

HISTORY OF THE LAW GOVERNING RECOVERY IN AUTOMOBILE ACCIDENT CASES

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ACCIDENT LIABILITY BEFORE THE AUTOMOBILE

The history of the law governing recovery in automobile cases began long before the time of the automobile. The older doctrine of liability for causing bodily injury directly, even by accident, was strict; the individual acted at his peril.¹ There were suggestions that he might escape liability by showing "inevitable accident," or that the cause of the injury was "utterly without his fault."² But it was the defendant's burden to make such a showing,³ and this was never successfully done in any reported case before the nineteenth century.⁴

Liability for negligence was recognized before the industrial revolution, but it was viewed simply as one way in which familiar specific duties might be breached. Thus, a carrier might negligently damage goods committed to his charge, or a landowner might negligently allow a condition on his land to become a nuisance to his neighbor. There was no generalized theory of negligence as a broad ground of liability.⁵

The industrial revolution of the eighteenth and nineteenth centuries was accompanied by a revolution in transportation. In the early 1800's the roads in England were greatly improved.⁶ These were the days of Telford and McAdam, who invented systems of road construction, some of which are still in use.⁷ Draft animals were

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1. *Dickenson v. Watson*, Jones, T. 205, 84 Eng. Rep. 1218 (K.B. 1682); *Weaver v. Ward*, Hob. 134, 80 Eng. Rep. 284 (K.B. 1617); 8 *HOLDSWORTH, A HISTORY OF ENGLISH LAW* 375 (2d ed. 1937); Ames, *Law and Morals*, 22 *HARV. L. REV.* 97, 99 (1908); Wigmore, *Responsibility for Tortious Acts: Its History — III*, 7 *HARV. L. REV.* 441, 443 (1894).

2. See *Dickenson v. Watson*, *supra* note 1; *Weaver v. Ward*, *supra* note 1.

3. *Hall v. Fearnley*, 3 Q.B. 919, 114 Eng. Rep. 761 (1842).

4. It was first made successfully in England in *Holmes v. Mather*, L.R. 10 Ex. 261 (1875). In America the insistence on fault as a requisite for liability in trespass came earlier. See, e.g., *Brown v. Kendall*, 60 Mass. (6 Cush.) 292 (1850); *Vincent v. Stinehour*, 7 Vt. 62 (1835).

5. *1 STREET, FOUNDATIONS OF LEGAL LIABILITY 185-90* (1906); cf. Winfield, *The History of Negligence*, 42 L. Q. REV. 184 (1926).

6. GREEN, *TRAFFIC VICTIMS: TORT LAW AND INSURANCE* 11-17 (1958).

7. See *ENCYCLOPEDIA BRITANNICA* under headings *McAdam*, *John Loudon*; *Telford*, *Thomas*.

better bred and better trained. Vehicles were greatly improved.⁸ All of these improvements resulted in a large increase in horse-drawn travel and in the number of traffic accidents. It also resulted, as Leon Green has pointed out, in a "newly found freedom of the highway,"⁹ in which more and more people participated — as potential defendants as well as possible victims.

These things led to a change in attitude toward liability for traffic accidents as well as accidents generally. The strict liability in trespass was viewed increasingly as an undue burden on desirable activity and enterprise. It was felt that a man should not be held liable in damages unless he had in some way been at fault in causing injury.¹⁰ The concept of negligence was developed to supply the element of fault in accident cases. The central notion in negligence is the duty of each actor to exercise reasonable care in conducting his activities. Reasonable care is measured by what a reasonably prudent person would do if he were put in the actor's shoes at the time and under the circumstances of the conduct in question.¹¹ Also, it is generally for jurors to decide what they think a reasonably prudent person would or would not have done.¹²

As the century progressed, it was marked by the growth of railroad transportation and of corporate enterprise generally. These enterprises were responsible for an increasing number of traffic accidents, and in such cases jurors were no longer likely to identify themselves with the defendants. Therefore, their natural sympathy for the injured victim was not diminished, and juries became "incurably plaintiff-minded."¹³ The man of broader outlook, however, could perceive the danger to the new and rising industrial system from too burdensome a scheme of liability,¹⁴ and courts were sometimes imbued with this viewpoint. These and other crosscurrents of the nineteenth century produced the law of negligence that governed traffic accidents when the automobile appeared on the scene. There were certain salient characteristics of this law.

