

Professor Patrick Atiyah
(1931–2018)

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I. INTRODUCTION

IT WAS MORE common in the past than it is today for legal scholars' interests to span multiple fields. This situation is no doubt due in large part to there being much less law in earlier times than there is at the present day. However, Patrick Atiyah's repertoire was nevertheless unusually diverse. He was a legal polymath whose expertise extended to tort law, contract law, legal history, general jurisprudence and legal institutions. Throughout his career, Atiyah drew profitably upon his great learning in various fields in aid of analyses that he advanced in other areas. Atiyah's writings were published between the mid-1950s and the late 1990s, although they were primarily produced prior to 1988, at which time Atiyah retired as Professor of English Law at the University of Oxford. Within the law of torts, his publications mainly concerned the personal injury context.

Atiyah's three principal publications regarding tort law are the books *Vicarious Liability in the Law of Torts*,¹ *Accidents, Compensation and the Law*,² and *The Damages Lottery*.³ This chapter examines the contribution of each of these works to scholarly thinking about tort law generally. However, it is convenient to say a few brief words about these texts by way of introduction. *Vicarious Liability in the Law of Torts*, which was published in 1967, was largely aimed at laying out the law regarding vicarious liability. Although it was thus mainly a work of doctrinal scholarship, one of its distinguishing features was the frequent recourse made in it to legal policy. Another distinctive characteristic

* William Twining provided me with several valuable insights regarding Atiyah's tort scholarship for which I am most grateful. I am also grateful to Václav Janeček and Harold Luntz for providing me with helpful reactions on drafts of this chapter. I am also indebted to Mengfei Ying for her careful research assistance.

¹ PS Atiyah, *Vicarious Liability in the Law of Torts* (London, Butterworths, 1967).

² PS Atiyah, *Accidents, Compensation and the Law* (London, Weidenfeld & Nicolson, 1970).

³ PS Atiyah, *The Damages Lottery* (Oxford, Hart Publishing, 1997).

is the extensive reference made to the law of other jurisdictions, especially that in the United States.

In 1970, Atiyah's path-breaking *Accidents, Compensation and the Law* was released. It offered a comprehensive survey of the many systems by which compensation could be recovered for personal injury and death resulting from accidents. In some ways, *Accidents, Compensation and the Law* was an extension of *Vicarious Liability in the Law of Torts*. It powerfully developed a host of ideas that were embryonic in its forerunner, in particular the idea that tort law was fundamentally and hopelessly deficient as an accident compensation system. However, on the whole, *Accidents, Compensation and the Law* struck out in a wholly new direction. It did not draw upon tort law as an organising device. And it also differed greatly from *Vicarious Liability in the Law of Torts* in that doctrinal analysis of the law was very much of secondary concern to the objective of understanding mechanisms of compensating for personal injury and death caused by accidents in their social context. Atiyah authored a further two editions of *Accidents, Compensation and the Law*⁴ before he handed responsibility for the book to Peter Cane.

In 1997, upon his being coaxed briefly out of retirement, Atiyah published *The Damages Lottery*. That work – Atiyah's final contribution to legal scholarship – comprises a withering attack on the tort system as a mechanism for compensating for personal injury and death. In some respects, *The Damages Lottery* merely distils ideas that Atiyah advanced almost 30 years earlier in *Accidents, Compensation and the Law*: he considered the tort system to be just as defective and irrational as he had found it in 1970 (if not more so). However, in other ways, *The Damages Lottery* stands apart from *Accidents, Compensation and the Law*, not least because Atiyah changed his position on certain key issues, because he developed new criticisms, especially the idea that the tort system stimulates a damaging 'culture of blame', and because he gave the agenda for reform heightened prominence.

Before proceeding, it is important for the discussion that follows to emphasise just how far Atiyah's interests extended beyond the law of torts. Atiyah's unusually wide range is noteworthy because it is obvious that his learning in other fields impacted significantly upon his thinking about tort law, with the result that Atiyah's writings on tort cannot be properly understood in isolation. Relatedly, it is also important to appreciate that Atiyah pursued his interests across multiple fields more or less simultaneously throughout essentially the full length of his career. He can usefully be compared in this regard with Glanville Williams, who serves as an interesting contrast (because both their interests and their careers overlapped, because their styles were similar in various ways, and because they were both leading lights in their chosen fields). Williams began

⁴PS Atiyah, *Accidents, Compensation and the Law*, 2nd edn (London, Weidenfeld & Nicolson, 1975); PS Atiyah, *Accidents, Compensation and the Law*, 3rd edn (London, Weidenfeld & Nicolson, 1980).

his career working in tort⁵ and contract⁶ before abandoning those fields,⁷ at a relatively early stage, for the criminal law. He became increasingly fixated by the minutiae of the criminal law as the years passed by. Conversely, Atiyah maintained his mastery of multiple areas over essentially the entirety of his professional life. This undoubtedly increased the effectiveness with which he was able to cross-fertilise.

Atiyah was at least as well known as a contract law scholar as for his contributions to tort law. In 1957, Atiyah released his classic *The Sale of Goods*.⁸ He authored eight editions of that work in total. In 1961, Atiyah's *An Introduction to the Law of Contract*⁹ appeared on bookshelves. Atiyah published five editions of that text before responsibility for it passed into the capable hands of Stephen Smith. In 1979, Atiyah published *The Rise and Fall of Freedom of Contract*,¹⁰ which is a *tour de force* that explores the development of, and influences on, the English law of contract, and which advances the claim that 'far from being the typical case of obligation', promise-based liability 'may be a projection of liabilities based on benefit or reliance'.¹¹ In 1982, *Promises, Morals, and the Law*¹² arrived in bookstores. In that text, Atiyah offered a radical account of the nature of promissory obligations, which account was influenced by his study of how tort law operated in practice.¹³ In 1986, Atiyah republished a selection of his essays on contract in a single volume.¹⁴ Again, the extent to which Atiyah brought to bear his learning in tort law in his quest to understand contract is a highly conspicuous feature of that book.¹⁵

⁵ See, eg, G Williams, *Liability for Animals: An Account of the Development and Present Law of Tortious Liability for Animals, Distress Damage Feasant and the Duty to Fence in Great Britain, Northern Ireland and the Common-Law Dominions* (Cambridge, CUP, 1939); G Williams, *Joint Torts and Contributory Negligence: A Study of Comparative Fault in Great Britain, Ireland and the Common-Law Dominions* (London, Stevens, 1951).

⁶ See, eg, R McElroy and G Williams, *Impossibility of Performance: A Treatise on the Law of Super-vening Impossibility of Performance of Contract, Failure of Consideration, and Frustration* (Cambridge, CUP, 1941); G Williams, *The Law Reform (Frustrated Contracts) Act, 1943: The Text of the Act with An Introduction and Detailed Commentary* (London, Stevens & Sons Ltd, 1944); G Williams, *Joint Obligations: A Treatise on Joint and Joint and Several Liability in Contract, Quasi-Contract and Trusts in England, Ireland and the Common-Law Dominions* (London, Butterworths, 1949).

⁷ Save for brief returns to tort law in G Williams and B Hepple, *Foundations of the Law of Tort* (London, Butterworth, 1976) and G Williams and B Hepple, *Foundations of the Law of Tort*, 2nd edn (London, Butterworth, 1984).

⁸ PS Atiyah, *The Sale of Goods* (London, Pitman, 1957).

⁹ PS Atiyah, *An Introduction to the Law of Contract* (Oxford, Clarendon Press, 1961).

¹⁰ PS Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford, OUP, 1979).

¹¹ *ibid* 4.

¹² PS Atiyah, *Promises, Morals, and the Law* (Oxford, Clarendon Press, 1982).

¹³ *ibid* 185–88 (arguing that promises can be understood as admissions of prior obligations, and developing this analysis with reference to examples drawn from personal injury litigation).

¹⁴ PS Atiyah, *Essays on Contract* (Oxford, OUP, 1986).

¹⁵ See, eg, *ibid* 8–9, 64 (arguing that contract and tort 'are merging' and that the idea 'that contract law is "based" on agreements or voluntarily incurred obligations, while tort law is "based" on legally imposed obligations ... is misconceived'); ch 10 (considering the fact that misrepresentation 'occupies a hazy and undefined area generally thought to lie along the boundaries of tort and contract' (at 275)); and 379–85 (considering the impact of the expansion of liability in tort on how the law of contract should be understood).

