AN EVALUATION OF THE FAULT CONCEPT*

FLEMING JAMES, JR.**

The debate between those who would retain fault as the basis of liability for accidental harms and those who would substitute for it some sort of a compensation scheme for traffic accidents is one of long standing. Yet the problem is a basic one which many persons think remains unsolved. Moreover there has recently been a resurgence of at least academic interest in the problem and some of the most significant contributions to its analysis — particularly economic analysis — are being made in our own decade. This has caused me to do a good deal of thinking about the matter and, I believe, justifies a review of it here even though the review itself will scarcely contribute anything new in the way of analysis.

The law which we currently apply to motor accidents is, of course, the law of fault; and, here the fault is for the most part negligence. The basic premises of the fault system are that an innocent actor should not have to pay for injuries caused by his lawful, careful conduct, but that a wrongdoer should be liable for the injurious consequences of his wrong. The law of negligence, as applied to accidental harms, came to flower in the 19th Century although the notion of liability based on fault had much older roots.

Negligence law made a lot of sense for the traffic accidents of the early 19th Century. When an accident caused injury it was largely a matter between the two individuals concerned and the law saw only two possible ways of handling the loss — letting it lie where it had fallen or shifting it to the individual who had caused it. But society does not benefit from the mere shifting of a loss. Compensation for the plaintiff may be a good thing but that good is exactly offset by depriving the defendant of the same amount. Indeed, if the process of loss shifting costs anything — and it certainly does — society is poorer for the shifting since its cost is added to the original loss.

The law was wise then not to shift the loss unless there was a good reason for it. And the law of that day was also wise to find in fault the reason for shifting. This fitted well individualistic morality. It seems fair to put the burden of liability on a wrongdoer and unfair to visit it upon one who has done no wrong. Moreover, this scheme fitted current notions of expediency. Accidents are apt to be caused by dangerous affirmative activities; but the industrial revolution was begin-
THE FAULT CONCEPT

ning to underscore the social value of many dangerous affirmative activities like manufacturing and later railroad, and there was a widespread desire not to burden such useful conduct. Indeed, infant industry was sometimes consciously subsidized as by protective tariffs. Negligence laws did not burden lawful activities carefully performed. Rather, its deterrence was saved for specific acts and omissions which were unreasonably — unnecessarily — dangerous. This system of liability must have seemed "very bright indeed" to the classical economist. But from another point of view it may be seen as a system which privileged actors to maim or kill people carefully, and, on the other hand, compelled the victims of accidents to subsidize dangerous activities.

Before we turn from this glimpse of the heyday of fault to see what has happened to it in the course of time, one more thing should be noted. The concept of fault which this system envisioned clearly pre-supposed free will (as most of us do at least to some extent), and beyond that also the notion that the actor had a choice in the conduct in question between doing it in a perceptibly dangerous way and doing it in some feasible, safer way. Holmes emphasizes this element of choice and reminds us that "a choice which entails a concealed consequence is, as to that consequence, no choice." Thus, legal negligence involved something of personal moral shortcoming; the man who was held liable had been guilty of ethical as well as legal wrong. And since fault involved a more or less informed choice, it was possible to see how the prospect of liability could influence the choice for the better.

If the fairness and expediency of the fault system once seemed so bright the question naturally arises whether that is not still the case. I believe it is not to any great extent and shall try to show this by pointing out what has happened to the fault principle in practice.

Early in the 19th Century there was the emergence of an objective standard of conduct. At least since Vaughan v. Menlove,¹ the actor's conduct is to be judged not by his own mental and emotional capacities but by an objective, community-average standard — that of the reasonably prudent person. The personal equation of the individual, so to speak, is to be largely disregarded. This means that the hasty, awkward, or dumb man may be held negligent for failing to meet a standard of conduct which he does not have the capacity to meet. Here surely there is no personal moral shortcoming — no choice of a bad alternative by one who is free to choose a good one. In such a case, what seemed so fair about visiting liability on a wrongdoer is lacking. Moreover, whatever deterrent effect liability may have cannot make a man exceed his

1. 8 Bing. 468 (N.C. 1837).
capacities, though it might occasionally induce him to refrain altogether from some activities.

