injurer's conduct is not necessarily deserving of punishment is because the failings involved in accidents are seldom specifically moral ones[20]. Whilst failing to tell the truth and failing to meet one's obligations are probably moral failings, failing to use the indicator when changing lanes and failing to check the rear and side vision mirrors are not moral failings. Coleman writes:

> "Imputations of moral culpability are distinguishable from all other ascriptions of fault by the fact that the standard the act fails to satisfy must be a `moral' standard. We do not, after all, judge someone as fitting of moral blame for his failings, even those which are his fault, unless they are moral shortcomings. Baseball players are not generally morally at fault for their fumbles, even when they are the result of personal carelessness, inattentiveness, or negligence. Such actors may be liable to allegations of incompetence or inadequacy as well as to `demerits' stamped indelibly on the appropriate records. They are not, however, ordinarily the objects of peer-group expressions of moral indignation, nor do they, themselves, generally experience remorse, shame, or guilt for their negligent bumblings. These incompetencies in the end simply do not suggest any moral inadequacy."[21]

This point can be further strengthened by taking a brief look at the distinction between criminal law and torts. Although in criminal cases accusations of fault are often moral ones requiring proof of *mens rea*, of a guilty mind, thus giving proper rise to retributive considerations, in torts accusations of fault do not carry with them the same moral overtones. Since proof of *mens rea* is not required to make accusations of fault stick in cases of tortious accidental losses, retributive considerations therefore do not apply in this context because the moral element is simply absent in an accidental injurer's faulty conduct[22].

The second reason why an accidental injurer's faulty conduct is not deserving of punishment is because ascriptions of fault are not based on subjective, but on objective criteria - that is, it is not relevant whether the standard which the injurer has failed to achieve was one which they *as individuals* could have been expected to achieve[23]. If ascriptions of fault were based on subjective criteria, then in reply to an accusation of negligence, for example (where negligence is the failure to do something which one should have done), an injurer could defend themselves by giving an excuse. They could point out that because of their particular individual traits, they can not be

expected to have done whatever it is that they were supposed to have done, and hence that they were therefore not negligent[24].

However although *justifications* may be offered in defence to an accusation of negligence, because they aim to show that the conduct was not in fact wrongful given the circumstances, *excuses* are not an acceptable form of defence to the accusation of negligence[25]. Ascriptions of fault are based upon objective criteria, defeasible only by justifications, because what comfort is it to a victim to hear that they will not be compensated for their losses because their injurer could not have helped to injure them because of some personal failing for which they are not to be blamed[26]. However since ascriptions of fault are based on objective and not subjective criteria, a faulty injurer does not necessarily fail to meet a standard which they could have met, and hence their fault is not necessarily of the moral variety and is thus not deserving of punishment.

If the concomitant obligation to compensate victims should in fact fall onto injurers, then this can not be so because of retributive justice. In the sort of cases which we are concerned with here - in cases of accidental losses - the injurer's fault is not usually of the moral variety, and hence they do not deserve to be punished for their faulty conduct.

But even when an injurer's fault is of the moral variety (such as might be the case when an injurer is accused of recklessness[27] rather than negligence), the *extent* of punishment dealt out by making injurers liable for the consequences of their actions still poses a problem. Since trivial faults often result in seriously burdensome losses, a person whose extent of moral fault was only small could end up being punished not in proportion to the wrongfulness of their conduct, but rather in proportion to the accidental amount of losses caused[28]. Now surely, if we are to punish those who deserve punishment, the level of punishment should be a deserved level[29], and not one selected arbitrarily by chance or by the victims' choices.

To push this point a bit further, consider the fact that if the extent of punishment was determined by the consequences of people's actions and not by their inherent moral blameworthiness, then we would not punish attempted (but unsuccessful) crimes because the consequences needed to justify the punishment would not actually have occurred. The fact that we do punish attempted crimes is evidence that we believe that the degree of punishment ought to reflect the degree of wrongfulness of the injurer's actions, and this simply can't be determined by the mere consequences of their actions since such consequences are by-and-large the results of chance and of other people's choices.