Beyond the English law of torts and contract, Atiyah was also profoundly interested in comparative law. In particular, he studied from a distance tort law in the United States, and wrote several major articles in which he ruminated on the differences between tort law in the United States and in England.¹⁶ He considered that tort law in the United States was particularly ripe for comparative investigation '[b]ecause American litigiousness affects the whole world'.¹⁷ Atiyah also thought that American tort law should be studied in so far as it stood as a warning. He wrote that the American tort experience had 'produced a crisis, an explosion of litigation, and a correspondingly disastrous effect on insurance premiums in various fields of activity, not to mention other unsatisfactory by-products'.¹⁸ Atiyah's study of American tort law culminated with the publication in 1987 of his *Form and Substance in Anglo-American Law*,¹⁹ which he co-authored with the American law professor Robert Summers.²⁰ Although tort law featured prominently in that text, it travels well beyond that field, and is ultimately concerned with the differences and similarities between the two countries in terms of their legal institutions and the style of legal reasoning generally employed. Atiyah also published several other important works that were concerned primarily with the nature of the English legal system.²¹

Finally, although Atiyah had all of the qualities of a world-class doctrinal scholar, a significant proportion of his work was highly philosophical in nature, especially certain of his writings regarding the theory of contract law and the nature of promises. Joseph Raz, no less, in a well-known review of Atiyah's *Promises, Morals, and the Law*, wrote:

[T]he book fulfils its promise in being a genuinely interdisciplinary study. Atiyah is not a philosopher using a few legal cases as illustration, nor is he a lawyer who uses the occasional philosophical argument. He is a great legal scholar who has studied the philosophical issues in detail and who speaks with equal confidence in both fields.²²

¹⁶ See, eg, PS Atiyah, 'No Fault Compensation: A Question That Will Not Go Away' (1980) 54 *Tulane Law Review* 271; PS Atiyah, 'American Tort Law in Crisis' (1987) 7 *OJLS* 279; PS Atiyah, 'Tort Law and the Alternatives: Some Anglo-American Comparisons' (1987) 6 *Duke Law Journal* 1002.

¹⁷ Atiyah, 'Tort Law and the Alternatives' (n 16) 1004.

¹⁸ Atiyah, 'American Tort Law in Crisis' (n 16) 293.

¹⁹ PS Atiyah and RS Summers, *Form and Substance in Anglo-American Law: A Comparative Study of Legal Reasoning, Legal Theory, and Legal Institutions* (Oxford, Clarendon Press, 1987).

²⁰ *Form and Substance in Anglo-American Law* provided the inspiration for the conference *Obligations IX: Form and Substance in the Law of Obligations* (2018) held at Melbourne Law School and the associated edited collection: A Robertson and J Goudkamp (eds), *Form and Substance in the Law of Obligations* (Oxford, Hart Publishing, 2019).

²¹ See, eg, PS Atiyah, *Pragmatism and Theory in English Law* (London, Stevens & Sons, 1987); PS Atiyah, 'Common Law and Statute' (1985) 48 *MLR* 1; PS Atiyah 'Justice and Predictability in the Common Law' (1992) 15 *University of New South Wales Law Journal* 448.

²² J Raz, 'Book Review: Promises, Morals, and the Law by Patrick Atiyah' (1982) 95 *Harvard Law Review* 916, 917.

Rather unexpectedly, given his willingness to grapple with philosophy in the field of contract, Atiyah adopted, on the whole, a very different approach in his tort scholarship. By and large, he shunned and, indeed, was derisory of, efforts to theorise tort law, whether in economic or moral terms. For example, in one article, Atiyah wrote:

There is something paradoxical, almost comical, about the fact that, in the last decade or so, the main thrust of the literature on this question [ie, whether tort law can be justified on the grounds of efficiency] has concerned the highly abstract and theoretical economic arguments about efficiency in the resource allocation sense. Once it had been thoroughly and convincingly demonstrated that the tort system was, by any comparable standard, highly inefficient in practice, new legal and economic theorists appeared on the scene to assure us that it was, nevertheless, extremely efficient in theory.²³

This chapter unfolds in the following way. Each of Atiyah's three principal books regarding tort law is discussed *seriatim*. The concern is not, for the most part, to engage with their substance but, rather, to understand their impact upon subsequent scholarly thinking regarding tort law. Thereafter, additional insight as to the influence of Atiyah's work is offered by way of a citation analysis. This analysis compares the significance of Atiyah's three books in Australia, the United Kingdom and the United States, and also considers Atiyah alongside several other leading twentieth-century Commonwealth torts scholars. Some more impressionistic and qualitative thoughts are also ventured as to Atiyah's past and continuing impact as regards tort law.

II. VICARIOUS LIABILITY IN THE LAW OF TORTS (1967)

Atiyah's earliest contributions to tort law comprised short articles²⁴ and case notes.²⁵ *Vicarious Liability in the Law of Torts* was his first major work in the field, and in it Atiyah developed certain ideas that he would advance with increasing urgency throughout his career. *Vicarious Liability in the Law of Torts*, which Robert Stevens described in 2007 as 'still the leading text on vicarious liability',²⁶ was presented by Atiyah as having been 'written mainly for practitioners'.²⁷ Although it is true that much of the book is expository in nature, it is nonetheless clear that Atiyah's principal audience is not, in fact, practising lawyers but legal scholars, and that his real interest lay in legal policy. Thus, the book commenced with an exploration of the master's tort theory

²³ Atiyah, 'No Fault Compensation' (n 16) 279. Consider, also, the passage set out in the text accompanying n 86, below.

²⁴ PS Atiyah, 'Causation, Contributory Negligence and Volenti Non Fit Injuria' (1965) 48 *Canadian Bar Review* 609; PS Atiyah, 'Negligence and Economic Loss' (1967) 83 *LQR* 248.

²⁵ See, eg, PS Atiyah, 'A Re-examination of the *Jus Tertii* in Conversion' (1955) 18 *MLR* 97.

²⁶ R Stevens, *Torts and Rights* (Oxford, OUP, 2007) 259.

²⁷ Atiyah, *Vicarious Liability in the Law of Torts* (n 1) v.

and the servant's tort theory²⁸ followed by an excursus of what Atiyah called 'The Social Justification for Vicarious Liability'.²⁹ Further, large tranches of the text are highly critical of the law of vicarious liability, which is something that one tends not to see in arid practitioner-oriented books. Atiyah laid siege to several key aspects of the law of vicarious liability, including the control test, which he argued was a deficient way of identifying the existence of a contract of service,³⁰ and tests for determining liability in the case of borrowed servants.³¹ This willingness to question basic principles of tort law would grow throughout Atiyah's career.

One feature of *Vicarious Liability in the Law of Torts* that distinguished it from most other legal writing of the same era was Atiyah's concern with the social impact of the relevant law. In developing his arguments, Atiyah placed significant weight on 'the widespread practice of insuring against legal liabilities', and on the resulting reality that 'the person who pays the damages is rarely the person who was at fault'.³² He also drew attention to the fact that 'some proportion of the cost of accidents – at least those involving death and personal injury – will be borne by the taxpayer if it is not borne by anyone else'.³³ Although these observations, and Atiyah's approach in general, may appear trite and unremarkable today, they were anything but when *Vicarious Liability in the Law of Torts* was written. The simple fact is that Atiyah's analysis constituted a radical break from the then conventional mode of legal scholarship. In the decades preceding Atiyah's arrival onto the scene, English torts scholars, and indeed legal academics more generally, eschewed policy-based analysis.³⁴ Instead, they tended to mimic the approach taken by judges, who had firmly embraced the Austinian positivist tradition, and confined themselves to the role of synthesising principles from the case law.³⁵ Atiyah's nakedly policy-based reasoning, and willingness to explore the practical impact of the law of vicarious liability, amounted to a root-and-branch rejection of the prevailing academic style.

In *Vicarious Liability in the Law of Torts* Atiyah sowed the seeds for his later, sustained assaults on the fault principle. He wrote:

If a person is injured in an accident and is unable to work, the loss is never thrown entirely onto him. Where there is legal liability the loss is thrown on the person at fault, and, in general, through him onto some insurance fund. Where on the other hand there is no legal liability the loss is thrown partly on the man himself and

²⁸ *ibid* ch 1.

²⁹ *ibid* ch 2.

³⁰ *ibid* 45–49.

³¹ *ibid* ch 18.

³² *ibid* 14.

³³ *ibid*.

³⁴ A good example of this style is J Salmond, *The Law of Torts: A Treatise on the English Law of Liability for Civil Injuries* (London, Stevens & Hayes, 1907).

³⁵ For further discussion of this theme, see B Hepple, 'Negligence: The Search for Coherence' (1997) 50 *Current Legal Problems* 69, 76.

partly on the state. The state in turn meets the cost partly by a charge on industry through national insurance, and partly by general taxation. When this broad picture is considered the whole element of fault in the law of torts comes to look a good deal less relevant to modern conditions. In the last analysis the law (including in this, law of a public nature) must allocate the losses caused by accidents, only part of which will fall within the scope of the law of torts anyhow. The question which has to be decided is generally not, what individuals should bear this burden?, but, what class of society should bear the burden? Take road accidents. Here the burden is principally cast on motorists who pay for the cost of road accidents caused by negligence through their insurance premiums. But those accidents not caused by, or not capable of being proved to have been caused by, negligence, will be paid for partly by those injured themselves, and partly by the state. Questions of fault are really irrelevant here. The policy issue which will have to be faced sooner or later is whether the cost of all road accidents (and not only those proved to have been caused by negligence) should not be borne by the motoring community.³⁶

Again, it is easy, with the benefit of modern spectacles, to underestimate the great significance of this passage. However, it is important to remember that this constituted a profound rejection of the then dominant style of tort scholarship, and indeed of the prevailing understanding regarding tort law more generally. Atiyah was writing at a time when the fault principle was in the ascendancy and when essentially the whole tort system was thought properly to be premised on the understanding that it was the fault of the defendant that justified the imposition of liability.³⁷

III. ACCIDENTS, COMPENSATION AND THE LAW (1970)

Accidents, Compensation and the Law, which was written while Atiyah was based in Canberra, launched the *Law in Context* series. William Twining, the series co-editor, who had been a colleague of Atiyah when they were both teaching in Khartoum, reveals that he had invited Atiyah to write a book for the series about regulation or commercial law in practice.³⁸ Although it was an entirely

³⁶ Atiyah, *Vicarious Liability in the Law of Torts* (n 1) 14–15.