In terms of the fault principle, the objective standard was sought to be justified in two ways: (1) By pointing to the difficulty or impossibility of applying any other rule. As Holmes said, we cannot see men as God sees them for more than one sufficient reason. (2) By assuming that, by and large, objective fault would coincide with moral fault.

Vicarious liability represents another inroad on the fault principle. The fault system's claim to fairness and ethical superiority rests on the supposition that the person who is at fault is the one who will be made to pay for its consequences. Whatever spiritual value vicarious atonement may have in some contexts, no moral principle is served by imposing it through legal compulsion on innocent persons. Yet, in the course of the 18th and 19th Centuries, it became established that the employer was liable for harm done by the casual negligence of the employee acting within the scope of his employment no matter how careful the employer had been in selecting, training, supervising, and equipping the employee.

True, the law did insist on fault in these cases, but fault was divorced from the liability to pay. Innocent A paid for B's fault. And, while the master has a right of indemnity against his servant, this right is generally valueless in practice for a good many reasons, and is in fact almost never pursued.

The advent and rapid growth of liability insurance for motorists has made great and deep changes in the way the fault principle works in practice. Some of these deserve mention:

(1) For one thing insurance has divorced fault from the actual incidence of liability in somewhat the same way that vicarious liability has.

(2) The prevalence of insurance has probably induced juries to dilute the fault standard for liability. Juries generally assume that defendants in automobile cases are insured — as they generally are — and tend to feel (among many cross-currents of feeling) that insurance exists for the purpose of compensating accident victims.

(3) The prevalence of insurance has also meant that the vast majority of accident claims are settled and not litigated, or not litigated to a conclusion. The settlement practices of insurance companies therefore play a more immediate role in determining how claims will be disposed of than do the rules of law. And while these practices certainly reflect legal rules, they also reflect a great many factors having little or nothing to do with the theoretical basis of legal liability. They reflect, for instance, the law's delays and their effect upon the bargaining position.
of claimants who need money to live on, especially in serious cases. They often are guided by the nuisance value principle — that any claim, however groundless, may be regarded as having a money value of slightly less than the cost of defending it. They are influenced by all the adventitious factors which will affect a jury, or which the insurance companies think will affect a jury, such as the personalities of plaintiff or defendant or even of their lawyers.

(4) The availability of liability insurance at rates that are not prohibitive has come to mean that virtually all automobile owners and drivers who have the means to respond to a judgment against them have chosen to protect those means by buying insurance, even where there is no legal compulsion. Thus, today practically everybody worth suing is insured.

Studies of accident producing behavior, made during the present century, also have a bearing on the practical application of the fault principle. These studies show that a great deal of such behavior — a good deal more than was commonly supposed in the 19th Century — stems from personality traits and from factors such as age, fatigue, unsuspected visual defect, and so on, that do not denote fault in the sense of personal moral shortcoming.

These studies have pointed up the fact that the discrepancy between legal fault — the failure to meet an objective standard of conduct — and moral fault — an individual's failure to do the best he can under the circumstances — is much greater than was assumed to be the case while the law of negligence was developing.

The prevalence of jury trial in America has probably meant, as I have already suggested, that many adventitious factors enter into verdicts beside a genuine quest for fault. Moreover, the tendency of American courts has been to respect and even to enlarge the jury's sphere by refusing to lay down specific rules of conduct and by leaving most questions to the jury.

Holmes thought this was a mistake, and that it should be the business of negligence law to formulate specific rules as guides for conduct in common situations, rules which would be applied by juries as tests of negligence. But Holmes' view did not prevail, and today a man generally acts at his peril in that some later jury will retrospectively determine that he acted unreasonably. And this determination will be made in the light of whatever adventitious factors influence a jury.

