

Compensation for Mere Exposure to Risk

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I. Introduction

It could be argued that tort law is failing, and arguably an example of this failure is the recent public liability and insurance ('PL&I') crisis. A number of solutions have been proposed, but ultimately the chosen solution should address whatever we take to be the cause of this failure.

On one account, the PL&I crisis is a result of an *unwarranted expansion* of the scope of tort law. Proponents of this position sometimes argue that the duty of care owed by defendants to plaintiffs has expanded beyond reasonable levels, such that parties who were not really responsible for another's misfortune are successfully sued, while those who really were to blame get away without taking any responsibility.¹ However people should take responsibility for their actions, and the only likely consequence of allowing them to shirk it is that they and others will be less likely to exercise due care in the future, since the deterrents of liability and of no compensation for accidentally self-imposed losses will not be there. Others also argue that this expansion is not warranted because it is inappropriately fuelled by 'deep pocket' considerations rather than by considerations of fault. They argue that the presence of liability insurance sways the judiciary to award damages against defendants since they know that insurers, and not the defendant personally, will pay for it in the end anyway.² But although it may seem that no *real* person has to bear these burdens when they are imposed onto insurers, in reality all of society bears them collectively when insurers are forced to hike their premiums to cover these increasing damages payments. In any case, it seems unfair to force insurers to cover

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¹ See, eg, Greg Pynt, 'Recent Developments in Liability Law — A Simple Plan' (1999) 11 *Insurance Law Journal* 26.

² See Michael Mills for an in-depth exploration of this type of account. Michael Mills, 'Insurance and Professional Liability — The Trend of Uncertainty Or: Negligence and the High Court — A Practitioner's Perspective' (2000) 12 *Insurance Law Journal* 25. Martin Davies also explores the role that liability insurance has played, and continues to play, in defining the concept of a duty of care, and in the practice of imposing liability on defendants. Martin Davies, 'The End of the Affair: Duty of Care and Liability Insurance' (1989) 9 *Legal Studies* 67.

these costs simply because they can afford to do so. If such an expansion is indeed the cause of the PL&I crisis, then a *contraction* of the scope of tort liability, and a pious return to the fault principle, might remedy the situation.

However it could also be argued that *inadequate deterrence* is the cause of this crisis. On this account the problem would lie not with the tort system's continued unwarranted expansion, but in the fact that defendants really have been too careless. If prospective injurers were appropriately deterred from engaging in unnecessarily risky activities, then fewer accidents would ever occur in the first place, and this would reduce the need for litigation at its very source. If we take this to be the cause of tort law's failure then our solution should aim to *improve deterrence*.

Glen Robinson has argued that improved deterrence could be achieved if plaintiffs were allowed to sue defendants for wrongful exposure to ongoing risks of future harm, even in the absence of currently materialized losses.³ He argues

that at least in toxic injury type cases the tortious creation of risk [should be seen as] an appropriate basis of liability, with damages being assessed according to the value of the risk, as an alternative to forcing risk victims to abide the outcome of the event and seek damages only if and when harm materializes.⁴

In a sense, Robinson wishes to treat newly-acquired wrongful risks as de-facto wrongful losses, and these are what would be compensated in liability for risk creation ('LFRC') cases. Robinson argues that if the extent of damages were fixed to the extent of risk exposure, *all* detected unreasonable risk creators would be forced to bear the costs of their activities, rather than

³ Glen Robinson, 'Risk, Causation, and Harm' in Christopher Morris and Raymond Frey (eds), *Liability and Responsibility: Essays in Law and Morals* (1991) 317. The significance of the word 'ongoing' is that Robinson does not want damages to be awarded for *all* wrongful risk exposures (eg once we know that the risk will not materialize into harm) but only when the risk of future harm is still an ongoing threat. Furthermore, such damages would not be intended to compensate, for example, for the cost of monitoring the plaintiff's state of health after the risk exposure, or stress and anxiety resulting from knowledge that they may suffer some harm in the future, since these are *actual losses* and not mere risks. On this last point see, eg, Arthur Ripstein, 'A Fair Division of Risks' in Arthur Ripstein (ed), *Equality, Responsibility, and the Law* (1999) 48 (especially 75–7).