³⁷ The dominant view is encapsulated by Ames's well-known remark that 'The early law asked simply, "Did the defendant do the physical act which damaged the plaintiff?" The law of today, except in certain cases based upon public policy, asks the further question, "Was the act blame-worthy?" The ethical standard of reasonable conduct has replaced the unmoral standard of acting at one's peril': JB Ames, 'Law and Morals' (1908) 22 *Harvard Law Review* 97, 99. Another prominent statement in support of the dominant understanding is Lord Macmillian's comment in *Read v J Lyons & Co Ltd* [1947] AC 156, 171 that 'the process of evolution has been from the principle that every man acts at his peril and is liable for all the consequences of his acts to the principle that a man's freedom of action is subject only to the obligation not to infringe any duty of care which he owes to others ... the emphasis now is on the conduct of the person whose act has occasioned the injury'.

³⁸ W Twining, 'Reflections on Law in Context' in P Cane and J Stapleton (eds), *Essays for Patrick Atiyah* (Oxford, OUP, 1991) 2.

sensible proposal (contextual analyses in those areas were badly needed),³⁹ had it been accepted, understanding regarding the law's treatment of accidents would have been profoundly impoverished. Twining records that Atiyah said that he was 'bored with contract and commerce'⁴⁰ and wanted to produce 'a book on torts',⁴¹ and that he proceeded to assemble *Accidents, Compensation and the Law* in short order. My sense is that Atiyah had almost certainly done much of the thinking that underpinned *Accidents, Compensation and the Law* when he wrote *Vicarious Liability in the Law of Torts*.

Atiyah described the agenda of *Accidents, Compensation and the Law* as being to offer 'a comprehensive survey of all aspects of the problem of compensation for accidents'.⁴² Thus, the text was organised around a single factual paradigm – accidents causing personal injury and death – rather than a traditional legal category.⁴³ This meant that the book was not confined to causes of action in tort but encompassed the myriad mechanisms by which redress can be obtained for personal injury and death, such as private insurance and criminal compensation schemes. This approach enabled Atiyah to examine, for example, the cause of action in negligence *qua* compensation system alongside the plethora of other compensation arrangements. Looking at tort law in this way led Atiyah to conclude that it was a dismal and wasteful failure: it afforded highly preferential treatment to a tiny minority of accident victims who, by chance, were able to prove that they had been injured by someone else's fault. His ultimate assessment was that '[w]hat is surely needed is a single comprehensive system based on the existing social security system, but with benefits as adequate as society can afford'.⁴⁴ *Accidents, Compensation and the Law* has (rightly) been described as a 'path-breaking and devastating critique of the tort system'.⁴⁵

Three features of *Accidents, Compensation and the Law* merit particular mention for present purposes. First, the book represented a concerted effort to cut free from traditional classifications to which torts scholars were generally wedded (or, as Atiyah may have thought, by which they were imprisoned) and to look at a particular *problem* of significant social importance – accidents resulting in personal injury and death – from a legal perspective. The traditional way in which torts scholars proceed is to bring together for consideration under one roof all civil wrongs other than breaches of contract and equitable wrongs. The difficulty that Atiyah perceived in this methodology was that it resulted in torts

³⁹ It would not be until 2007 that a book on regulation appeared in the *Law in Context* series: B Morgan and K Yeung, *An Introduction to Law and Regulation: Text and Materials* (Cambridge, CUP, 2007). The series still lacks a book on commercial law.

⁴⁰ Twining, 'Reflections on Law in Context' (n 38) 2.

⁴¹ *ibid.*

⁴² Atiyah, *Accidents, Compensation and the Law* (n 2) xiv.

⁴³ Atiyah may well have looked askance at the present edited collection due to its focus on tort law.

⁴⁴ Atiyah, *Accidents, Compensation and the Law* (n 2) 572.

⁴⁵ J Conaghan and W Mansell, 'Review Article: From the Permissive to the Dismissive Society: Patrick Atiyah's *Accidents, Compensation, and the Market*' (1998) 25 *Journal of Law & Society* 284, 284.

that were largely addressed to one particular issue being treated alongside torts that were really aimed at a very different problem. Although not the first work to reject the strictures of existing legal classifications,⁴⁶ *Accidents, Compensation and the Law* was nonetheless pioneering in its approach. Atiyah's hope was that the book

may provide some encouragement towards the break up of existing courses and syllabuses on the law of torts. I have for long felt that the law of torts as at present delineated is not a coherent or satisfactory subject for study by university students. It includes too many diverse groups of law. For example, economic torts are today almost entirely concerned with industrial relations and with fair trade compensation. To teach these subjects properly requires far more attention to other aspects of the law and practice than can possibly be accommodated in a torts course. On the other hand, to teach them at all means that less time and room is available in a torts course for teaching the law of negligence as in my view it should be taught, namely as one part of a complex system of compensation for accidents.⁴⁷

The extent to which this hope was realised is debatable. However, Richard Lewis claims that '[t]he pedagogical revolution eventually precipitated by *Atiyah's Accidents, Compensation and the Law* has influenced all but the most ostrich-like of undergraduate tort courses'.⁴⁸ Harold Luntz reports that he structured his *Torts: Cases and Commentary*⁴⁹ in view of Atiyah's approach.⁵⁰

Second, *Accidents, Compensation and the Law* constituted a categorical rejection of approaches that concentrated on doctrine at the expense of legal policy and the practical operation of the law. The book was fundamentally concerned with the social reality of personal injury litigation and the institution of liability insurance in particular. Accordingly, Atiyah described the relevant

⁴⁶ It was preceded by T Ison, *The Forensic Lottery: A Critique on Tort Liability as a System for Personal Injury Compensation* (London, Staples, 1967); JG Fleming, *An Introduction to the Law of Torts* (Oxford, Clarendon Press, 1967); and DW Elliott and H Street, *Road Accidents* (Harmondsworth, Penguin, 1968).

⁴⁷ Atiyah, *Accidents, Compensation and the Law* (n 2) xv.

⁴⁸ R Lewis, 'Criticisms of the Traditional Contract Course' (1982) 16 *Law Teacher* 111, 111.

⁴⁹ H Luntz and D Hambly, *Torts: Cases and Commentary* (Sydney, Butterworths, 1980).

⁵⁰ Luntz wrote (H Luntz, 'A Personal Journal Through the Law of Torts' (2005) 27 *Sydney Law Review* 393, 401): 'I attended the annual conference of the Australasian Law Schools Association (as ALTA was then called) in Adelaide. At the conference, Atiyah put forward his model for teaching an accident compensation course instead of the traditional torts course. At first I was sceptical as to the feasibility of this, given the requirements for admission to the profession, but of its merits I had no doubt. It was one of the inspirations for the case book that I produced with David Hambly and Robert Hayes, *Torts: Cases and Commentary* (1980). The other model for the case book was the one produced by Bob Hepple and Martin Matthews, *Tort: Cases and Materials* (1974). Bob Hepple had taught me at Wits, though not torts. He had escaped to England, where he went on to an eminent career (he is now Sir Bob). There was no doubt that his approach to the law of torts accorded with my own. We did not abandon the traditional intentional torts completely, though I left the writing of those chapters largely to my co-authors. Negligence, however, was in the forefront and dominant throughout. I wrote a long introductory chapter, seeking to place the law of torts in its social context and emphasising its actual operation. It also drew attention to the alternatives to the law of torts for compensating victims of accidents.'

law simply as a means to an end rather than (as is the case with conventional textbooks) the end in itself. Consequently, while certain areas of tort law were treated fairly fully in *Accidents, Compensation and the Law*, such as the tort of negligence, other parts of tort law that are often treated extensively in torts textbooks, such as the law of nuisance and the action in *Rylands v Fletcher*, were barely mentioned at all.⁵¹

Third, although *Accidents, Compensation and the Law* is fundamentally a book about accident compensation in the United Kingdom, it offered significant engagement with the tort system and enormous associated literature in the United States.⁵² In *Accidents, Compensation and the Law*, Atiyah said that he proceeded in this way partly because the tort system in that jurisdiction had been the subject of far more intense investigation,⁵³ and he clearly drew much of his inspiration for his critiques of the English tort system from earlier denunciations of tort law that had been made by American scholars, especially Fleming James.⁵⁴ Atiyah's engagement with the United States literature extended to his crossing swords with several American scholars, especially Guido Calabresi,⁵⁵ whose work he realised was of great significance.

