TRAFFIC ACCIDENTS: FAULT OR RISK?*

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Since Sainctelette's pioneering study *On Liability and Indemnity: Transportation and Industrial Accidents*[1] was published nearly a century ago, the question raised in the title has lost none of its importance or timeliness. In what follows, we will attempt to show that the apparent dichotomy should properly be resolved by recognizing that while traffic does involve inherent risks, and that compensation for personal physical injury should be allowed on this basis, the element of fault — ranging from momentary inattention to criminal negligence — must also be taken into account. This will require us to conduct our examination at three levels, namely (1) objective facts, (2) current law and (3) a revised law.

1. Objective Facts

The issue under review is quite clear. Are traffic accidents the realization of risk, or the consequences of faults? It would be puerile to deny the risks of driving. An accident is, by definition, a vexatious and essentially fortuitous event which lies largely beyond the control of the interested parties; in fact, most victims of traffic accidents are the drivers themselves and members of their families. Statisticians can calculate the risks involved, and tell how many persons will be killed or injured on any given day, and for a given set of weather conditions. They can designate peak accident hours, and compute each driver's risk status on the basis of sex, marital status, socio-economic category, and driving experience.

There is, therefore, a very strong element of inevitable risk in traffic accidents. Yet it would be wrong, and even dangerous, to wrap up the matter without further inquiry. Certain accidents are the result of culpable behavior that may amount to criminal negligence. A driver who speeds through a village at 80 mph as

 This article first appeared in I Recueil Dalloz Sirey 103 (1982). It is duplicated herein at 840 in the original French with permission of the author and publisher.

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[1] C. Sainctelette, De la responsabilité et de la garantie. Accidents de transport et accidents de travail (1884).

children are going home from school or one who drives when intoxicated accepts the risk of killing. Such behavior is an intentional fault, even if the driver does not intend to kill.

It is true that the cause of many accidents lies somewhere between the error or momentary lapse in attention, which can occur with even the most prudent driver, and criminal behavior. The actual cause may be the error or inattention of an inept or absentminded driver — to whom society has nevertheless issued a driver's license. It may be an error which could have been avoided, had the driver been more attentive to what he was doing, or had he not taken medicine which he knew would induce drowsiness. It may have been avoided simply by eating less at dinner, or by not driving on an empty stomach. The momentary inattention may have been avoided had the driver been more alert — as in the case of an overworked mother, or a scientist who spends long hours in the laboratory, or a doctor reflecting on his patients after a busy day.

The picture is thus a complex one, and must be subjected to further analysis to see how an effective accident-prevention policy can be developed in terms of criminal law. In terms of civil law, the foregoing analysis should suffice: we have seen that accidents arise from a range of causes running from statistically inevitable errors to serious faults involving manifest negligence. The issue at hand is whether, limiting our discussion to compensation for personal physical injury, our current law takes this diversity of causes into account.

2. Current Law and Policy

Our law considers liability in terms of both risk and fault. There is a general recognition of inherent risk, as evidenced in the following features of French law:

- The *Jand'heur* decision,[2] by which the Court of Cassation attributed to the driver[3] a "presumption of liability," which in subsequent decisions became "ipso facto liability" and then simply "liability;"
- The law of 1958 requiring drivers of motor vehicles to take out liability insurance;[4]
- The law of 1981 automatically extending coverage to pas-

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[2] Judgment of Feb. 13, 1980, Cass. ch. réun., I Dalloz Periodique et Critique 57 (1930).

[3] Throughout this essay, *gardien de la chose*, i.e., the person with legal custody of items of property, is translated as "driver."

[4] Code des Assurances art. L-211 (1).

sengers injured in traffic accidents;[5]

— The policy of the Court of Cassation tending to limit to exceptional circumstances the cases in which the driver may be exonerated from his liability, a policy set forth in its last two reports to the Minister of Justice (*Garde des Sceaux*), although advanced in a very hesitant manner.[6]

Current law also recognizes the concept of fault, or negligence. The guiding force of the *Jand'heur* decision has been waning, but it still applies. The driver — or to be realistic, his insurance company — is exonerated from his liability when evidence proves the existence of *force majeure*, an act by a third party, or a fault committed by the victim.