⁴ Robinson, above n 3, 325. The sort of cases that Robinson's *liability for risk creation* ('LFRC') would apply to might include exposure to asbestos, the anti-miscarriage drug diethylstilbestrol ('DES') which caused cancer in some daughters of the women who took it during pregnancy, silicone breast implants, crude oil spills, environmental contamination from toxic waste, and other relevantly similar cases.

only those who could be found responsible for another's injuries 'on the balance of probabilities'.⁵ The incidence of accidents should decrease as a result of improved deterrence, reduce the 'suing fest', and so resolve the PL&I crisis. So whilst the first solution involves contracting the scope of tort liability, Robinson's solution involves an *expansion* of its scope.

However Robinson acknowledges that LFRC seems prima-facie incompatible with current tort principles which in the least require the presence of plaintiff losses, defendant fault, and causation to be established before making defendants liable for plaintiffs' compensation.⁶ Since losses would be absent in LFRC cases by definition, the first evidentiary requirement would always be frustrated, and in its absence proof of defendant fault and causation would also seem scant.⁷ If such an expansion of tort liability were not supported by current tort principles then it would be no better than proposals to switch accident law across to no-fault, since both solutions would require comprehensive legal reform.⁸ However Robinson argues that the above three evidentiary requirements could be met in LFRC cases to the same extent that they are met in other currently accepted cases, and hence that his solution would therefore be preferable to no-fault solutions as it would only require incremental but not comprehensive legal reform.

Although I believe that actual losses should be present before allowing plaintiffs to seek compensation, I will not present a positive argument for this conclusion. My aim in this paper is not to debate the relative merits of Robinson's solution as compared to no-fault solutions, nor to determine which account of the cause of the PL&I crisis is closer to the truth, but rather to find out whether Robinson's solution would indeed require less radical legal reform than, for example, proposed no-fault solutions.⁹ I will argue that Robinson fails to show that current tort

⁵ See Scott Mann for an excellent discussion of some serious problems associated with reliance on standards of proof in tort law that make reference to the balance of probabilities. Scott Mann, 'Science, Corporations and the Law' (2001) 26 *Alternative Law Journal* 289.

⁶ For brevity I shall refer to these as three *evidentiary requirements* of tort liability.

⁷ What would a defendant be at fault for if nobody suffered a loss as a result of their conduct, and (more importantly) how could causation ever be established?

⁸ Robinson, above n 3, 344–6. Robinson's main reason for rejecting no-fault solutions is that they require 'comprehensive' tort law reform (and hence upheaval and uncertainty), and his aim is to offer an alternative that would only require 'incremental' reforms.

⁹ I will take it for granted that a shift to no-fault would create upheaval and uncertainty. The question of whether the advantages of no-fault outweigh these disadvantages will not be addressed.

principles would support his proposed solution, and hence that his solution is at best on an even footing with no-fault solutions since both would require comprehensive legal reform.

II. Robinson's argument for LFRC from precedents

Robinson uses two strategies to defend the legitimacy of expanding the scope of tort liability to include LFRC. His first strategy denies that current tort principles really do require the satisfaction of the first evidentiary requirement to justify imposing liability, and his second strategy argues that, contrary to initial appearances, the latter two requirements can in fact be met in LFRC cases.