The two subsequent editions of *Accidents, Compensation and the Law* that Atiyah authored maintained much the same message as the first, although my impression of those subsequent editions is that Atiyah adopted an increasingly hostile view of the tort system as a mechanism for compensating for personal injury and death. The second edition was largely prompted by the implementation of the New Zealand Woodhouse Scheme.⁵⁶ The third edition was provoked by the publication of the Pearson Commission's Report.⁵⁷ The Pearson Report

⁵¹ The first edition of *Accidents, Compensation and the Law* contains just over two pages of text on 'Rylands v Fletcher, Nuisance and Animals': Atiyah, *Accidents, Compensation and the Law* (n 2) 168–70. The relevant text was left largely unchanged in the second and third editions: Atiyah *Accidents, Compensation and the Law*, 2nd edn (n 4) 152–54; Atiyah, *Accidents, Compensation and the Law*, 3rd edn (n 4) 163–66.

⁵² Atiyah's most sustained treatment of United States torts scholarship is his review article of OS Gray (ed), *Harper, James and Gray The Law of Torts* (Boston, MA, Little, Brown & Co, 1986) in Atiyah, 'American Tort Law in Crisis' (n 16).

⁵³ Atiyah complained that 'the information available with regard to the tort system [in England] is seriously deficient and I have often had to fall back on the fruits of American research' (Atiyah, *Accidents, Compensation and the Law* (n 2) xv). He added '[t]o those familiar with American work it will be obvious how much I owe to the masters of American tort law of the past decade, and to the protagonists of the present day' (ibid xviii).

⁵⁴ One suspects, in particular, by F James, 'Accident Liability Reconsidered: The Impact of Liability Insurance' (1948) 57 *Yale Law Journal* 549. Atiyah considered that 'James was one of the first lawyers to systematically downgrade the importance of the deterrence aspect of tort law': see Atiyah 'American Tort Law in Crisis' (n 16) 288.

⁵⁵ See, eg, Atiyah, *Accidents, Compensation and the Law* (n 2) ch 4, on 'general deterrence'; and PS Atiyah, 'Book Review: The Costs of Accidents by Guido Calabresi' (1970) 44 *Australian Law Journal* 297.

⁵⁶ In the form of the Accidents Compensation Act 1972 (NZ). See Atiyah's remarks in the preface to the second edition: Atiyah, *Accidents, Compensation and the Law*, 2nd edn (n 4) xii.

⁵⁷ *The Report of the Royal Commission on Civil Liability and Compensation for Personal Injury* (Command 7054, 1978). See Atiyah's remarks in the Preface to the third edition: Atiyah, *Accidents, Compensation and the Law*, 3rd edn (n 4).

yielded a prodigious amount of statistical information regarding the tort and liability insurance systems that was vitally relevant to *Accidents, Compensation and the Law* given its agenda. The Report also acted as a punching bag for Atiyah, and on the whole he (rightly) treated its proposals with contempt and incredulity.⁵⁸

IV. THE DAMAGES LOTTERY (1997)

The Damages Lottery warrants extended discussion because it provoked much more debate than either *Vicarious Liability and the Law of Torts* or *Accidents, Compensation and the Law*.

A. A Prelude

It is necessary to preface the analysis of *The Damages Lottery* by mentioning Atiyah's important essay 'Personal Injuries in the Twenty-First Century: Thinking the Unthinkable'.⁵⁹ That contribution, which appeared in 1996 in a collection of essays edited by Peter Birks, was a prelude to *The Damages Lottery*. In it, Atiyah made two overarching claims, which he described as follows:

It is one of the functions of the academic lawyer from time to time to think the unthinkable, and to challenge some of the most fundamental assumptions of our legal system. Few assumptions are more basic than the idea that if someone wrongfully does you an injury you should be entitled to sue him, and to think of abolishing this right without providing any real replacement is to go about as far as one can in thinking the unthinkable. Yet I want in all seriousness to float the suggestion that the action for damages for personal injuries should largely be abolished, and its replacement left to the free market.⁶⁰

Atiyah developed the first of these claims – the retrenchment claim – by contending that tort compensation is, in effect, a type of welfare benefit, and by asserting that it is bizarre that 'welfare' benefits available through tort law are continuing

⁵⁸ eg, in relation to the Pearson Commission's proposal to extend strict liability for dangerous things and activities, Atiyah wrote in the third edition that 'the Commission appears to have paid inadequate attention to the implications of these proposals, nor do they really attempt any serious justification of them in principle. ... The truth is that these proposals of the Commission were ill-thought out and are unlikely to be implemented. We need waste no further space on them' (Atiyah, *Accidents, Compensation and the Law*, 3rd edn (n 4) 165–66). His overall assessment was that 'the Pearson Commission's Report has proved a great disappointment. Although there are a great many detailed recommendations, there is a marked lack of over-all principle, of underlying strategy. And on the crucial question of abolition, in whole or in part, of the right of action in tort, the Commission have provided no leadership' (ibid 623 (footnote omitted)).

⁵⁹ PS Atiyah, 'Personal Injuries in The Twenty-First Century: Thinking the Unthinkable' in P Birks (ed), *Wrongs and Remedies in the Twenty-First Century* (Oxford, Clarendon Press 1996).

⁶⁰ ibid 1.

to be increased at a time when the tendency is to curtail the welfare state, especially in circumstances where those benefits are being increased by judges and, hence, without any oversight or authorisation by Parliament. Atiyah suggested that this raised ‘a serious constitutional question’.⁶¹ He also cast doubt on attempts to justify the tort system on the basis that, for example, it tended to ensure that accidents occurred at an efficient rate.

The retrenchment claim had been fully developed by Atiyah, although with differences in emphasis, in *Accidents, Compensation and the Law*. However, the second claim – that tort law, once largely abolished, should not be replaced by anything – was entirely novel. It was animated by an understanding on the part of Atiyah that the tort system effectively

forces us all to have insurance coverage which is not the coverage many of us would choose to have in the open market, if insurance against personal injury was the kind of insurance people bought for themselves, as they buy household insurance, or holiday insurance, or motor comprehensive insurance.’⁶²

Absent the tort system, people would, he argued, instead tend to buy loss insurance, which would permit them to choose the level of cover that suited them.

B. Atiyah’s Theses

Just a year later, in 1997, *The Damages Lottery* burst onto the scene. Its title, an obvious allusion to Terrence Ison’s *The Forensic Lottery*,⁶³ showed the influence of that work on Atiyah’s thinking. In *The Damages Lottery*, Atiyah built upon the foundations that he had laid down in his essay. He made the same two overarching claims, although he developed his case in support of each of them in rather different ways than he had previously. As to the retrenchment claim, Atiyah complained that the tort system ‘is as unjust and inefficient as it could be’⁶⁴ and ‘built on ... rotten foundations’.⁶⁵ He endeavoured to make good this argument by way of a loose federation of propositions between which he regularly glided. Five ideas seem to have been particularly important to him, and it is worth setting them out in some detail.

First, Atiyah drew attention to the fact that the tort system determines both the entitlement to compensation and the quantum of compensation based on luck rather than on (for example) need.⁶⁶ He observed that accident victims

⁶¹ *ibid* 26.

⁶² *ibid* 33 (footnote omitted).

⁶³ T Ison, *The Forensic Lottery: A Critique on Tort Liability as a System of Personal Injury Compensation* (London, Staples, 1968).

⁶⁴ Atiyah, *The Damages Lottery* (n 3) 2.

⁶⁵ *ibid* 93.

⁶⁶ I engaged with the idea of compensation awarded on the basis of need in J Goudkamp, ‘Reforming English Tort Law: Lessons from Australia’ in E Quill and R Friel (eds), *Damages and Compensation Culture: Comparative Perspectives* (Oxford, Hart Publishing 2016).

often have little or, more often, no control over whether or not they are injured in compensable circumstances, which usually means being injured by the fault of someone who holds third-party insurance or who is employed by a government department. In Atiyah's words, 'it is almost pure chance whether an injured person ends up with damages'.⁶⁷

Second, Atiyah observed that only a tiny fraction of the very many people in society who suffer disability are eligible to receive tort compensation.⁶⁸ Most people who suffer disability are not entitled to tort compensation and instead need to look to other sources of support, such as the social security system. Those alternative compensation systems offer assistance at much less generous levels than the tort system which, uniquely among compensation systems, is committed to the principle that the compensation awarded should place the claimant into the position that he or she would have occupied but for the defendant's tort. Thus, the tort system creates, in Atiyah's words, 'a highly privileged class of accident victims'.⁶⁹

Third, Atiyah emphasised the fact that defendants hardly ever pay tort compensation personally. In fact, he observed, it is the premium-paying population or taxpayers who pay.⁷⁰ The upshot of this situation, Atiyah pointed out, is that the relatively small number of people who are 'fortunate' enough to be injured in circumstances that attract tort compensation are compensated by substantially the same group of people who fund the various other, much less generous compensation systems.