Our law thus recognizes both fault and risk, but draws the line between them — and seeks out fault — in the strangest way imaginable. We are now quite used to seeing the courts actively seek out the *victim's* fault, and this is one of the reasons there are 100,000 lawsuits a year — over 250 every day — brought before French courts in this area. It is too often forgotten that the distinction between fault and risk is, in our law, secondary and subordinate.

The greater, and primary distinction in the relevant law is between the person who causes injury to another, and the person who suffers the injury. The driver who injures someone is never answerable for the injury he causes, whatever his behavior, because he is compulsorily covered by insurance. The driver thus automatically benefits from the "risk" thesis: since driving entails risks, the driver need not be answerable for the injury he causes.

However, the person who suffers the injury is subjected to the "fault" thesis. The courts will attempt to reconstruct the accident in order to find some shred of negligence — or any other event — to establish the victim's liability and thereby deprive him of compensation.

It is hard to see how this paradoxical treatment can be justified. Consider, for instance, a head-on collision caused by the fault of driver A. If driver B is killed, the accident is deemed the realization of a risk and insurance will automatically cover the injury. But if driver A is killed, his death is deemed to result from his own fault. However slight his fault, and regardless of the underlying cause, his insurance policy will not come into play. What difference does it make if the driver leaves a widow and children? We treat him as though he deserved the death penalty. And since it is a matter of

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[5] *Id.* art. L-111 (2).

[6] *Rapports de la Cour de Cassation* in ANNEES JUDICIAIRES 1980-1981.

chance that one driver is killed and the other uninjured, so it is chance that decides whether the collision will be handled according to the "risk" thesis or according to the "fault" thesis.[7]

"Never kill," said Alphonse Allais,[8] "for you will tell lies to hide your shame, and you might end up a hypocrite."

We civil law jurists offer advice of a different sort: "Kill and maim!' As long as you only kill and maim, we guarantee you impunity and immunity, protection and sanctuary, and you won't even have to come to court!'

"But woe unto the victim, woe unto the meek!' How could you dare to bring up traffic "risks"? Abandon all hope, for we will scrutinize your behavior down to the last degree, and any error will be held against you. The highest judges in the land will be called to examine and determine your behavior. They've just examined the case of a pedestrian who had both feet on the sidewalk, but they found his shoulder extended over the curb, so they ruled he has no right to compensation.

"And you who perish on the streets, beware!' Your fault may be held against your kith and kin, unto the youngest generation, if your heirs seek compensation. Reams have been written on the subject and hundreds of decisions handed down. The Court of Cassation has twice been convened in a plenary session, and the commentaries on its decisions have become so subtle that they are beyond the grasp of the uninitiated. But severity continues to carry the day."

Legal science and judicial practice have focused their attention on the victim — not for but *against* him: the "negligent" victim, public enemy number one, the source of all our woes. Whoever kills or injures pretty much disappears from the picture: whatever happens, he will never foot the bill. He won't even have to find a lawyer, since the insurance company will take care of everything.

At this point, a simple question may very well be in order: Are we jurists blind to what we are doing day in, day out? As far as

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[7] The assertion is, of course, simplistic. The injury suffered by the driver is subject to the constraints of physics and medicine. But these constraints are totally indifferent to the merits of drivers. In particular, they depend on the kinetic energy of the vehicles, hence their weight and their speed squared. They take equally into consideration the resistance of the vehicles to shocks, hence the thickness of their steel and interior safety features. One may further observe that the stoutness of a driver protects him. Thus, one may say, very analytically, that a driver has more chance to benefit from the theory of risk at the time of a collision the fatter he is and the faster he drives a more expensive vehicle. It is regrettable, but inevitable, that human life depends on such factors. It is more peculiar that jurists leave to them the selection of the applicable rule of law.

[8] Humoristic French writer, 1885-1905.

equity and justice go, we certainly deserve Christ's accusation against the lawyers of His day: "*You blind gates, straining out a gnat and swallowing a camel.*"[9]

As far as prevention is concerned, we "deter" people (obviously in vain) not from killing and injuring, but rather from getting themselves killed or injured. Our civil law is as efficient in this area as a criminal law system based on trying the victim and his heirs, rather than the criminal offenders.

The system was never intended to operate this way. No one would have advocated laws so unjust and so ineffectual. The paradoxical current system has arisen from successive, unco-ordinated measures.