A. Proof of actual losses is not required to justify the imposition of liability

Firstly, Robinson points out that when plaintiffs receive *lump sum compensation payments*, a portion of those damages is for anticipated future losses not for currently present losses. Lump sum payments inherently force us to make guesses about what future losses may eventuate, but the fact is that what is expected may never materialize. For example, plaintiffs may die prematurely for an unrelated reason, or on a more optimistic note they may recover; nevertheless this does not prevent us from awarding damages. So since the present tort system already compensates for non-existing but probable or expected losses, it could also compensate for probable losses in LFRC cases.¹⁰

Furthermore, Robinson also draws attention to *lost chance cases* which usually involve the following kind of scenario:

At time t_1 plaintiff (patient) had a chance of recovery from their malady.

At time t_2 defendant (doctor/surgeon) treats plaintiff for their malady.

Because of the treatment, by the time t_3 comes around, plaintiff no longer has that chance of recovery — they lost it as a result of the medical treatment.

Judges award damages to plaintiffs for loss of their chance of recovery.

Here Robinson argues that since '[t]ortious exposure to risk is ... the obverse of ... lost chance cases, and the problems of causal determination

¹⁰ Robinson, above n 3, 323–4. Also see Peter Cane's discussion of the problems surrounding lump sum payments. Peter Cane, 'Damages for Personal Injury and Death' in Peter Cane (ed), *Atiyah's Accidents, Compensation and the Law* (6th ed, 1999) 108.

and valuation are virtually identical', that we should treat both cases alike.¹¹ If we are prepared to compensate people for the *loss of a chance* of something good, then we should also compensate those who *gain a chance* of something bad. Since both chances are equally tangible or intangible, and plaintiffs are already compensated for lost chances, they could also be compensated for newly acquired chances. Robinson concludes that contrary to initial appearances tort law does not require plaintiffs to sustain actual losses to warrant the imposition of liability, and hence that we should not suppose that LFRC is incompatible with current tort principles merely on account of the fact that plaintiffs would sue in the absence of having sustained materialized losses.¹²

B. Fault could be established in LFRC cases

Secondly, Robinson points to the *criterion of fault*. He argues that a standard of care is breached not when a person causes a loss to another, but rather when they take unreasonable risks. Although judgments of fault are, of practical necessity, made after the occurrence of loss-causing events, the judgments themselves are not based on an ex-post but on an ex-ante perspective. Although '[t]he trier of fact may ... be aided by an ex post perspective[, t]hat perspective ... ought not to be used to distort the nature of the risk as it (should have) appeared to the parties ... at the time of its creation'.¹³ So on Robinson's account, judgments of fault do not take into consideration the presence, extent or nature of losses suffered by plaintiffs, but they are made on grounds of the riskiness of that action — whether it was unreasonably risky or acceptably risky. This riskiness is present irrespective of whether losses actually eventuate, and so those who expose others to unreasonable risks are just as much at fault as those who do so but are also unfortunate enough to have caused losses. As long as defendants create unreasonable risk, they could rightfully be considered to have been at fault, and hence we can not suppose that defendant fault would be absent in LFRC cases.

C. Causation could be established in LFRC cases

Finally, Robinson argues that although it is usually assumed that '[t]ort law is deterministic in its view of causal relationships', and thus that proof of causation requires evidence of a 'fully determined ... relationship between

¹¹ Robinson, above n 3, 324.

¹² Joseph King's and Dov Apfel's discussion suggests that they too would endorse Robinson's analysis of the sort of reasoning that is used in lost chance cases. Joseph King, 'Causation, Valuation, and Chance in Personal Injury Torts Involving Preexisting Conditions and Future Consequences' (1981) 90 *Yale Law Journal* 1353. Dov Apfel, 'Loss of Chance in Obstetrical Cases' (1993) 29 *Trial* 48.

¹³ Robinson, above n 3, 323.

act and injury',¹⁴ distinctively different types of reasoning and evidentiary standard were used to settle the issue of causation in the following cases:

In *Sindell [v Abbott Labs]*, 26 Cal 3d 588 (Cal, 1980) plaintiff was injured by DES [diethylstilbestrol] taken by her mother but she could not establish the identity of the manufacturers that made the particular pills that caused the injury. The court held that liability should be apportioned among DES manufacturers in proportion to their share of the [DES] market.

