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Green: Traffic Victims. Tort Law and Insurance

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RECENT BOOKS

TRAFFIC VICTIMS. Tort Law and Insurance. By *Leon Green*. Evanston, Illinois: Northwestern University Press. 1958. Pp. 128. $4.

This provocative little book is based on the 1958 Rosenthal lectures, given at Northwestern University School of Law. Though little is new in this publication, for Professor Green and others have been writing and talking about the automobile accident problem for many years, it succeeds in putting the whole problem in perspective for the non-specialist in tort law. Essentially the book's thesis seems to be this: Originally tort law was based on a doctrine of strict liability keyed to the action of trespass; under the impact of increasing commercial activity and industrialization, negligence law developed and protected infant business enterprise against burdensome liability by relieving the defendant of all liability for unintended harms except those involving "fault," or blameworthiness of conduct; in the twentieth century an increasing concern for the individuals ground beneath the mechanical juggernaut is leading to a revision of tort law in the direction of strict rather than fault-based liability, so that the user of machines must pay for the harm he does; as yet this tougher-minded negligence law is too uncertain and complex to solve the problem of automobile accidents, even when accompanied by widespread automobile liability insurance; thus a legislative solution is needed. The solution Professor Green proposes is compulsory motor vehicle comprehensive loss insurance, which would compensate injured persons irrespective of fault.

The industrialization of society brought sweeping changes in the law, for a legal system adapted to an agrarian, stationary, status-oriented society is not suitable for the needs of an industrial, mobile, individualistic society. Thus earlier law puts excessive emphasis on the values of the status quo. Its property notions prevent change; its contract law is little developed. By the nineteenth century, however, public attitudes called for significant change. Protection of static property gave way to concern for enterprise; property was fully protected only if it was property in use. As Hurst put it in an earlier Rosenthal lecture, "We were concerned with protecting private property chiefly for what it could do; as one looks at the facts of cases and pays somewhat less attention to the sonorous language of judicial opinions, he is impressed that what we did in the name of vested rights had less to do with protecting holdings than it had to do with protecting ventures. There is no key instance where vested rights doctrine protected a simple *rentier* interest."[1]

The law of torts, too, responded to the change in the environment. Strict tort liability was consistent with the basic patterns of the older

[1] HURST, LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES 24 (1956).

society. "One must use his own so as not to injure another, and if he does injure him he must show himself utterly without fault." But as enterprise became more important than status quo, the tort of negligence developed. The doctrines of negligence fitted the aggressive, enterprising, changing nineteenth century milieu better than did the stricter liability of trespass, for it relieved enterprise from excessive risk. The result was a doctrine that required "fault" for tort liability; the underlying basis of liability became a "moral" one. It is one of the merits of Green's book to point out that the real basis for the new tort law was not "morality," but the needs of infant enterprise, or if morality then the morality of the industrial revolution. The change was coincident with increase in traffic on the highways; "horse and buggy" cases constituted the anvil on which the new law was hammered out. If the old basis of liability had continued, the business man would have put his fortune at risk whenever he went on the highway with a load of merchandise. The new doctrine eliminated that potential liability in the absence of "fault." Enterprise could not pay for the harm it caused, charging it off in the price of its product, because (1) enterprise was largely individual, and very modestly capitalized, so that a single large damage suit might bankrupt the entrepreneur, and (2) the insurance devices for protecting him against this eventuality were far in the future. Thus the law accommodated itself to the apparent needs and capacities of social organization, and relieved the entrepreneur of certain adventitious costs so that he did not have to take account of them in his pricing. Harms that we would regard as a proper part of the cost of doing business were thus left to lie where they fell. In a sense, the injured individual was sacrificed on the altar of collective need, i.e., the hapless individual subsidized a supposedly dynamic and fearless enterprise.

One can recognize the need for this result at one stage in the evolution of our society without approving it in principle. Indeed, in our modern view, this subsidy collected from unwilling individuals was immoral. Most of us today give at least lip service to the proposition that these "social" costs of private enterprise should be brought into the cost accounting process of the entrepreneur and passed on to the consumer through the pricing mechanism—at least this is announced public policy in all the advanced capitalist nations.[2] The merits of this change in social practice have long been obscured by the effective use of pejorative terms to describe it. At least since Dicey[3] it has been customary to talk of the nineteenth century as an age of individualism, and to speak of the developments of the twentieth century as *collectivist.* The development of administrative tri-

[2] For a full discussion of this whole idea, see KAPP, THE SOCIAL COSTS OF PRIVATE ENTERPRISE (1950).