Reformers are sometimes accused of attempting to "destabilize" the long-established law of obligations. But the reformers are not responsible for "destabilizing" the system. Indeed, what is left of Article 1382 of the Civil Code now that drivers are automatically protected by compulsory liability insurance? Current law is, from every standpoint, the world turned upside down.

In order to restore coherence to the law, it must be set right-side up again, first by letting victims benefit from the "risk" thesis, and then, perhaps, by restoring the "fault" thesis for drivers whose serious negligence causes injury.

3. A Revised Law

In the United States, the American Insurance Association (A.I.A.) conducted an in-depth study of the causes of traffic accidents.[10] It found negligence, that is to say, behavior which would not have obtained with a person conscientious in his duties — in less than five percent of two-car accidents and in less than ten percent of collisions with a fixed object. The A.I.A. draws the conclusion that it is necessary to abandon the illusion of absolute justice, an apparition that is the source of costs, delays, and ultimately of uncertainty and unequal treatment, and instead shift to compensating all victims without dispute.

This is the obvious conclusion, at least in principle. In a world that fails to take account of the fault committed by a person who kills or injures, it is crazy to seek out the fault of the

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9 *Matthew* 23:24 (Revised Standard Version).

10 Report of the Special Committee to Study and Evaluate the Keeton-O'Connell Basic Protection Plan and Automobile Accident Reparations (New York, Oct. 1968).

person who is killed or injured. This solution can be justified on two related grounds.

In the first place, if we suppose that the victim has committed an error or even a fault, he will be punished by the accident itself, often in a manner cruelly out of proportion to the actual fault. People die every day because of a momentary lack of attention. But is it the role of the law — and of insurance law in particular — to formally sanction tragedies, or to mitigate them?

Secondly, because our law fails to specify that the idea of traffic "risk" can apply to the victim, our courts deny the very notion of accident. They are obliged, except in the exceptional case of *force majeure*, to always consider that accidents are caused by faults. Yet a "fault" is supposed to be behavior which a normally prudent person would not engage in. Yet, as the A.I.A. data show, ninety-five percent of collisions are the result of inadvertent acts, acts which may be caused by even the most prudent, well-coordinated drivers. Our courts are thus bound by an inherent contradiction, a contradiction pushed to its illogical extreme in a 1971 decision by the Court of Cassation, which considered a pedestrian "at fault" because of his "natural reflex" in the face of sudden danger.

Justice therefore demands that all victims be compensated without dispute. But should we stop there? Is it proper to never hold drivers accountable for their faults? While sharing the concern of the A.I.A. for simplicity and speed in compensation, it is also possible to shape the revised law to provide for personal accountability.

The first step is for judges in accident cases to take their task more seriously. It remains a paradox that the civil judge carefully seeks out the victim's fault, whereas in the criminal courts each and every judge seems to be an unreserved proponent of the "risk" thesis. All too often, judges accept 35 deaths and 1000 injuries a day as a statistical fact of life. It cannot be overemphasized that although any driver — even a prudent one — runs the risk of injuring or killing, certain accidents arise from criminal behavior. In these cases, appropriate repression would be in order, with co-ordination provided by the public prosecutors' offices.

One role of the judge in criminal court is to seek out guilt. If a driver is found guilty of gross negligence, is it proper for him to be fully shielded by insurance from the civil consequences of his fault? Insurance should not cover intentional faults — and "in-

tentional fault" certainly describes driving at twice the speed limit or with a vehicle one knows to be defective and dangerous.

Accordingly, when the driver is sentenced to a considerable penalty (such as imprisonment), the judge, at the request of the plaintiff, the public prosecutor, or even at his own discretion, after consulting the defendant's attorney, should have the power to deprive the offender of the benefit of insurance, to the degree he may see fit in light of the circumstances, including the offender's family responsibilities. If the offender is also a victim, he could be allowed, for example, only part of the compensation to which he would otherwise be entitled. The other victims would certainly be compensated in full by the insurance company, but the judge would be able to authorize the insurance company to claim some compensation from the offender. Even limited use of this approach would certainly have a major impact on public opinion, and could be a non-negligible factor in the difficult task of accident prevention.