...

In *Summers [v Tice]*, 33 Cal 2d 80 (Cal, 1948) plaintiff was injured by gunshot fired by one of two negligent hunters, but he could not prove which one fired the particular shot. The court held that he could recover against either or both hunters.¹⁵

In both cases there were a number of candidates, and for each candidate there was a certain probability (relative to our knowledge) that they had caused the plaintiff's losses, and liability was apportioned on grounds of those probabilities. What this suggests, according to Robinson, is that to establish causation in tort law one need not provide evidence of a fully determined relationship between act and injury, but only to establish the probability that the said defendant caused the plaintiff's loss.¹⁶ Thus given the way that the last evidentiary requirement was satisfied in these cases, Robinson argues that plaintiffs should also be allowed to use probabilistic reasoning and related probabilistic evidentiary standards to satisfy the third evidentiary requirement in LFRC cases. The last evidentiary requirement would only be difficult to satisfy in these cases if it could only be satisfied by the provision of deterministic evidence, but if probabilistic evidence were sufficient to establish causation then no such difficulty would arise in LFRC cases. Robinson concludes that plaintiffs should therefore be allowed to successfully sue defendants when it is only probable that the plaintiff will suffer a loss and not only when they have already suffered a tangible loss.

III. Rejection of Robinson's argument

Robinson argued that radical tort law reform would not be required to justify the introduction of LFRC because such cases would be compatible with current tort principles. Specifically, he argued that although it may initially seem that current tort principles require the satisfaction of three evidentiary requirements to justify the imposition of liability onto

¹⁴ Ibid 317.

¹⁵ Ibid 318, 319 n 5.

¹⁶ I shall refer to the former as 'deterministic evidence' and the latter as 'probabilistic evidence'.

defendants — proof of plaintiff losses, defendant fault, and causation — and that these requirements could not be met in LFRC cases, that in actual fact the first requirement was not always met in current run of the mill cases anyway, and that the second and third requirements could be satisfactorily met in LFRC cases. I will now argue that, contrary to Robinson's arguments, proof of defendant losses is present in lump sum payments and in lost chance cases, and that the reasoning used to establish causation in *Sindell*¹⁷ and *Summers*¹⁸ could not be used to establish causation in LFRC cases. Hence, irrespective of whether fault could be established in LFRC cases, the mere presence of fault in these cases would be insufficient to support Robinson's preferred solution, rather than a no-fault solution, because fault is only a necessary condition for the justification of imposing liability.

A. Competing accounts of lump sum payments and lost chance cases

Robinson argued that if the first evidentiary requirement (ie the presence of losses) was indeed a precondition of imposing liability under the present tort system, then nobody should receive compensation unless they have already sustained actual losses. However he then presented an account of what goes on in lump sum payments and in lost chance cases, on which plaintiffs were compensated despite the absence of actual losses. On his account, these were both counter examples to the first evidentiary requirement because a large portion of lump sum payments is usually intended to cover not currently materialized losses but expected future losses, and because plaintiffs are compensated in lost chance cases not for the loss of anything tangible but for the loss of a probabilistic entity (ie a chance). Given that, on this account, the current tort system compensates people in the absence of actual losses, Robinson concluded that this could not be a precondition of imposing liability, and hence that plaintiffs should not have to establish the existence of actual losses in LFRC cases either. Let me now explain why Robinson's account of these cases fails to show that the first evidentiary requirement is not a precondition of imposing liability under the present tort system.

On orthodox accounts neither of these cases would lack actual losses. Calculating costs of losses does indeed require careful consideration of the cost of living with that loss into the future as well as what it has cost up to the present, but this only shows that proper estimation must take future costs into consideration. Although the element of expectation is required to make proper estimates of the full cost of sustaining and living with those losses, this cost attaches like a price tag to currently present losses and not

¹⁷ *Sindell v Abbott Labs*, 26 Cal 3d 588 (Cal, 1980) ('*Sindell*').