All of these things which have happened in the course of time to the practical application of the fault principle have had many significant implications. Among them are these:

1. Fault itself has become an uncertain and diluted concept. So far,
at least, as defendants are concerned, the law, or its handmaiden the jury, often finds legal fault where there is no moral fault. And, to compound this uncertainty, the law often absolves a patently careless plaintiff of legal fault in order to temper the harsh rule of contributory negligence. Thus the law gives no clear guide to parties telling them what they should and should not do in potential accident situations, a fact which detracts seriously from any deterrent effect that civil liability might have.

2. Any attempt to revitalize the notion that legal fault should correspond to personal moral shortcoming would pose serious problems. The extra hazards of some of our most dangerous groups stem not from moral fault, but from factors such as age, inexperience, and a wide variety of psychological and personality traits that are likely to make persons accident repeaters. If these persons are to be held liable only when there is clear moral fault on their part, then that will mean that the victims of these extra hazards will go uncompensated. On the other hand, if the personal equations of these drivers is not taken into account they will often be held liable where there is no moral fault on their part.

This dilemma is sometimes pointed up by our attitude toward licensing. Driving a car is so important a part of our way of life today — of our self-esteem, our prestige, and so on — that we as a society are unwilling to exclude from the highways many groups of drivers who are known to be somewhat more dangerous than the average. Thus, we do not exclude drivers under 25 or over 70. And many states do not exclude persons suffering from heart conditions, diabetes, or epilepsy, where those diseases are under reasonable control. Surely such people are not at fault for driving with official sanction based on a finding that their ages or conditions do not, on an over-all view, pose unreasonable danger. But even when these conditions are controlled they will occasionally produce blackouts or other lapses and, consequently, accidents. Should the victims of these accidents be denied recovery because the driver was not at fault? Should they pay with their injuries for society's choices to let these people drive?

3. The real defendants today — the persons who actually foot the bill for liability — are rarely the active participants in an accident who were guilty of whatever fault there was. Rather, the brunt of liability today is borne, in the first instance, by innocent absentee employers, and liability insurance companies. And if distribution of losses occurs after that, the aliquot parts of this burden, like the gentle rain from heaven and the quality of mercy, fall indifferently on the just and the unjust.

4. No longer is the law limited to the stark and simple alternatives
of either letting a loss lie where it fell, or shifting it entirely to the one who caused it. Liability insurance and large scale production provide means for the wide distribution of losses, thereby minimizing their disutility according to insurance principles.

From these last two facts, in turn, two further consequences follow:

1. Our system is no longer one of liability based on fault in the sense that made it originally seem so fair and gave it so strong a moral claim. No longer does it make the wrongdoer pay for the injuries caused by his wrong. Rather, it thrusts vicarious atonement for those wrongs on innocent persons. And this is true however clear and meaningful our notion of fault may be. The question no longer is in fact whether A should pay for B's injury but whether the cost of that injury should be distributed over the insured motoring public or some other large group.

2. Since liability's burden is not borne by those at fault, it can scarcely operate directly as an effective deterrent against faulty conduct. To be sure those who must pay -- employers and insurers -- may use discipline, or higher premiums, or some other means, as incentives to safety on the part of motorists for whom they are responsible. And this may take the form of trying to forestall faulty conduct. But these pressures will be brought to bear whether the initial liability is based on fault or is imposed without it. Employers and insurers will try to reduce accidents in order to minimize the cost of their accident liability whatever its legal source. In doing so they will choose whatever feasible means they think most effective. If the best way to reduce accidents is to concentrate on those caused by fault -- as defenders of the fault system sometimes suggest -- then that is where employers and insurers will concentrate their efforts if they think the effort practically worthwhile.

From the foregoing, it seems that the fault system can no longer be justified because it works fairly between the individual participants in an accident, or because it is an effective deterrent against wrongful conduct in accident cases. This does not mean, of course, that the fault system cannot be justified in modern context; but it does suggest that if it is to be justified; new reasons must be found for it. These we should examine in comparison with another point of view that has gained wide acceptance among students of the subject and has been generated in part by the very factors which we have found to undermine the classic justifications of fault.

This point of view, which may be called enterprise liability, is most simply stated by the proposition that an activity like motoring should pay for the accident loss it causes because, as a general proposition,
each enterprise in our society should pay its own way. The proposition that an enterprise should pay its way has been defended on general considerations of fairness and on the economist's argument that this leads to the proper allocation of limited resources in a free society.