The test of the reasonably prudent man, although refined and modified, remained the central concept of negligence. Some of the modifications represented an attempt to control juries and to counter-

8. GREEN, *TRAFFIC VICTIMS: TORT LAW AND INSURANCE* 11-17 (1958).

9. *Id.* at 15.

10. See, e.g., HOLMES, *THE COMMON LAW* 94-96 (1881).

11. See, e.g., 2 HARPER & JAMES, *TORTS* §16.2 (1956).

12. *Id.* §16.10.

13. Malone, *The Formative Era of Contributory Negligence*, 41 *ILL. L. REV.* 151, 156-58 (1946).

14. A summary description of the points of view current in the later 19th century may be found in HOFSTADTER, *SOCIAL DARWINISM IN AMERICAN THOUGHT 1860-1915* (1945) (especially chs. 2, 3, 4).

act their plaintiff-mindedness. Thus, in a number of situations courts declared that certain conduct was or was not negligence "as a matter of law," and they implemented their declarations by directed verdicts or non-suits.¹⁵

The doctrines of contributory negligence and assumption of risk had been developed.¹⁶ The former was the more important in traffic cases; it barred a negligent plaintiff from all recovery from a negligent defendant. The courts also utilized this concept as a device for controlling juries by declaring that certain conduct constituted contributory negligence as a matter of law.¹⁷ On the other hand, the doctrine of last clear chance had developed to allow a plaintiff full recovery in certain situations in spite of his own negligence.¹⁸

The doctrine of proximate cause, which had enjoyed luxuriant growth, was also available for judicial control of juries.¹⁹ The plaintiff had the burden of proving the defendant's negligence and in some states his own due care.²⁰

The theory of *respondeat superior* was recognized in cases in which an employee of the owner of a vehicle was acting within the scope of his employment, but the owner was generally not liable for injuries because of negligent operation of the vehicle by another member of his family or by any other borrower.²¹

There was one great statutory development in the law of negligence during the nineteenth century: the allowance of civil recovery for wrongful or negligently caused death. At the turn of the century many states limited the amount of such recovery.²²

When the automobile came on the scene this law of negligence was applied to it, lock, stock and barrel.

In addition to the legal rules governing recovery, there was at

15. The chief proponent of this point of view was Holmes. See, e.g., *Southern Pac. Co. v. Berkshire*, 254 U.S. 415 (1921); *Lorenzo v. Wirth*, 170 Mass. 596, 49 N.E. 1010 (1898); HOLMES, *THE COMMON LAW* 100-29 (1881).

16. 2 HARPER & JAMES, *TORTS* chs. xxi, xxii (1956).

17. See, e.g., *Baltimore & O.R.R. v. Goodman*, 275 U.S. 66 (1927) (opinion by Holmes, J.); *Hayes v. New York, N.H. & H.R.R.*, 91 Conn. 301, 99 Atl. 694 (1917); *Benner v. Philadelphia & R. Ry.*, 262 Pa. 307, 105 Atl. 283 (1918); *Lauson v. Town of Fond du Lac*, 141 Wis. 57, 123 N.W. 629 (1909).

18. See, e.g., *Nehring v. Connecticut Co.*, 86 Conn. 109, 84 Atl. 301 (1912); *Cavanaugh v. Boston & M.R.R.*, 76 N.H. 68, 79 Atl. 694 (1911); *Locke v. Puget Sound Inter. Ry. & Power Co.*, 100 Wash. 432, 171 Pac. 242 (1918); *Davies v. Mann*, 10 M. & W. 546, 152 Eng. Rep. 588 (Ex. 1842); 2 RESTATEMENT, *TORTS* §§479, 480 (1934).

19. GREEN, *RATIONALE OF PROXIMATE CAUSE* (1927). A partial list of articles on this subject may be found in 2 HARPER & JAMES, *TORTS* 1109 (1956).