[3] DICEY, LECTURES ON THE RELATION BETWEEN LAW AND PUBLIC OPINION IN ENGLAND DURING THE NINETEENTH-CENTURY (1905).

bunals has been decried as "Bureaucracy Triumphant,"[4] and government protection of hapless individuals against the machine as "The Road to Serfdom."[5] These developments may have their dangers, which it is not the province of this book review to explore, but there is much merit in Green's suggestion that the appellation "collectivist" is misused. For it was in the nineteenth century that the injured individual was sacrificed to the collective need—to the desire of society for more and cheaper goods, and for successful enterprise, while it is in the twentieth century that the dignity and worth of the individual is better recognized and protected. No longer can the unemployed or injured workman be casually cast upon the industrial scrapheap and left to bear alone the accidental costs of the industrial machine.

This drastic change in social attitudes has produced elaborate schemes of social insurance; it is also having its effect through a massive subterranean movement to alter the conformations of negligence law—to return tort liability for injury back to a stricter form, not based on fault.

Two factors are important in causing this reversion. For one thing, business itself has developed a sound method for converting risk into cost—a highly developed and enterprising insurance business will sell insurance coverage protecting against almost any liability for harm done to others. Even without insurance, the risk to enterprise of a stricter tort liability would be less, for the enormous modern corporation can easily convert risk into cost through self-insurance. Perhaps more important than the possibility of insurance, however, are the ravages of the motor car. This lethal weapon, which some years since killed its millionth victim, poses a problem of incredible proportions. A social problem so dramatic and pervasive calls for drastic solutions, and even scholars generally unsympathetic to a departure from fault orientation for tort law may concede that the "sheer bulk of the automobile accident problem is such that unusual measures are suggested."[6]

Professor Green feels that "the courts are powerless to reconstruct a rational process for general use." The elaboration of doctrine and the general resistance of the litigation process to change make it likely that the court will not solve the problem posed by the slaughter on the highways. Others would go farther and, adhering strictly to the received notions of stare decisis, deny to the courts the right to make the change, even if they could do so.

Many suggestions have been made for legislative solution of the problem. A compensation scheme akin to workmen's compensation would re-

4 ALLEN, BUREAUCRACY TRIUMPHANT (1931).

5 HAYEK, THE ROAD TO SERFDOM (1944).

6 Cooperrider, "A Comment on *The Law of Torts*," 56 MICH. L. REV. 1291 at 1302 (1958).

move the automobile problem from the sphere of negligence litigation, recognizing the irrelevance of fault where fault is almost impossible to assess. This scheme would not seek to redress wrong but to distribute risk. The compensation proposal has been in the mill for several decades, but despite repeated introduction in state legislatures, it is still untried in the United States. Less drastic is compulsory insurance as a prerequisite to automobile registration. Massachusetts adopted it thirty years ago, but was alone until New York recently followed suit, after insurance company opposition was weakened by intra-industry disagreement. Financial or safety responsibility laws are almost universal; these laws compel unsuccessful defendants or persons who have been involved in accidents to buy insurance. They also induce most other persons to do so.

If what is desired is to assure persons injured on the highways that they will not have to bear alone the accidental costs of motorized transport, the difficulty with all these proposals, save only the compulsory compensation system, is that insurance remains tied to the unwieldy lawsuit for negligence. Of course the pervasiveness of insurance does make it likely that the defendant can pay a judgment without serious harm to him; insurance thus creates a solid basis for reconstruction, if the courts wish, of a stricter form of tort liability. But Green thinks such a reconstruction is beyond their powers.

Even if the courts could reconstruct tort law, there is much to be said for legislative intervention, for the solution can then be limited to automobile accidents. Where "fault" can be more readily ascertained, there may be strong arguments for preservation of a fault-based system.[7]

Professor Green proposes compulsory motor vehicle comprehensive loss insurance, as an incident to the licensing of a motor vehicle. It differs from the compulsory insurance proposal mentioned above in insuring the loss of the injured person rather than the liability of the tort-feasor. This makes the proposal for compulsory insurance more rational and self-consistent, for the reason for compelling insurance is the protection of injured third persons. It makes little sense, then, to filter that protection through a fault screen. Compulsory loss insurance would protect the injured person directly, without the intervention of negligence doctrines, though it would remain a court-administered system. Professor Ehrenzweig's similar proposal of "full-aid" insurance would also eliminate the fault screen.[8]

It is beyond the purpose of this book review to examine the proposal in more detail. That is the province of a more ambitious literary undertaking. Perhaps it is sufficient to say, by way of conclusion, that Professor Green has added a useful and provocative piece to the growing literature which is concerned with reconstructing the field of tort law to serve the

[7] See, e.g., Cooperrider, "A Comment on *The Law of Torts*," 56 MICH. L. REV. 1291 (1958).

[8] EHRENZWEIG, "FULL AID" INSURANCE FOR THE TRAFFIC VICTIM (1954).

needs of twentieth century society. It is to be hoped that much more attention will be given to this problem, not only by scholars, but also (and more important) by legislators and their advisers.

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