The argument from fairness is stated by Keeton and O'Connell with reference to a motor accident where nobody is at fault. Here the fault system denies liability. But this denial does not rest on the notion that the victim deserves to bear the loss (for he is innocent) but because there is no sufficient reason to shift it to another. The authors continue: "The harshness of this result becomes especially evident once it is recognized that the alternatives include not only the unpalatable shifting of the whole loss to another equally blameless but also the distribution of the loss among a larger group, all of whom are potentially victims of mischance."

The argument from resource allocation is a little more complicated but I believe it may go to the root of the matter. This argument is being developed by my colleague Calabresi and it is worth anyone's while to read what he has written on the matter. I shall offer here only a brief and oversimplified summary: when the law permits a dangerous activity it makes a decision for accidents. Building a skyscraper or a long tunnel will, with actuarial certainty, take a certain minimum toll in life and limb no matter how carefully it is done. When society permits the activity it decides, in effect, in favor of the taking of this accident toll. This does not, of course, imply approval of the accidents but a willingness to incur them.

If the rules of liability are such that the activity must pay its way in terms of accident costs (as well as other costs), the market will regulate the extent to which we, as a society, will engage in that activity and that extent will be measured by the number of accidents for which we are willing to pay. But if the activity does not have to pay its accident costs, then we are likely not to make intelligent choices about how much of our resources we wish to allocate to this activity and how many accidents we are willing to cause by it. If motoring does not have to pay its full accident costs then there unwittingly may be more motoring than people would choose if its full costs were known. And, since motoring is an accident prone activity, this would mean that we as consumers would vote for more traffic injuries and deaths than we should be willing to vote for if the cost of motoring reflected the full cost of its accident toll.

If a system which compelled motoring to pay its own way should increase the cost of motoring, this might well result in fewer cars and fewer miles driven. And this, in turn, would tend to reduce the number
of motor accidents. This is what Calabresi calls "general deterrence" as distinguished from the specific deterrence of faulty driving behavior. A system of liability which promotes proper allocation of resources will not only limit the costs incurred by an activity (including the accident losses) to those for which we are willing to pay; it may also in present context have collateral advantages. It will tend to assure compensation for traffic victims and it will bring about a wide distribution of the costs of accidents. But it must be conceded that if these ends were sought by themselves, the most effective way to attain them might well be some broad form of social insurance for all disabling accidents; or, perhaps, for disability from any source, the cost of which would be distributed over society as a whole by general taxation. The superiority of enterprise liability over such a broad scheme is probably found in terms of resource allocation. If the accident costs of motoring are externalized in this way — that is, divorced from the activities which generated them — then the activity in question will receive a hidden subsidy which will invite us to vote for more accidents than we should be willing to pay for if we realized their cost.

Throughout the argument for enterprise liability so far, it has been assumed that the cost of motor accidents is properly a cost of motoring, so that if motoring should pay its way, these accident losses are part of what it should pay. It is at this point that the most thoughtful recent attack on enterprise liability finds weakness. Blum and Kalven in their recent provocative treatment of the problem assure us that an economist cannot say what, if any, part of the social costs of traffic accidents are properly a cost of motoring. Many motor accidents involve other activities also like railroading, bicycling, or walking. Even in a two car accident, one of the drivers may have been engaged at the time in his employer’s business which was not an activity otherwise concerned with transportation or traffic. When so many of us own and drive cars, perhaps automobile accidents should be regarded as simply a cost of modern life rather than of any one of its component activities. These authors conclude that motor accidents “appear to be imprernably a cost of multiple activities.” They illustrate this by juxtaposing the activities of motoring and walking, pointing out that every motorist-pedestrian accident is just as much a cost of walking as it is a cost of motoring. So they despair of being able to allocate any part of the cost of motor accidents to the activity of motoring, and fall back on the traditional attempt to allocate this cost on the basis of individual fault.