The final reason why appeals to retributive justice can not justify placing the concomitant compensatory obligation onto injurers, is suggested by the availability of TPPI. If the reason that the concomitant obligation to compensate fell on injurers was because injurers deserve to be punished for their faulty conduct, then wouldn't it be self-defeating to allow people to take out TPPI? Since people with insurance do not compensate their victims out of their own personal funds, but rather the insurer compensates the victims on their behalf, by allowing people to take out TPPI we would effectively allow injurers to buy themselves out of deserved punishment; it would not be dissimilar to buying the services of a 'hired fall guy' to sit our prison sentence for us. However since we do not allow people to appoint proxies to sit their prison sentences (or indeed other just punishments) on their behalf, neither should we allow people to buy their way out of their liability for compensation. If it is objected that the analogy being drawn here between the criminal law and torts can not be drawn, then it will have to be conceded that the law of torts does not principally aim at the injurer's punishment but rather at the victim's compensation. The fact that we do offer insurance is a *prima-facie* reason to doubt that considerations of retributive justice can give support to the deontological argument in support of placing compensatory obligations onto injurers.

Considerations of deterrence do not justify placing concomitant obligation to compensate onto injurers.

But what about the deterrence argument; can the aim or deterrence be used to justify placing the concomitant compensatory obligation onto injurers? It is useful to see the deterrence argument as an instance of an economic analysis of Law. Without plunging into an exposition or a long discussion of the main works in this area, broadly speaking economic analyses of Law generally argue that the aim of the Law is not justice in the traditional sense, but rather that the law ought to deter people from behaving in a manner which results in economically inefficient distributions of resources, where efficiency is defined in Paretian terms[30]. Specifically, the deterrence argument says that the reason that the concomitant compensatory obligation should be placed on faulty injurers is because doing so provides the best way to avoid inefficient distributions of resources. Unfortunately, this argument is not convincing for two reasons.

The first reason why this argument does not support placing the concomitant compensatory obligation onto injurers, is because the aim of deterrence is not necessarily best achieved by targeting injurers. If the aim of deterrence is to reduce the number and cost of accidents, then the best way to do this might actually be to make someone other than the injurer liable for the victims' compensation. For example, it may be better to make local councils liable for certain types of accidents, because doing this will provide councillors with an incentive to embark on such initiatives as lowering speed limits in problem areas, installing traffic islands, round-abouts and traffic lights, all of which may more effectively and efficiently reduce the number and cost of accidents. Another example which demonstrates that the aims of deterrence are often better met by targeting somebody other than the injurer is WorkCover, the state operated compulsory employee insurance scheme that covers employees for work related accidents on a no fault basis. Part of the rationale behind such schemes is that since the best way to reduce the number of work related accidents is to make employers liable for their employees' accidents, because this provides an incentive for employers to create a safe working environment and to enforce good work practices amongst their employees, employees are therefore compensated by their employers through the WorkCover system for work related accidents even when they were to blame for their own misfortune. Structural changes are often better able to achieve the aim of lowering accident numbers and costs, and hence if the aim of deterrence is as suggested (ie. to reduce the number and cost of accidents), then it is not necessarily the case that the concomitant compensatory obligation should be placed on injurers.

But even if it was decided that systems of vicarious liability such as WorkCover were unfair, it would still not be a forgone conclusion that injurers should be deterred from their injurious conduct with the threat of liability for their victims' losses. The reason for this is because making injurers liable for their victims' losses is only one of a number of ways to give prospective injurers the incentive to alter their risky behaviour. For example, other ways to give prospective injurers such an incentive could include the imposition of stiff penal fines for risky or loss producing conduct or (more specifically to the car accident example) threatening risky drivers with suspension and loss of their drivers' licence. Had the threat of liability been the only method of giving injurers an incentive to respect their duty of care, then the deterrence argument might have supported placing the concomitant compensatory obligation onto injurers. But without supporting arguments to show why this is the best of all the alternatives, we are certainly not forced to accept that this is the best way of achieving the aim of deterrence.

To make matters worse, there is one very good reason why making injurers liable for their victims' compensation is not a good way to deter them from risky or injurious conduct. If our aim was indeed to deter injurers from loss causing conduct, then shouldn't we ensure that injurers will not be able to avoid the unpleasant consequences that their risky or loss causing conduct would bring upon them? After all, the strength behind deterrence lies in the assumption that since people wish to avoid

unpleasant consequences, that they will therefore abstain from behaviour which brings those consequences upon them. However by offering TPPI, injurers *can* avoid the unpleasant consequences that causing losses to others would bring upon them had they not been insured, because instead of having to pay for their victims' compensation out of their personal funds, the insurer will compensate their victims on their behalf. If deterrence was indeed our aim, then it would make more sense to either ban TPPI, or else for the unpleasant consequences to take the form of stiff penal fines or suspensions and loss of drivers' licenses (as was suggested earlier), because these types of penalties are uninsurable and hence not avoidable by the injurer. The availability of TPPI again provides a *prima facie* reason for why we are unlikely to justify making injurers liable for their victims' losses on grounds of deterrence.