Fourth, Atiyah argued that the tort system had been 'stretched' in many ways over the course of the twentieth century in favour of claimants. The consequence of this 'stretching' had been to increase the number of disabled persons who were eligible for tort compensation. Although it is understandable that judges (who are principally but not exclusively responsible for the 'stretching') might want to treat accident victims sympathetically, Atiyah argued that this 'stretching' simply made the tort system even more absurd. He developed the following vivid analogy in support of this contention:

The basic problem is that those who are compensated with damages are in a tiny minority of all victims of accidents and disabilities, and the more we squeeze into this category, the less money is likely to be available for the great majority of those victims. It is rather as though, faced with a hundred homeless people living on the street, we picked out one or two and lodged them in the Ritz at our expense. If we then stretch things a little more here and a little more there, perhaps we could afford to help one or two more of the homeless and put them in the Ritz too. But we shall then find that the bill from the Ritz is so large that we shall have little or nothing to

⁶⁷ Atiyah, *The Damages Lottery* (n 3) 2149.

⁶⁸ '[O]f all the disabled or handicapped people in society, ... only a tiny minority obtain damages at all': *ibid* 99.

⁶⁹ *ibid* 103.

⁷⁰ '[T]he whole public pays': *ibid* 111.

spend on the remaining still sleeping on the street. So stretching things will actually have made things worse.⁷¹

Fifth, Atiyah argued that the tort system is unjust, highly inefficient, has a host of highly undesirable side-effects and is largely devoid of redeeming features. He referred, for example, to the fact that the tort system is delay-stricken and enormously expensive to administer relative to other systems of delivering compensation. Atiyah also contended that the tort system was liable to encourage an unhealthy 'blame culture'. And he poured scorn on suggestions that tort law can be justified on the grounds that it punishes where punishment is deserved, deters unwanted behaviour and serves a useful role as a public accountability mechanism.

As to the other overarching claim made in *The Damages Lottery* – that after tort law has been largely eliminated nothing need be put in its place – Atiyah contended that many of his attacks on the tort system applied equally to the social security system, such as his view that the tort system encourages malingering,⁷² is prone to exploitation by claimants who falsely assert that they have suffered mental injuries⁷³ and lends credence to the unattractive idea that individuals are entitled to have governments care for their every need.⁷⁴ However, it appears that Atiyah's most fundamental reason for not suggesting that a social security system should fill the gap left by the retrenchment of tort law is the fact that welfare state ideals had fallen out of favour.

Atiyah did not actually go quite as far as saying that the state should not put anything in the void left by the retrenchment of the tort system. In the case of road accidents, Atiyah favoured total removal of the tort system and a compulsory loss insurance regime being installed in its place. Atiyah argued for this limited state involvement on the basis that if buying insurance were optional, few would purchase it and many would be left without cover. However, in the case of other accidents, Atiyah preferred to leave it up to individual citizens to decide whether to purchase loss insurance. He accepted that a society security safety net would be required for people who could not, even after the savings that would be made by dispensing with the requirement of purchasing liability insurance, afford cover.

C. The Intended Audience

Atiyah directed *The Damages Lottery* at the layperson.⁷⁵ He wrote in the Preface that '[t]his book is designed for the ordinary reader who may, perhaps, have

⁷¹ *ibid* 32.

⁷² *ibid* 12–13.

⁷³ *ibid* 61–62.

⁷⁴ *ibid* 184.

⁷⁵ *The Damages Lottery* was not the only popular text that Atiyah wrote. See also PS Atiyah, *Law and Modern Society* (Oxford, OUP, 1995).

read accounts of strange cases in which huge damages have been awarded for bizarre events, and wonders whether the law has gone mad'.⁷⁶ Atiyah positioned *The Damages Lottery* in this way because he thought that it might be the only hope of achieving the change that he desired. Efforts (his own included, through *Accidents, Compensation and the Law*) to effect change by influencing academic opinion had (predictably) been in vain, and Atiyah considered that institutions that might be capable of prompting the legislature to enact the required root-and-branch reforms had been 'captured' by the tort system. He thus sought to sway public opinion in the hope that doing so would elicit a groundswell of support for change. Atiyah wrote:

The one body which might have been able to [achieve the reforms required] – the Law Commission – is far too closely wedded to the system and its underlying value structure, to be able to bring to bear the independent scrutiny the system needs. In the long run the only solution to the difficulty must lie in educating the public to understand more fully the nature of the system we live under, and who pays its costs.⁷⁷

Consistently with that objective, *The Damages Lottery* is almost devoid of footnotes and citations, brief (it runs to just under 200 pages) and written in a highly accessible style. Moreover, and in a radical break from the way in which legal academics in Commonwealth jurisdictions tend to write, *The Damages Lottery* is a highly partisan project that heaps invective on the tort system. On account of these features, *The Damages Lottery* is the antithesis of a dreary academic text. Arthur Ripstein writes that '*The Damages Lottery* is written with great passion and urgency. Readers unfamiliar with Atiyah's earlier work are likely to experience the thrill of reading an exposé'.⁷⁸ In a recent lecture, Lord Sumption observed that *The Damages Lottery* is 'one of the most eloquent polemics ever to be directed against a firmly entrenched principle of law'.⁷⁹

Despite Atiyah's approach, *The Damages Lottery*, not unexpectedly, apparently made little or no impression on society's attitude towards tort law. In a country in which tort law occupies a very fringe role in the lives of most people,⁸⁰ an apathetic public was seemingly essentially unmoved by the problems Atiyah identified. However, *The Damages Lottery* quickly garnered attention for its significant scholarly value. Two critics refer to it as

a sustained, relentless (and highly accessible) examination of the problems which beset personal injury litigation, exposing the system as indefensible (both rhetorically

⁷⁶ Atiyah, *The Damages Lottery* (n 3) vii.

⁷⁷ *ibid* 173.

⁷⁸ A Ripstein, 'Some Recent Obituaries of Tort Law' (1998) 48 *University of Toronto Law Journal* 561, 567.

⁷⁹ J Sumption, 'Abolishing Personal Injuries Law: A Project', Personal Injuries Bar Association Annual Lecture (2017) 1.

⁸⁰ 'Nobody in England would regard tort law as playing more than a very peripheral role in the life of the society': Atiyah, 'Tort Law and the Alternatives' (n 16) 1044.

and legally), unjustifiably expensive, and producing a fundamentally unfair distribution of the 'compensation cake'.⁸¹

D. The Retrenchment Claim

The retrenchment claim, although deeply controversial, was certainly not new. Atiyah himself had, of course, argued in *Accidents, Compensation and the Law*⁸² for the substantial abolition of tort law in the personal injury context. And impassioned calls for the abolition of tort law, for essentially the same reasons that Atiyah gave, had been made previously elsewhere.⁸³ How did scholars react to Atiyah's articulation of the retrenchment argument? Those who reject the retrenchment argument generally contend that it overlooks the fact that tort law is ultimately a system of interpersonal justice. In his well-known response to *The Damages Lottery*, Andrew Burrows contends:

My central defence of the tort system rests on it being a system of individual responsibility. It pins responsibility for compensating another on an individual because of what the individual has done, or has not done. ... A central flaw in the argument put by critics of tort is to assume that because individual defendants rarely pay the damages themselves, tort cannot stand up as a system of individual responsibility. ... But whether the defendant pays the damages himself or herself is not of central importance. What is important is that the defendant is made legally responsible for ensuring that the plaintiff is paid compensation. It is the pinning of that legal responsibility on the defendant that is at the heart of the tort system.⁸⁴

In a similar vein, Ripstein contends:

Atiyah's rhetoric obscures the role of responsibility in tort law. Atiyah ... put[s] forward a litany of examples in which the law has been 'stretched' by plaintiffs seeking compensation from defendants whose responsibility is dubious. As he describes the cases, the defendants typically appear blameless. In some of them, we are left with the impression that if anyone ought to have been more careful, it was the plaintiff. Reflection on these examples is supposed to lead us to conclude that people should insure against their own carelessness, and perhaps also against their own bad luck. They should bear the costs of their choices, rather than trying to displace those costs onto others. Because they are examples in which we are not inclined to think that the defendant is not [sic] responsible for the plaintiff's injury, though, they distract us from the cases that are of central concern of the tort system, namely, those in which the defendant *is* responsible.⁸⁵

⁸¹ Conaghan and Mansell, 'Review Article: From the Permissive to the Dismissive Society' (n 45) 286.

⁸² See the text accompanying n 44, above.

⁸³ Especially in Ison, *The Forensic Lottery* (n 63).

⁸⁴ A Burrows, *Understanding the Law of Obligations: Essays on Contract, Tort and Restitution* (Oxford, OUP, 2000) 122–23.

⁸⁵ Ripstein, 'Some Recent Obituaries of Tort Law' (n 78) 565–66 (original emphasis). Consider also Stevens, *Torts and Rights* (n 26) 325.