¹⁸ *Summers v Tice*, 33 Cal 2d 80 (Cal, 1948) ('*Summers*').

to expected future losses. The difference between saying 'X is the likely cost of this loss' and 'Y is the cost of likely losses' is that in the former case X is the cost of a loss which does exist, whereas in the latter case Y is the cost of a loss that does not exist. Thus the difference between lump sum payments and LFRC cases is that lump sum payments compensate only for losses which currently exist, whereas LFRC cases would compensate for non-existent losses.

Secondly, the reason why something real would have been lost on an orthodox account of what goes on in lost chance cases is best explained by use of an example. Imagine yourself in a room with four walls and a door in each wall. Each door is either locked or unlocked, and behind most doors are hungry lions with a taste for human blood whereas behind one door is a passage to safety, however you do not know which door leads to safety. Now if initially only three of the four doors (including the safety door) were open, but I flicked a switch and locked the safety door, then in effect I would have ensured that some grief would come to you once you attempt to leave the room. However if instead I unlocked the remaining door behind which another hungry lion sat, then although there would now be a greater risk that you would make the wrong choice and walk through the wrong door and be eaten by a hungry lion, we could not say that I would have made this result inevitable.

By analogy, in lost chance cases a defendant's real action has a very real consequence of wiping out all other avenues — of closing all safety doors — such that no matter what, the plaintiff will now never recover. Although we can never really know if recovery would have occurred had the doctor or surgeon not intervened, what we do know for certain is that avenues of recovery which were open before are now closed as a result of the treatment — we now know that recovery will never occur. To completely lose a chance of something good is very different to gaining a chance of something bad happening in the future. Something significant happens when a person loses their only chance of something positive happening, which does not happen when they gain a chance of something unwanted coming about. In a sense, it could be argued that a different form of causation is present in the former case which is not present in the latter case because in the former case the defendant's action ensures that a loss will definitely occur, whereas in the latter case the defendant's actions do not seal the plaintiff's fate. What can be said, without getting entangled in the metaphysics of the difference in causation between these cases, is that real losses are present in lost chance cases because by losing an only chance of recovery it is not certain that mischief will come to the plaintiff, whereas

real losses would be absent in LFRC cases because to gain a chance of something bad happening does not make it certain that it will happen.¹⁹

Given that, on an orthodox account, actual losses were present in lump sum compensation and lost chance cases, are there any further reasons to prefer Robinson's accounts on which actual losses were absent? If such reasons exist, then Robinson fails to provide them, and I am not inclined to look for them either. As accounts go, both seem initially plausible, however since one of these accounts is incompatible with the orthodoxy, in the absence of further argument Robinson's accounts must be rejected. If Robinson wishes to tender his own accounts as counter examples to the claim that proof of actual losses is a precondition of imposing liability under the current tort system, then he must provide a better reason to prefer his account than its mere initial plausibility. Without such reasons Robinson's argument fails.

Hence, contrary to Robinson's assertion, tort law does require proof of actual losses to justify the imposition of liability. Such proof exists in lump sum payments because payment is made for the cost of actual losses that are present at the time of the legal action. Such proof also exists in lost chance cases because to lose an only chance of recovery is very different from gaining a chance of something bad happening. In both of these examples actual losses are sustained, and hence these are not counter examples to the first evidentiary requirement of tort liability.

B. The ontological status of risk ascriptions and wrongful losses

Robinson claimed that causation was established in *Summers* and *Sindell* not by the provision of what I had called deterministic evidence, but by the use of probabilistic reasoning and probabilistic evidence, and hence he argued that such evidence should be accepted in LFRC cases as well. In this section I will argue that the so-called probabilistic reasoning that was used in these cases was substantially and relevantly different from the sort of reasoning that would be used in LFRC cases, and hence that *Summers* and *Sindell* do not support LFRC either.