20. Annot., 33 L.R.A. (n.s.) 1085 (1911).

21. See, e.g., *Watkins v. Clark*, 103 Kan. 629, 176 Pac. 131 (1918).

22. See TIFFANY, *DEATH BY WRONGFUL ACT* (2d ed. 1913), for a collection of the statutes then in force.

the turn of the twentieth century another institution in its infancy that was destined to play a most important part in the matter of recovery for traffic accidents. Liability insurance was invented to meet the needs of employers who were faced with increasing statutory liability for industrial accidents;²³ and it was soon adapted to the automobile.

LIABILITY FOR AUTOMOBILE ACCIDENTS

The automobile has enjoyed phenomenal growth in this country. Soon after the First World War it was recognized as one of the largest causes of accidental death and bodily injury; since that time it has become an increasingly greater cause. The victims for the most part come from lower income groups that lack the means or other resources to meet the crisis of a serious injury. An accident often means financial ruin to the victim and his family, since the majority of them are wage earners. The repercussions of such an event affect many others outside the family: landlords, doctors, hospitals, merchants, and so on. The uncompensated motor victim then poses a serious social problem over and above the problem of accident prevention.²⁴

There are two basic reasons for the prevalence of the uncompensated motor accident victim: the substantive law and the financially irresponsible driver. The remainder of this article will trace developments in these two fields during the present century.

The substantive law of negligence denies all recovery to many traffic victims either because no negligence on the defendant's part can be shown or because contributory negligence on the plaintiff's part is shown. The breadwinner's family, for example, may be denied recovery for his death if his momentary preoccupation contributed to it. Moreover, the determination of liability when it is contested will be made by a court or jury at the end of a long process of litigation. In some of the populous urban centers this process may take several years.²⁵

The combination of these factors of uncertainty and delay often puts the victim in a very weak position to bargain for an adequate settlement. Further, the more serious the injury and the greater the

23. CROBAUGH & REDDING, *CASUALTY INSURANCE* 395 (1928); McNealy, *Illegality as a Factor in Insurance*, 41 COLUM. L. REV. 26, 28 (1941).

24. Studies that show this are described and collected in Franklin, Chanin & Mark, *Accidents, Money and the Law: A Study of the Economics of Personal Injury Litigation*, 61 COLUM. L. REV. 1 (1961); James, *The Columbia Study of Compensation for Automobile Accidents: An Unanswered Challenge*, 59 COLUM. L. REV. 408 (1959).

25. See, e.g., ZEISEL, KALVEN & BUCHHOLZ, *DELAY IN THE COURT* (1959); Franklin, Chanin & Mark, *supra* note 24.

need, the weaker is this bargaining position likely to be. The net result is that the fact and the amount of any recovery are likely to turn on factors that have little to do with the theoretical merit of the case and are inversely proportioned to the need of the victim.²⁶

For these and other reasons the doctrine of negligence in industrial accidents has been abandoned altogether, and many feel that the best solution for the traffic accident problem lies in the same direction. Only the Province of Saskatchewan, Canada, has adopted this solution to date. But everywhere a dissatisfaction with some aspects of the existing system has built up pressure toward greater ease in securing compensation. These pressures have not as yet led to much judicial or statutory change in the theoretical law of negligence. They have, however, tended to modify its actual application, largely through an increasing judicial reluctance to declare a defendant's conduct not negligent, or a plaintiff's conduct contributorily negligent, as a matter of law.²⁷ This has enlarged the sphere of the plaintiff-minded jury. A similar result has been obtained by an increasing willingness to regard an injury as reasonably foreseeable and by some relaxation of the standards of proof, although *res ipsa loquitur* has been applied rather sparingly in automobile cases.²⁸

Legislatures have done little to change the substantive law of negligence. Their principal contribution has been the guest statutes of the 20's and 30's, adopted in about half of the states. These provide that a gratuitous guest in an automobile may recover against his host only upon a showing of something more than negligence — for example, his host's wanton and willful misconduct.²⁹ Whatever else may be said for or against these statutes, it is clear that they tend to impede, not further, the compensation of motor accident victims.