Atiyah pre-empted these criticisms and wrote in his essay that foreshadowed *The Damages Lottery*:

I am aware that many lawyers and philosophers who have discussed the moral foundations of tort liability take the view that insurance is irrelevant to the moral basis of the wrongdoer's liability. Either he pays the damages, we are told, or he pays an insurance premium which is actuarially sound and this amounts to the same thing. Yet in most cases outside the road accident sphere the guilty party does not even pay the insurance premium. Except for some (though not, of course, all) road accidents, most tort liability for personal injuries is these days imposed on corporations or public authorities of some kind, and it is the employer or the authority which pays the premium or acts as a self-insurer. So (with the same exception) not only is it the case that the damages are hardly ever paid by the guilty party, but the insurance premiums are hardly ever paid by him either ... The employer or insurer, who is not to blame, pays the damages; the wrongdoer, who is to blame, does not pay. How then can it possibly be argued that the tort system is one of corrective justice?⁸⁶

However, this retort does not really meet Burrows' and Ripstein's point. Their argument is not that the ubiquity of liability insurance prevents tort law from being understood in terms of personal responsibility because tortfeasors must pay damages or must pay premia. Instead, it is that arrangements in relation to insurance say nothing about tort law *qua* personal responsibility system, because insurance merely enables wrongdoers to discharge liabilities that descend upon them. A sounder way by which Atiyah might have sought to defuse the criticisms concerned is to contend that even if the tort system, despite the fact that the actual wrongdoers normally do not pay, is a system of personal responsibility, it does not follow that retaining it, with all its prolificacy, waste, delay and the like, is justified. Atiyah did not see things in quite this way, however, being unwilling to accept that the tort regime can be understood as a system of personal responsibility in the first place.

Another and quite different rebuttal of the retrenchment claim is that it is imprecise. The objection is that Atiyah failed to make it sufficiently clear which parts of tort law should be done away with and which aspects preserved. Burrows writes:

A major problem with the arguments advanced by the critics of tort is that the precise subject-matter under attack is never made entirely clear.

If we first of all confine ourselves to tort, is it the whole of tort or only parts of it that are under attack? While the main focus is clearly on negligently caused personal injury and death, what about intentionally caused personal injury (through the tort of trespass to the person)? What about strict liability causing personal injury (through, for example, the tort of breach of statutory duty or the Consumer Protection Act 1987)? And is the attack also intended to knock out negligently, or intentionally, caused property damage or pure economic loss? What about the torts of defamation and nuisance?

⁸⁶ Atiyah, 'Personal Injuries in The Twenty-First Century' (n 59) 13 (footnote omitted).

It is not obvious that the critics of tort have properly considered this issue. ...

[A] lack of clarity [in this regard] is to be found in *The Damages Lottery*. Atiyah writes, 'In general this book is not concerned with ... intentional torts, and certainly no proposal will be found here to abolish or reduce the liability of a person who commits an intentional tort. But there are some cases which do raise issues with intentional torts which are really identical to issues which arise with negligence. These cases concern the liability of employers or others for the actions of a wrongdoer. When, for instance, a policeman uses excessive force in arresting someone (and thereby commits a tort) the police authority will be liable for the damages, just as much as the policeman himself. This kind of liability – which is actually the liability of the public in the last resort – is very much the concern of this book, and raises problems in no way different from the liability of police officers for negligence. But apart from that this book is not concerned with intentional torts which do not give rise to anything like the volume of claims and litigation which negligence does.'

But what is it that links the police or employer intentional torts with negligence, yet does not link other intentional torts with negligence?⁸⁷

To a degree, the complaint is a valid one. The scope of the retrenchment claim is not specified with the precision that one would hope to see in, for example, a statute that was carving out one area of law from a larger field. However, it must be remembered that Atiyah was concerned in *The Damages Lottery* to write an accessible polemic about tort law as a compensation system.⁸⁸ It would have been incompatible with that objective to condescend to a fine-grained analysis of the specific causes of action that should be expelled from the law of torts in so far as they afford redress for personal injury and death.

Connected with the imprecision objection is the suggestion that, regardless of which parts of tort law Atiyah thought should survive, Atiyah offered no rational basis, and could offer no rational basis, for stopping at any particular point. Atiyah placed great weight on the fact that defendants do not personally pay damages awards that are made against them.⁸⁹ However, if it is that fact that contributes to tort law's problematic state, several other parts of the law of obligations should be abolished too. Burrows makes the point forcefully:

If one is criticising the tort system on the basis that defendants do not themselves pay the damages ... why is the whole system of civil wrongs (and indeed aspects of the law on unjust enrichment) not subjected to the same attack?⁹⁰

One possible answer to Burrows is that tort law is different from other departments of private law in that it is one of a plethora of compensation systems that are all funded by substantially the same people (ie the premium-paying population and taxpayers), and that it makes no sense to have different regimes that afford widely disparate levels of support to different groups of

⁸⁷ Burrows, *Understanding the Law of Obligations* (n 84) 126–127 (footnote omitted).

⁸⁸ See the text accompanying n 75, above.

⁸⁹ See the text accompanying n 70, above.

⁹⁰ Burrows, *Understanding the Law of Obligations* (n 84) 128.

people based on luck. Contract law and the law of unjust enrichment do not resemble tort law in this regard.

A final but important point in evaluating the retrenchment argument, as presented by Atiyah, concerns Atiyah's jaundiced opinion of claimants and claimants' lawyers generally. Atiyah implies that accident victims as a class are prone to exaggerate their symptoms and refrain from rehabilitating themselves with a view to maximising their monetary recovery. Thus, he writes that an accident victim who has entitlements in tort 'may simply assume that he can never lead a normal life again, never work again, and make no effort to rehabilitate himself'.⁹¹ Atiyah also expressed scepticism as to whether many recognised psychiatric illnesses actually exist. He said that '[g]iving ... perfectly natural conditions fancy names like "post-traumatic stress" does not actually demonstrate that they have a real, objective existence, though judges striving not to appear old-fashioned fuddy duddies, are naturally persuaded by the doctors that they have'.⁹² Atiyah also criticised claimants for partaking in the tort system instead of accepting responsibility for their own problems,⁹³ and lawyers for their facilitative role. He argues that the tort system may encourage 'behaviour ... which ... help[s] to foment claims or litigation – lawyers may ... start advertising'.⁹⁴ There are formidable difficulties with this collection of claims. Atiyah cites no evidence – let alone any credible evidence – in support of his apparent suggestion that claimants generally are prone to malingering, and his view that one should respond sceptically when invited to conclude on the basis of medical evidence that a given condition is a psychiatric illness is downright surprising. Further, it is difficult to fault accident victims for choosing to exercise rights that the law confers upon them, or lawyers for assisting claimants to invoke those rights. Atiyah seems not to have considered the possibility that lawyers who advertise, far from engaging in discreditable behaviour, are, in fact, performing a public service.⁹⁵

E. Atiyah's Volte-face

A striking feature of *The Damages Lottery* is that it involves a significant change of position by Atiyah. Although Atiyah continued to favour retrenchment of the

⁹¹ Atiyah, *The Damages Lottery* (n 3) 12.

⁹² *ibid* 61.

⁹³ *ibid* 138–143. Cf Atiyah's remark that 'we should not blame ... (in general) the people who take advantage of [the tort system] to claim what they are entitled to' (*ibid* 155).

⁹⁴ *ibid* 28.

⁹⁵ An immense literature exists regarding the desirability of permitting lawyers to advertise. Contributions include Note, 'Advertising, Solicitation and the Profession's Duty to Make Legal Counsel Available' (1972) 81 *Yale Law Journal* 1181; M Walker, 'Advertising by Lawyers: Some Pros and Cons' (1979) 55 *Chicago-Kent Law Review* 407; G Hazard, R Pearce and J Stempel, 'Why Lawyers Should be Allowed to Advertise: A Market Analysis of Legal Services' (1983) 58 *New York University Law Review* 1084.

tort system as a mechanism for dispensing compensation for personal injury and death, instead of arguing for the installation of a comprehensive society security system he contended that nothing should replace tort law (except in the context of road accidents and subject to a safety net for people who cannot afford to buy insurance). Burrows chides Atiyah for this volte-face. He writes:

One must have concerns, about Atiyah's willingness to argue so vehemently for such radically different conclusions in such a relatively short space of time. Critics would say that, had policy-makers applied his arguments in the 1970s, we would have abolished the tort system and instead had in place a wide-ranging social welfare scheme for the benefit of the injured. Yet only fifteen years later those policy-makers would have been condemned by Atiyah for creating a misconceived new system which should be abolished. Those concerned with legislative reform may be forgiven for thinking that such a willingness to 'switch horses' means that one must not take Atiyah's views too seriously. Fascinating, beautifully expressed and brilliantly argued as they are, they may be the stuff of classrooms and academic conferences and not for the real world.⁹⁶

With respect, this criticism is unjustified. In the first place, the political currents in the United Kingdom ebbed rather differently in 1970 when *Accidents, Compensation and the Law* was published from the way in which they flowed in 1997, when *The Damages Lottery* appeared. Atiyah, as he made clear, changed tack precisely because the prevailing political ideology had shifted.⁹⁷ He realised that his earlier proposals, not having been acted upon in the 1970s, would not now be implemented.⁹⁸ More fundamentally, the mere fact that Atiyah changed his mind does nothing to undermine the case that he presented in favour either

⁹⁶ Burrows, *Understanding the Law of Obligations* (n 84) 122.

⁹⁷ 'I now see no likelihood whatever of large, bureaucratic, welfare schemes of the Woodhouse type, coming back into fashion in the near future, or even the next half century, either in the UK or elsewhere. It is not simply a matter of left-wing or socialist parties winning elections. As everyone knows, there has been a massive, world-wide reaction against bureaucratic welfare schemes in the past decade' (Atiyah, 'Personal Injuries in The Twenty-First Century' (n 59) 34).