We are convinced that in a remodeled law designed to compensate victims on the basis of risk, there is indeed room to reintroduce personal liability for fault, and that the system could operate quite well. This is not the place to discuss its implementation, since the matter of drivers' personal liability cannot be raised at present without encountering opposition, and that would lead us away from the essentials.

In conclusion, let us restate the central issue. Why should the prospect of even partially lifting the driver's insurance coverage run into virtually unanimous opposition? At the very least, the opponents should be consistent in their reasoning. In refusing to accept that the driver can be held liable for his faults, they want to render him harmless — in all cases — against the injury he may cause. So how can they possibly hold the victim responsible for the injury he suffers? Theirs is indeed a paradoxical position.

APPENDIX
DECISION*

THE COURT: On the ground submitted to the Cour de Cassation for review, considered in its first four parts, as set forth in the amplifying submission:

Whereas, according to the judgment under review, at nightfall, in a built-up area, Mr. Desmares's motor vehicle struck and injured Mr. and Mrs. Charles as they were crossing the street on foot; Mr. and Mrs. Charles brought an action against Desmares and his insurer, La Mutualite Industrielle, seeking compensation for their injury; and the S.N.C.F., in its capacity as a Social Security fund, and the Ardennes Health Insurance Fund intervened in this action;

Whereas it is objected that the overruling judgment attributed liability to Desmares under Article 1384, paragraph 1 of the Civil Code;

Whereas, after determining the factual matter,[1] that little credit could be given to the statements of a witness who had not seen the accident but only its consequences, the overruling judgment noted that Mr. and Mrs. Charles were thrust several meters from the pedestrian crossing, and found — on the basis of the skid marks on the road, taking account of the "reaction time" prior to braking and of the fact that Desmares did not see the pedestrians before the moment of impact — that the impact could only have occurred within the pedestrian crossing or in its immediate vicinity;

On the basis of these findings, the *Cour de Cassation* rules that the appellate court did not base its decision on hearsay or on conjectural grounds, and in properly rejecting such grounds, answered the relevant points of the submission, and thereby legally justified its judgment on this point submitted for review.

On the ground submitted to the *Cour de Cassation* for review, considered in its last two parts:

Whereas it is objected that the appellate court (i) failed to address the submissions holding that the victims failed to abide by Article R. 219 of the Traffic Code, which required them to refrain from crossing the street until they had made sure they could do so without any immediate danger; and (ii) failed to re-

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* This judicial decision first appeared in II RECUEIL DALLOZ SIREY 452 (1982). It appears herein at 847 in the original French.

[1] Hence not subject to review by the *Cour de Cassation* (Translator's note).

fute the findings of the court of first instance holding (a) that Mr. and Mrs. Charles had further been negligent in beginning to cross the street before making sure they could do so safely and in failing to take account of the speed and distance of the approaching vehicle, and (b) that Desmares' automobile was too near for the pedestrians to cross the street safely and that therefore they should have refrained from beginning to cross the street in such circumstances, all the more given that the car to Desmares's right prevented Desmares from seeing them;

But whereas only in circumstances of *force majeure*[2] can the custodian[3] of property which causes injury be exonerated from his liability under Article 1384, paragraph 1 of the Civil Code; and accordingly the victim's behavior, unless unforeseeable and irresistable, cannot exonerate such custodian, not even in part;

And whereas after noting that the accident occurred at rush hour, in a pedestrian crossing or in its immediate vicinity, on a four-lane avenue with street lights operating properly, the overruling judgment found that Desmares was driving in the left-hand lane when his automobile struck Mr. and Mrs. Charles, who were crossing from right to left with respect to the automobile's path;

On the basis of these findings, even assuming that the victims had committed the fault they are alleged to have committed, such fault would not constitute unforeseeable and irresistable circumstances; the *Cour de Cassation* rules that the appellate court consequently was not required to seek out the existence of such fault which, even if established, could not have exonerated the driver from his liability, and therefore legally justified its overruling judgment;

On the grounds set forth above, the *Cour de Cassation* dismisses the appeal against the overruling judgment handed down by the appellate court of Reims on January 15, 1981. Decision handed down July 21, 1982.

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[2] Unforeseeable, irresistable circumstances beyond the control of the party (Translator's note).

[3] *Gardien de la chose*: person with legal custody of items of property; in this case, the driver (Translator's note).