Greater changes have taken place in pursuing what the writer calls the quest for a financially responsible defendant. Some of these changes have been judicial, some statutory, and some institutional. The greatest judicial change has been the extension of vicarious liability, notably by devising the family-car doctrine. As has been noted, the bailor of an automobile is not liable vicariously for the bailee's negligence, even when they are both members of the same family. Since owners as a class are more likely to be financially re-

26. Corstvet, *The Uncompensated Accident and Its Consequences*, 3 LAW & CONTEMP. PROB. 466 (1936); authorities cited note 24 *supra*; cf. Pollack, *Workmen's Compensation for Railroad Work Injuries and Diseases*, 36 CORNELL L.Q. 236, 242-45 (1951).

27. James, *Accident Liability: Some Wartime Developments*, 55 YALE L.J. 365 (1946); Nixon, *Changing Rules of Liability Accident Litigation*, 2 LAW & CONTEMP. PROB. 476 (1936); Searl, *Automobile Liability Law Development and Trend*, 39 BEST'S INS. NEWS 585 (Fire & Cas. ed. 1938).

28. 2 HARPER & JAMES, TORTS 1090 (1956).

29. *Id.* §16.15 (collecting and analyzing statutes).

sponsible than non-owning drivers, this often meant that recovery was allowed only against an impecunious member of the family (often a minor child). The family-car doctrine makes the owner liable, under some circumstances, by declaring that the owner has made the family pleasure his business, so that the driver, in pursuing his own pleasure, is also furthering the business of the owner. This palpable fiction is adopted in roughly half of the states.³⁰ The Florida Supreme Court alone has reached a similar goal, on a much wider front, by treating the automobile as an inherently dangerous instrumentality for the purpose of holding the owner vicariously liable without invoking the doctrines of agency, with their limitations.³¹ A few other states have reached the same result by statutes that impose liability on the owner for the negligence of anyone who drives the car with his consent, express or implied.³²

These extensions of vicarious liability do nothing, of course, to provide a financially responsible automobile owner. By far the greatest contribution toward assuring financial responsibility has been made by the institution of liability insurance. Today most non-business policies provide protection not only for the owner (the insured) but also for anyone who drives the car with the owner's consent, express or implied. The prevalence of such policies has made extension of vicarious liability relatively unimportant.

Since liability insurance affords financial responsibility (and at the same time provides a wide distribution of losses), there has been pressure for requiring it of all automobile owners by law. This requirement is virtually universal in Europe and throughout the British Commonwealth. Until recently, however, it was imposed by only one American state³³ — a fact that non-Americans find scarcely credible. This has been caused by the strong opposition of the insurance companies themselves and of other interested groups, such as farmers, in some states. Legislatures have tried to meet the pressure for compulsory liability insurance by offering halfway measures, such as financial responsibility laws and provisions for an unsatisfied judgment fund.³⁴

30. *Id.* §26.15.

31. *Southern Cotton Oil Co. v. Anderson*, 80 Fla. 441, 86 So. 629 (1920); see Note, 1 U. FLA. L. REV. 286 (1948).

32. See, e.g., *Young v. Masci*, 289 U.S. 253 (1933); *Sutton v. Tanger*, 115 Cal. App. 267, 1 P.2d 521 (1931); *Psota v. Long Island R.R.*, 246 N.Y. 388, 159 N.E. 180 (1927).

33. Massachusetts; see *Opinion of the Justices*, 251 Mass. 569, 147 N.E. 681 (1925). New York has recently provided for compulsory automobile liability insurance. N.Y. VEHICLE & TRAFFIC LAW §§310-21 (effective Oct. 1, 1960).

34. Some form of unsatisfied judgment fund may well be needed to supplement compulsory insurance where it is found desirable.

CONCLUSION

English and American courts — largely without legislative help — fashioned a law governing civil recovery in traffic cases that was reasonably well adapted to the needs of the horse-and-buggy stage of the transportation revolution and reasonably well attuned to the social and political philosophy of the nineteenth century. There has been, however, no comparable change in twentieth-century America to meet the needs of today's traffic and its victims. Nor have the legislatures done much to meet these needs. This is virtually the only country in the world where automobiles are common that continues to reject compulsory liability insurance. Financial responsibility laws have not in fact eliminated financially irresponsible drivers and owners, although they may have combined with the sales efforts of the insurance companies to increase the number of insured drivers.

As far as changes in the substantive law go, legislation has done almost nothing.