What this means today, if fault is a workable concept at all, is this:

1. The cost of accidents caused by the fault of the individual motorist, without contributory fault, is distributed over the whole insured motor-
ing public. It is not visited on the individual wrongdoer and its distribution is not confined to insured wrongdoers. As Blum and Kalven put it: "[L]iability insurers in allocating costs among the insured appear to think in strict liability terms."

2. The entire cost of motor accidents where the motorist is not at fault or where the motorist and victim are both at fault is either borne by the victims, or by the enterprises in which they are engaged, or is externalized to all specific enterprises as by being added to welfare costs. Thus the refusal to make allocation on any other basis results in fact in making the most arbitrary and least defensible allocation of all. None of the cost of such motoring accidents is allocated to motoring.

Though this result seems to satisfy its authors — and no doubt will please all those who have a vested interest (either emotional or pecuniary) in the fault system — it has failed to satisfy other thoughtful critics. Of those who have written since the appearance of the Blum and Kalven piece, Keaton and O'Connell and my colleague Calabresi, have all agreed that at least some of the social cost of all motor accidents is properly allocable to motoring, so that if motoring is to pay its way it should meet at least a fraction of these costs.

I suggest that this is a reasonable point of view and further suggest that the part of the costs of motor accidents to be allocated to motoring should be a rather large one for several reasons. As a basis for discussing these reasons, let us juxtapose the activities of motoring and walking as all of these writers do.

In one sense it is true, as Blum and Kalven point out, that an accident involving both activities is a risk of each. If you remove the pedestrian you will just as surely prevent this particular accident as if you remove the motorist. But it is also true in another sense that automobiles inject virtually all the danger. Without them the risks of walking would be minimal. Motoring on the other hand is a dangerous activity whether pedestrians are present or not. A pedestrian threatens no one but himself. A motorist threatens fellow users of the highway and a good many others as well as himself unless perchance he is driving alone on the Great Salt Desert. As between motorist and pedestrian the risk is pretty one-sided. Whatever the economist may think of the matter, I suggest that it is equitable to consider this one-sidedness and this affirmative injection of new danger as factors in allocating costs. They may of course be outweighed in some situations, as where the social importance of an activity is so great that society decides to subsidize it in every possible way. Military operations in wartime might furnish an example. But nothing like that, it is submitted, is the case here.
The other reason for considering a large part of the cost of motor accidents as properly a cost of motoring may be more to the economist's taste. Pedestrians as well as motorists could of course insure against losses from auto-pedestrian accidents. In this case the protection would take the form of accident insurance rather than liability insurance. If now such insurance were compulsory or widely held and if it covered only the type of risk here involved then the premiums would roughly reflect the accident cost which is allocated by the present system to the activity of walking, and pedestrians would have brought home to them the extent of this cost. If it should be found excessive this would presumably be reflected in a reduction in the amount of walking and consequently in the number of auto-pedestrian accidents. But no such thing is likely in fact to occur. Walking is a definite enough physical phenomenon, but for present purposes it is hard to identify it as a significant activity or enterprise. We all do it, whether or not we also own or drive cars, if it is only to cross the street or walk to and from a parking place. And there is not and probably never will be insurance to cover its risks as such. Of course accident insurance which includes these risks is readily available; but it covers also a host of other risks so that its premium cost does not recognizably reflect the accident cost of this one activity. Moreover, even general accident insurance is not widely held by pedestrians and there seems to be no effective way of inducing them to buy it much more widely — especially those of them who can least afford to bear accident costs individually. Allocating the cost of auto-pedestrian accidents to pedestrians will not, therefore, be likely to reduce such accidents by the kind of general deterrence which would result from allocating these costs to motoring. Pedestrians do not constitute an "actuarial class" for which we can "evaluate the risk of such costs in the future"; and, the allocation of these accident costs to them rather than to motorists has additional disadvantages. Since pedestrians are far less likely to be insured than motorists there would be much less chance that victims of such accidents would receive compensation, or that these accident losses would be put into the channels for widely distributing them.

For these varied reasons, allocation of the cost of motor vehicle accidents to motorists seems to give promise of being the most feasible and just solution of one of our major unsolved problems.