⁹⁸ This point has been convincingly made by Edwin Peel. Peel wrote (E Peel, 'Book Review of Understanding the Law of Obligations: Essays on Contract, Tort and Restitution by Andrew Burrows' (1997) 115 *LQR* 335, 340–41) that 'one particular attack on [Atiyah] does seem a little unfair. Atiyah has, indeed, performed a volte-face in *The Damages Lottery* (1997) in which he now argues that the tort system should be abolished and replaced with nothing at all, save the hope that individuals with more money in their pockets will be encouraged to take out personal accident insurance. This contrasts starkly with the stance he took in *Accidents, Compensation and the Law* (now in the hands of Peter Cane) where he advocated the abolition of the tort system and its replacement with some form of enhanced publicly-funded no fault compensation scheme. The unfairness lies in suggesting that Atiyah would now condemn any policy-makers who might have acted on his earlier proposals. The fact of the matter is that they did not, and a fairer interpretation of this change of approach might be to congratulate Atiyah on his political astuteness. Still faced with the obvious failings of the existing tort system, but all too well aware that no political party is looking to extend the social welfare system, Atiyah has adopted the pragmatic approach so prevalent in much of Burrows' writing by seeking a solution which would be politically acceptable and therefore represent an attainable goal.'

of the social security solution or of the loss insurance solution. Atiyah may well have been wrong to abandon the former as the type of reform for which society should strive. Equally, prior acceptance of another view does nothing to show that a newly held position is wrong. The fact of the matter is that Atiyah's exceptional intellectual honesty and preparedness to revisit his earlier views and shift his position where he felt that doing so was appropriate is a desirable quality in a scholar rather than a shortcoming.

F. The Loss Insurance 'Solution'

The second major claim made by Atiyah in *The Damages Lottery* (ie, that loss insurance should be allowed to fill the gap left by tort law), which claim I suspect was heavily influenced by his experience in the law of contract, has apparently persuaded few, if any, scholars. Ripstein writes:

In the end, the main benefit Atiyah's alternative offers to the needy is reduced prices for goods and services, and perhaps reduced taxes, because manufacturers will not need to buy liability insurance. No numbers are offered, but even this promised side benefit sits uneasily with his other arguments. He is attuned to the ability of companies to pass the costs of liability insurance on to their customers. In contrast, he does not consider the ability of those with market power to pass the costs of their own first-party coverage on to their customers. Nor does he mention that under his proposed system, people would need to pay for their own first-party insurance, including insurance against the carelessness of others.⁹⁹

Joanne Conaghan and Wade Mansell argue:

Atiyah has not solved the problem of the damages lottery, but has simply substituted one system of arbitrary and fortuitous distribution for another. In what sense is it more justifiable for protection from injury or illness to depend on ability to pay premiums rather than on what causes the injury or illness in question? It is only if one accepts that the distribution of wealth is itself just (rather than the random product of a socio-economic system where there is, too often, little correspondence between individual merit and financial reward) that its outcomes appear defensible.¹⁰⁰

Bob Hepple says:

[W]hen I hear the words 'free market' I reach for my begging bowl. Would low income earners be able to afford first-party insurance? How would unemployed people or unwaged women at home be protected? How would the private insurance market react to the abolition of tort law?¹⁰¹

⁹⁹ Ripstein, 'Some Recent Obituaries of Tort Law' (n 78) 564 (footnote omitted).

¹⁰⁰ Conaghan and Mansell, 'Review Article' (n 45) 291–92.

¹⁰¹ B Hepple, 'Negligence: The Search for Coherence' (1997) 50 *Current Legal Problems* 85.

Other commentators have been similarly unkind to Atiyah's proposal, for substantially the same reason. Pat O'Malley wrote, in relation to Atiyah's first-party insurance solution to the damages lottery:

It has to be said that this is the kind of vague utopianism for which socialists and supporters of welfare state policies have been vilified for decades. Worse, this Faith in Markets is coupled with an almost complete wishing away of the very troubling complexities.¹⁰²

O'Malley proceeds to criticise Atiyah for not having thought through in any detail how his proposed safety net would function. In a similar vein, John Keeler doubts that loss insurance is a promising alternative to the tort system given its apparently limited popularity at the present.¹⁰³ Jeffrey O'Connell and Christopher Robinette write that 'Atiyah is merciless and effective in flaying tort law for its hopeless inadequacies'.¹⁰⁴ However, they, too, dissent from his loss insurance proposals on the basis that he goes too far in saying that 'efficiency and corrective justice in tort law ... do not matter at all'.¹⁰⁵

One additional objection to Atiyah's argument in favour of allowing loss insurance to fill the gap left by the removal of the tort system concerns his suggestion that loss insurance should be compulsory in relation to road accidents. The first difficulty here is that it is not at all clear why road accidents should be singled out for separate treatment, or why Atiyah thought, as he apparently did, people would be less likely to purchase loss insurance voluntarily in this setting. Another problem is that the idea of making loss insurance compulsory rather cuts against his idea that the *Zeitgeist* requires individuals to look after themselves.

V. INFLUENCE

How is Atiyah's influence on scholarly thinking regarding tort law to be determined? And to what extent does his thinking continue to affect the writing of today's torts scholars? One way of answering those questions is by analysing citations of Atiyah's work. The burden of this section is to provide that analysis. Before proceeding, it is worth observing that Atiyah's scholarship has been included in one previous citation analysis.¹⁰⁶ Although that study, which

¹⁰² P O'Malley, 'Book Review: The Damages Lottery by Patrick Atiyah' (1999) 16 *Law in Context* 123, 127.

¹⁰³ J Keeler, 'Thinking Through the Unthinkable: Collective Responsibilities in Personal Injury Law' (2001) 30 *Common Law World Review* 349, 350.

¹⁰⁴ J O'Connell and CJ Robinette, 'The Role of Compensation in Personal Injury Tort Law' (1999) 32 *Connecticut Law Review* 137, 147.

¹⁰⁵ *ibid* 148.

¹⁰⁶ BS Markesinis and J Fedtke, *Engaging with Foreign Law* (Oxford, Hart Publishing, 2009) 111–12.

was conducted by Basil Markesinis and Jörg Fedtke, is not limited to Atiyah's writings in tort law, it is nonetheless of interest. The investigators report citation rates for Andrew Ashworth, Patrick Atiyah, Peter Birks, Roy Goode and Guenter Treitel for the period 1980 to 2000 in the periodical literature in (among other countries) the United States and England. Markesinis and Fedtke explain that those scholars were included within their study on the basis that 'no English colleague would, we believe, argue that [they] are not among the leaders of our profession' and because '[a]ll also taught (or teach) core subjects'.¹⁰⁷

Eight hundred and ninety-four citations of Atiyah's work were identified in scholarly literature in the United States. That rate was by far the highest, with the next highest figure being 164 citations of Andrew Ashworth's writings. Two hundred and seven citations of Atiyah's work were recorded in the English academic literature. The next highest figure related to Peter Birks, whose work had been referred to 144 times. These figures are particularly striking given that Atiyah had retired in 1988, whereas all of the other writers were at the height of their powers throughout the study period. All things being equal, one would reasonably expect to observe greater academic interest in contemporaneous publications than in older writings, not least because the more dated a contribution, the less relevant it is likely to be to scholars who are interested in the law as it presently stands. Markesinis and Fedtke also examined citations of the same scholars' writings for the period 2001 to 2005. By this time, the picture had changed significantly: Atiyah's writings were still the most frequently cited in the United States at 259 citations, but Andrew Ashworth, in second place, had closed much of the gap, his work having been cited 182 times. As regards citations in the English academic literature, Atiyah had tumbled to third place with 51 citations, behind Peter Birks, who had 193 citations, and Andrew Ashworth, whose work was cited 77 times.

The following methodology was used for the citation analysis that follows. All citations of Atiyah's three principal contributions to tort law – *Vicarious Liability in the Law of Torts*; *Accidents, Compensation and the Law*; and *The Damages Lottery* – in articles, case notes and book reviews published prior to 31 December 2017 in Australia, the United Kingdom and the United States were identified. The citations were located by way of database searches on Westlaw UK, Lexis and HeinOnline. In the case of *Accidents, Compensation and the Law*, which saw three editions authored by Atiyah and a further five editions under the authorship of Peter Cane, only citations to editions for which Atiyah was responsible were counted. Self-citations by Atiyah were disregarded as were, in order to avoid double counting, republications of works that cited one of the three books in issue. No attempt was made to examine citations in books (there being no straightforward way to perform any such examination). If any given source referred to one of Atiyah's three works in question, a single citation was

¹⁰⁷ *ibid* 111.

recorded in respect of that source, irrespective of the number of times the book in issue was cited in it. Accordingly, no significance was attached to the weight that a given writer attached to Atiyah's scholarship: a single reference to one of Atiyah's books in issue was accorded the same significance as a substantial review article of one of Atiyah's three texts. Endeavouring to ascribe the weight given to Atiyah's books would have greatly complicated the exercise and, in a sense, rendered the tally of citations more imprecise, because, for example, it would have been debatable how to treat a publication that referred explicitly (say) once to one of Atiyah's three books by name but then discussed it indirectly thereafter. Similarly, no attempt was made to discriminate between the various purposes for which Atiyah's work concerned were cited (for example, to indicate approval or disagreement, for a description of the positive law, and so on). The results of the analysis are shown in Table 11.1.