When Robinson says that *Summers* and *Sindell* both used probabilistic reasoning to establish causation, what he means is that a question mark hung above the cause of each of these losses to signify that although we knew that a loss was suffered in each case, we did not know who caused it. However the difference between these cases and LFRC cases is that in the latter the question mark would hang not above the defendant's

¹⁹ Richard Posner also argues along these same lines. Richard Posner, 'Lecture Two: The Common Law' in Richard Posner (ed), *Law and Legal Theory in England and America* (1996) 39 (especially 49–50).

actions, but above the plaintiff's losses to signify that we do not know if any losses will ever materialize. This difference is crucial because the presence of actual losses is epistemically advantageous in establishing causation. On the deterministic assumption that every effect must have a cause, if we can point to a loss then we can also say with certainty that something or someone must have caused it — that causation must have occurred. And although it may be difficult to determine who or what was the source of this causal agency, one thing that could not be doubted would be that causation had occurred. But how could causation ever be established in LFRC cases if evidence would be so thin in these cases that the effects could not even be pinned down? Whilst in *Sindell* and *Summers* the element of uncertainty attached to the attribution of causal agency to a particular party, in LFRC cases the element of uncertainty would attach to the very claim that causation had occurred, and this would make it particularly difficult for LFRC cases to meet the last evidentiary requirement.

Nevertheless, Robinson might deny that question marks would hang above the effects in LFRC cases. For instance, he might argue that not only could we point to definite causal agents and their unreasonably risky behaviour in LFRC cases, but we could also point to definite effects, namely that the plaintiffs were now at risk (eg of developing cancer) whereas before they did not have those risks. So, far from being unable to point to definite effects, the effects in LFRC cases would be precisely the increased levels of risk now hanging over the plaintiffs. Given that no question marks would hang above either the causes or the effects in LFRC cases, it would in fact appear that causation could be established with greater ease and certainty in LFRC cases than it was in *Summers* and *Sindell*.

Given Robinson's treatment of risk ascription claims as claims about de-facto losses — as similar to ontological claims about actual losses — and given that so much hangs on whether this treatment is appropriate, it is important to ask what is meant by such claims. How should risk ascriptions be understood?

The most charitable way to interpret risk ascriptions, given their alleged ontological equivalence with actual losses, would be to treat them as claims that are made true by facts about the physical state of the world — possibly by physical changes in the plaintiff's body. The claim would be that when someone says, for example, 'There is now a 20 percent risk that I will develop incurable cancer as a result of your exposing me to that radioactive plutonium', that they would be saying something in the order of 'My body has undergone certain physical changes as a result of your exposing me to that radioactive plutonium, and 20 percent of people whose bodies undergo such changes also subsequently develop incurable cancer'. If risk ascriptions were interpreted in this manner then wouldn't it be

appropriate to treat risk exposures as de-facto losses — as ontological claims about physical changes that took place in the world as a result of the defendant's actions, which are indeed on par with claims about actual losses?

Although this interpretation of risk ascriptions does seem to warrant treating them as ontological claims, it fails to support Robinson's argument in another respect. When it is suggested that tort principles require proof of causation, what is sought is not just proof that causation of any sort whatsoever had occurred, but rather we want proof that causation of something wrongful and hence compensable had taken place. If *Sindell* had established that her mother took DES during her pregnancy and that this led to some changes in her own body, but nobody thought those changes wrongful, then she would not have been compensated. If Summers had established that one of the defendants' bullets caused some changes in him, but nobody thought those changes wrongful, then he too would not have been compensated. Thus similarly, if our fictitious character established that their exposure to plutonium led to some physical changes in their body, but they could not also show that those changes were actually wrongful, then they too should not be compensated for their risk exposure because we would not yet know if those changes were wrongful and hence compensable. Something that was implicit in *Sindell* and *Summers* was that the plaintiffs' losses were *actually wrongful*, and this was why they were compensated. But if victims of risk exposures also want to be compensated then they must show explicitly that their exposure is actually wrongful too because this will not be immediately obvious.