This brings us to the conclusion that the aim of deterrence does not provide a good justification for placing the concomitant compensatory obligation onto injurers. The reasons for this are (i) because the best person to target the liability at is not necessarily the injurer, (ii) because liability for victim's losses is only one of a number of ways of achieving the aim of deterrence, and (iii) because in light of the availability of TPPI, making injurers liable for their victims' losses would not achieve the aim of deterrence anyway.

The lessons to be learnt from TPPI.

The second part of this paper began by pointing out the contingent nature of the relationship between TPPI and responsibility. It was suggested that if it could be shown that either injurers should not have the obligation to compensate their victims for their losses, or that TPPI was not an appropriate way to ensure that one can meet this obligation in the event of an accident, then taking out TPPI should not be required of responsible drivers. It was then argued that injurers should not be forced to compensate their victims because 'being liable for the consequences of our actions' ought not be part of what it means to 'take responsibility', and because our victims' right to compensation (if such a right does exist) does not create a concomitant duty in injurers to provide that compensation. In light of this we therefore do not have to take out TPPI in order to do the responsible thing. Furthermore, even if it had been the case that injurers should compensate their victims for their accidental losses, then it would still not follow that anyone ought to take out TPPI, because doing so would either frustrate the aims of deterrence or else it would frustrate the aims of retributive justice.

[1] Information obtained from VicRoads Internet Site, `http://www.vicroads.vic.gov.au/` using the CrashStats Java-based utility. For brevity, the term 'loss' will be used to refer to both the costs associated with and arising from injuries as well as to damage to property, and further clarifications will be provided as required.

[2] It is acknowledged that accidents can also go hand-in-hand with *gains*, such as (for example) accidentally stumbling upon a gold nugget while camping. However accidental gains will not be discussed, because their distribution appears to create different dilemmas to those created by the apportionment of accidental losses.

[3] The terms 'victim' and 'injurer' refer respectively to the party that suffered a loss and the party that inflicted this loss. The term 'injurer' is not intended to suggest 'bodily injury' and, for present purposes, is defined in a topic-neutral manner (ie. that person *whomever they might be*) to avoid rather troublesome questions raised by considerations such as *proximity*, which are more appropriately dealt with in Legal text books.

[4] Jonathan Glover, *Responsibility*, London, Routledge & Kegan Paul Ltd., 1970, p 19.

[5] Greg Pynt, 'Recent Developments in Liability Law - A Simple Plan', *Insurance Law Journal*, Vol 11:1, Sydney, Butterworths, 1999, p 31.

[6] Jules Coleman summarises Joel Feinberg by saying that "there is a principle of weak retributive justice that holds that if a loss must fall on either of two parties, one of whom is at fault in causing it and the other of whom is faultless, [then] the party at fault ought to bear the loss, all other things being equal". Jules Coleman, 'The morality of strict tort liability', in Jules Coleman (ed.), *Markets, Morals and the Law*, Cambridge, Cambridge University Press, 1988, p 181 (henceforth cited as Coleman[1]).

[7] It is a consequence of Feinberg's principle of weak retributive justice that it would also be wrong for innocent third parties to be burdened with such losses.

[8] Please note that no arguments have been presented for the conclusion that victims do actually have a right to be compensated; this should be treated as an assumption. It would perhaps be more appropriate to use the subjunctive mood and say that if such a right were to exist, then it could be argued that this right would create a concomitant duty which would then have to fall on someone.

[9] Thomson examines a similar argument, but in the context of the anti-abortion debate. Judith Jarvis Thomson, 'A Defence of Abortion', in John Arthur (ed), *Morality and Moral Controversies*, New Jersey, Prentice-Hall, 1981, p 190-191.

[10] In 'A Defence of Abortion' Thomson argued that although a fetus may indeed have a right to life, that this right should not be seen as imposing a special duty on anyone in particular. Thomson starts out by drawing an analogy between the dependence of an unborn fetus on its mother-to-be, and the dependence of a sick violinist on a kidnapped and hospitalised person whose kidneys are then used against their will to cure the violinist. She then uses this analogy to argue that since the violinist's right to life should not create a special duty in the kidnapped person to fulfill that right, that neither should the fetus' right to life create a special duty in the mother-to-be to carry that fetus to term. Ibid., p 191. The conclusion to be drawn from the above for the purpose of the present argument is that even if rights could only be understood in the context of concomitant obligations, then this would still do little to clarify whom those obligations should fall onto, which is why further arguments are needed to this effect.