Table 11.1 Citations of Atiyah's principal contributions to tort law scholarship

	Australia	United Kingdom	United States	Total
<i>Vicarious Liability in the Law of Torts</i>	37	82	50	169
<i>Accidents, Compensation and the Law</i>	52	134	125	311
<i>The Damages Lottery</i>	31	73	36	140
Total	120	289	211	620

Pausing here, it is clear from these results that, of the three texts under investigation, *Accidents, Compensation and the Law* made by far the largest mark in terms of citations. That is, perhaps, unsurprising in circumstances where that book ran to more than one edition, unlike the other two works concerned, and given that it is the most substantial by far of the three publications. Also of interest is the fact that Atiyah's work gained more traction (in terms of citations) in the United Kingdom than elsewhere, although interest in *Accidents, Compensation and the Law* was fairly similar on both sides of the Atlantic. That result may be thought to be somewhat surprising given, first, the fact that the market for legal scholarship in the United States dwarfs that in the United Kingdom, second, Atiyah's extensive engagement with United States scholarship in *Accidents, Compensation and the Law*,¹⁰⁸ third, the fact that Atiyah's policy-driven style of analysis is much more familiar in the United States than in the United Kingdom and, fourth, the findings of Markesinis and Fedtke's study.¹⁰⁹

¹⁰⁸ See the text accompanying nn 52–55, above.

¹⁰⁹ See the text accompanying n 107, above.

How did Atiyah's impact, understood in terms of citations, fare relative to that of other leading twentieth-century Commonwealth torts scholars? Table 11.2 records the number of times (as of 31 December 2017) the tort-related periodical writings of several other great Commonwealth torts scholars (or scholars whose interests included tort law) were cited in periodical publications according to searches performed on HeinOnline.¹¹⁰ Perhaps unsurprisingly, given that John Fleming spent a large proportion of his career at Berkeley¹¹¹ and published much of his work in United States journals and reviews, Fleming's work had the greatest impact by far (in terms of the number of citations).

Table 11.2 Citations of leading 20th-century Commonwealth torts scholars

PS Atiyah	284
JG Fleming	891
Harold Luntz	18
Harry Street	32
Tony Weir	11
Glanville Williams	199

Although these results are of interest, they should not be taken too seriously in circumstances where they have not been informed by citations of the scholars' books or by those of their periodical contributions that do not appear on HeinOnline. Furthermore, publications in United States journals and reviews are overrepresented on HeinOnline, and a prominent publication in the United States thus has the potential to distort the results. Indeed, in some ways, the results contained in Table 11.2 are principally a measure of the degree to which the scholars in issue penetrated the United States market in tort scholarship than anything else.

Putting the numerical picture to one side, from a more qualitative perspective, what impact has Atiyah's writings on tort law had on the thinking of prominent torts scholars? It is obvious that Atiyah's work has made a major mark on several leading thinkers, even if they have not necessarily followed Atiyah down all of the principal avenues he travelled. It seems likely that John Fleming was significantly influenced by Atiyah's work in a sceptical assessment that he wrote regarding the future of tort law,¹¹² despite only fleeting references to

¹¹⁰ The vast majority of the publications concerned were authored by the scholar of interest writing alone. However, a few contributions were co-authored, and these were included in the results.

¹¹¹ Fleming spent two years as a visiting professor at Berkeley in 1958 and 1959, before relocating permanently to Berkeley in 1961, where he remained for the rest of his career: RM Bauxman, 'John G Fleming – 1919-1997' (1997) 45 *American Journal of Comparative Law* 645, 645.

¹¹² JG Fleming, 'Is There a Future for Tort?' (1984) 58 *Australian Law Journal* 131.

Atiyah's writings in the article in question. Harold Luntz's understanding of tort law was profoundly shaped by Atiyah's vision. Luntz was persuaded by Atiyah's critiques of the tort system and attempts to justify it,¹¹³ and considered those criticisms to show conclusively that the tort system should be jettisoned and a comprehensive no-fault system installed in its place.¹¹⁴ As with Luntz, Atiyah's assaults on the tort system persuaded Peter Cane that *qua* mechanism for providing compensation to victims of accidents, it had few redeeming features. However, Cane was unconvinced by Atiyah's proposal that tort law should be largely abolished and nothing installed in its place. Instead, he prefers a 'two-tier system in which cover for losses and expenses above a certain minimum would be voluntary', but contends that 'up to that minimum level, people should not be left to the vagaries of the "free market"'.¹¹⁵

My sense is that Atiyah's writings in tort are, regrettably, no longer featuring in the works of tort theorists as prominently today as they once did. This is particularly so in the case of scholars who are concerned to advance moral accounts of tort law, which accounts are now in vogue. Ernest Weinrib did not refer once to Atiyah in his landmark *The Idea of Private Law*.¹¹⁶ John Gardner similarly fails to engage with Atiyah's work in any of his major writings on tort law.¹¹⁷ John Goldberg and Ben Zipursky in their important work have made reference to Atiyah's scholarship only in passing.¹¹⁸ No doubt, the reason why these writers have apparently side-lined Atiyah is that his view that tort law is a clumsily and grossly inadequate compensation system does not fit their respective understandings of tort law. Another reason for the lack of engagement with Atiyah's writings may be to do with the fact that Atiyah was deeply sceptical of efforts to justify tort law in theoretical terms. It appears that Atiyah's intensely functionalist reasoning has become unfashionable.

¹¹³ In a personal reflection written in the twilight of his career, Luntz describes in detail the impact that Atiyah's writings had made on him: Luntz, 'A Personal Journal Through the Law of Torts' (n 50) 401, 404, 411, 415.

¹¹⁴ See, eg, H Luntz, 'Compensation for Injuries Due to Sport' (1980) 54 *Australian Law Journal* 588; H Luntz, 'Proposals for a National Compensation Scheme' (1981) 55 *Law Institute Journal* 745; H Luntz, 'National Compensation Scheme: A Further Contribution' (1982) 56 *Law Institute Journal* 35; H Luntz, 'The Case for No-Fault Accident Compensation' (1985) 15 *Queensland Law Society Journal* 161; H Luntz, 'Reform of the Law of Negligence: Wrong Questions – Wrong Answers' (2002) 25 *University of New South Wales Law Journal* 836; H Luntz, 'Guest Editorial: Medical Indemnity and Tort Law Reform' (2003) 10 *Journal of Law and Medicine* 385; H Luntz, 'Looking Back at Accident Compensation: An Australian Perspective' (2003) 34 *Victoria University of Wellington Law Review* 279; H Luntz, 'The Australian Picture' (2004) 35 *Victoria University of Wellington Law Review* 879; H Luntz, 'A View from Abroad' (2008) *New Zealand Law Review* 97.

¹¹⁵ P Cane, *Atiyah's Accidents, Compensation and the Law*, 8th edn (Cambridge, CUP, 2013) 493.

¹¹⁶ E Weinrib, *The Idea of Private Law* (Cambridge, MA, Harvard University Press, 1995).

¹¹⁷ J Gardner, 'What is Tort Law For? Part 1. The Place of Corrective Justice' (2011) 30 *Law & Philosophy* 1; J Gardner, 'What is Tort Law For? Part 2. The Place of Distributive Justice' in J Oberdiek (ed), *Philosophical Foundations of Tort Law* (Oxford, OUP, 2014).

¹¹⁸ See, eg, JCP Goldberg and BC Zipursky, 'Tort Law and Moral Luck' (2007) 92 *Cornell Law Review* 1123, 1146–67, fn 84; JCP Goldberg and BC Zipursky, 'Torts as Wrongs' (2010) 88 *Texas Law Review* 917, 924.

VI. LEGACY

Tony Weir was not a person who dispensed praise lightly or withheld criticism where he felt that criticism was deserved.¹¹⁹ In a book review published in 1992 of *Essays for Patrick Atiyah*,¹²⁰ he (rightly) wrote that Atiyah 'is unrivalled in the number, scope and quality of his contributions to English scholarship in the last 40 years'.¹²¹ Atiyah, perhaps uniquely among the great legal scholars of the twentieth century, rose to the apex of more than one major field simultaneously. He was a masterful expositor of the law, but first and foremost he was an inquisitor, who was able, with unparalleled ability, to synthesise and marshal a vast array of sources convincingly to bear out his arguments.

¹¹⁹ Consider T Weir, 'Book Review: The Law of Contract by Hugh Collins' (1986) 45 *CLJ* 503.

¹²⁰ P Cane and J Stapleton (eds), *Essays for Patrick Atiyah* (Oxford, Clarendon Press, 1991).

¹²¹ T Weir, 'Book Review: Essays for Patrick Atiyah edited by Peter Cane and Jane Stapleton' (1992) 51 *CLJ* 374, 374.