Since the wrongfulness of risk exposures attaches either to the eventual future outcome, or to the negligent nature of the defendant's actions, risk exposure victims would face an uphill battle trying to show that their bodily changes were wrongful in themselves. To show that these changes were wrongful in themselves, risk-exposed parties would have to know for certain that the changes would lead to particularized harms, however this knowledge is precisely what they do not have. On the other hand, in pointing to defendants' negligence, they would only show that defendants had done something wrong, and this would perhaps justify punishing the defendant, but they would not have shown that they had themselves suffered anything wrongful and hence compensable. At best such claims for compensation would be grounded in the defendant's creation of *uncertainty*, but this would make risk ascriptions into *epistemic* claims, and these are not on par with ontological claims about actual losses. The charitable interpretation of risk ascriptions would therefore ultimately reduce to an epistemic claim about uncertainty, and this can not support Robinson's argument because whilst the losses in *Sindell* and *Summers* were obviously wrongful and hence compensable, the de-facto losses in

LFRC cases would not be wrongful in themselves and hence they would not be compensable.

The less charitable interpretation of risk ascriptions is to treat them as expressions of statistical probability which profess to make no ontological claim whatsoever — to treat them as expressions of epistemic uncertainty. On this interpretation the aforementioned utterance would be understood as saying something like ‘I have no idea whether your exposing me to that radioactive plutonium has actually had the slightest physical impact on me — for all I know it has not — but I know that in 20 percent of all cases of such exposure there are physical changes which invariably lead to the development of incurable cancer’. However given that this interpretation is essentially the same as what the charitable interpretation reduced to, I will conclude that it would not justify treating LFRC cases as similar to *Sindell* and *Summers* either.

Thus irrespective of how risk ascriptions are interpreted, they will not bestow the same epistemic advantage in establishing causation as is bestowed by the presence of actual losses. The presence of effects establishes that causation must have occurred, and in their absence or when they are not visible it is not clear that causation took place. This means that the sort of probabilistic reasoning that was used in *Sindell* and *Summers* can not be used to establish causation in LFRC cases.

C. Fault is not sufficient to justify the imposition of liability

Finally, irrespective of whether I agree with Robinson’s claim that fault could be located in LFRC cases, the satisfaction of the second evidentiary requirement is only necessary, but not sufficient, to justify the imposition of liability onto defendants. Thus since the other two evidentiary requirements could not be satisfied in LFRC cases, this kind of expansion of tort liability would not be justified on the success of this argument alone.

IV. Conclusion

This paper began by arguing that until we reach some conclusion regarding what has caused tort law’s recent problems, we will have little basis for choosing between alternative solutions. If we take these problems to be caused by an unwarranted expansion of the scope of tort liability, then a contraction of its scope, and perhaps even a partial replacement of accident law with a no-fault scheme, might appear attractive. On the other hand, if we take these problems to be caused by inadequate deterrence, then Robinson’s LFRC solution might seem more appropriate.

Robinson’s arguments for the compatibility of LFRC with current tort principles were then presented, and it was argued that unless they were successful then neither the no-fault nor the LFRC solution would be

preferable on grounds of how much upheaval each would create, since both would require comprehensive tort law reform.

I have argued that LFRC is incompatible with current tort principles, because irrespective of whether defendant fault could be established in LFRC cases, Robinson fails to show either that proof of actual losses is not required in current run of the mill tort cases, or that causation could be established in LFRC cases using the same sort of reasoning as is already used in other currently accepted cases. Thus, neither of these solutions is better than the other on account of how much upheaval and uncertainty it would create, since both would require comprehensive legal reform.