[11] For a brief introduction to the concept of retributive justice please see Jonathan Glover's discussion in *Responsibility*. Glover, op.cit., p 72, 144-5. Alternately, Murphy and Coleman also provide a clear discussion of this concept. Jeffrie Murphy & Jules Coleman, *Philosophy of Law: An Introduction to Jurisprudence*, Colorado, Westview Press, 1990, p120-1 (henceforth cited as Murphy & Coleman).

[12] Since retribution is based on the notion of desert, the administration of punishment is therefore needed to restore "moral equilibrium". Questions concerning whether any other good will come of such punishment are hence considered inconsequentionl by proponents of retributive justice. For these reasons retribution is usually seen as a deontological position, and it is often contrasted with deterrence. John Kekes, entry on 'desert', in Ted Honderich (ed.), *The Oxford Companion to Philosophy*, Oxford, Oxford University Press, 1995, p. 193. For contrast, please refer to Glover who suggests a non-Utilitarian but nevertheless a consequentialist angle on retribution. Glover suggests that retribution could be justified on grounds that the injurer may benefit from their own punishment because it will improve them, or because to deny them punishment would be to deny them the recognition that they are responsible agents. Glover, op.cit., p 152-5. The latter point is, I believe, frought with the sort of ambiguity about what is meant by the term 'taking responsibility' which this paper is meant to address.

[13] As it is suggested in the previous note, deterrence is usually seen as a consequentialist aim. Murphy & Coleman, op.cit., p 117-120.

[14] This figure, obtained from the VicRoads Internet Site, represents the percentage of accidents that human conduct was a significant contributor in. It is assumed that the role of human conduct would be important in other sorts of acidents as well. Either way, the point being made here is merely that in those accidents where human conduct is a significant

factor, it should be possible to reduce the number of accidents by using various deterrent strategies. http://www.vicroads.vic.gov.au/iconlinks/site_roadsafe.htm.

[15] François Ewald, 'Insurance and risk', in Graham Burchell, Colin Gordon & Peter Miller (eds.), *The Foucault Effect: Studies in Governmentality*, London, Harvester Wheatsheaf, 1991, p 207.

[16] Clifford C Kasdorf, 'Protection Against The Uninsured Motorist', *Insurance Counsel Journal*, Wisconsin, International Association of Insurance Counsel, 1964, p 675.

[17] This interpretation of the *raison d'être* for this legislation is also confirmed by Professor Craig Brown's much more recent analysis of the changing traffic accident laws in Ontario, Canada. Professor Brown's paper also describes the path, taken by a number of American and Canadian provinces, which has led to the introduction of laws requiring drivers to take out *compulsory* TPPI, as well as the implementation of a comprehensive no-fault system in Ontario. Professor Craig Brown, 'No-fault Car Insurance in Ontario: The Latest Stop on a Long Journey', *Insurance Law Journal*, Vol 3:1**,** Sydney, Butterworths, 1990**,** p 18-33.

[18] These examples are intended to point out that it is nearly always a matter of blind luck whether, in the event of an accident, we end up crashing into a cheap car or an expensive car.

[19] Jules Coleman, 'On the Moral Argument for the Fault System', *The Journal of Philosophy*, New York, Comumbia University, 1974, p 475 (henceforth cited as Coleman[2]).

[20] Ibid., p 475-7.

[21] Ibid., p 476-7.

[22] Accidental losses that result from recklessness are a boundary example. See note 27 for the distinction between negligence and recklessness.

[23] Coleman[2], op.cit., p 478-9.

[24] This argument would apparently be based upon the premise that nobody should be obliged to do that which they can not possibly do. Also see note 26.

[25] Coleman[2], op.cit., p 480.

[26] On the other hand, Glover argues that "the principle of 'retribution in distribution' ... [prescribes that] legal punishment may only be given to an offender, and then only for an offence which he could help committing". Glover, op.cit., p 161. This principle is however in conflict with the objective criteria which the standard of the reasonable person is based upon.

[27] The main difference between negligence and recklessness is the absence of the knowledge component in the former. Whilst a negligent person fails to act on something that they should have known but didn't, the reckless person fails to act on something that they did know.

[28] The problem here can take one of two forms. An injurer might not receive enough punishment if they just happened to be lucky enough such that their recklessness resulted in only minor losses, or they can receive too much punishment if they were unlucky enough such that their recklessness resulted in extensive losses. A similar point is also made by Murphy and Coleman in their analysis of the role of the private law. Murphy & Coleman, op.cit., p 153-4.

[29] Glover, op.cit., p 149.

[30] Jules Coleman, 'Rethinking the theory of legal rights', in Jules Coleman (ed.), *Markets, Morals and the Law*, Cambridge, Cambridge University Press, 1988, p 28-63.