Damage Suits and the Contagious Principle of Workmen's Compensation

Wex S. Malone
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PROFESSOR SMITH’S PROPHECY

There is an interesting parallel in literature between the bitter and agonized protests of Jeremiah, the great prophet of the Bible, and the later writings of Professor Jeremiah Smith, who was a distinguished professor of law at Harvard during the first years of the present century and who was one of the titans of legal thought during this period. Jeremiah Smith, like the tragic biblical prophet whose name he bore, was profoundly concerned over the languishing of morality in his time. His anxiety, however, was over a decline of the moral element in the law. He foresaw with dismay that the requirement of blameworthiness on the part of the defendant in accident litigation was destined for extinction.

Professor Smith had done his creative work during the last part of the Nineteenth Century, and he had been a contemporary witness of the final triumph of the moral element in tort law. He, like other legal scholars of that period, had observed the emergence of the idea that liability for harm must depend upon ethical blameworthiness, and that an innocent defendant should not be saddled with damages for a hurt which he could not avoid. Students of legal history know that the notion that fault is essential to liability was not characteristic of the early common law.¹ The requirement of moral blameworthiness is a relative newcomer in our legal system. It came into being as a product of the industrial revolution and the increasing dangers

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† Professor of Law, Louisiana State University.

[231]
of steam propelled railway traffic which was characteristic of
the eighteen hundreds. Courts came to the realization that
absolute liability would unduly discourage the infant industrial
and transportation enterprises of this period. They felt that they
should offer enterprised the opportunity of conducting itself with
reasonable respect for the safety of others as a means of avoid-
ing responsibility. When the requirement of fault finally emerged
transcendent, it was hailed by scholars and lawyers as the
crowning triumph of reason and morality toward which the
common law had been groping for centuries.

To Professor Jeremiah Smith and his contemporaries the
notion that no person should be held except for his own fault
was more than a gain in the field of morality. For the scholar
of that time the general requirement of fault represented at last
a unifying principle which had emerged to bring together as a
rational science of torts what had formerly been a mere indiscriminate collection of isolated wrongs. The idea of a single and
universal requirement of fault lent logical consistency to the
law. It made possible the erection of a structure of reason in
what was formerly a tangled field of disordered anomalies, and
as such it deserved a vigilant guardianship by legal scholars. Any
threat to its continued prosperity deserved to be ferreted out,
exposed and exterminated if possible lest it spread like a cancer
and destroy the newly acquired blessing in its infancy. This,
then, was the intellectual climate that prevailed when Jeremiah
Smith was at the height of his career in 1913, the year in which
he made the observation with which we are presently concerned.
Let us now see how and why he became the embittered prophet
doing.

Even as the notion of required fault was wrapping its last
firm tendril around the law of torts in America there was develop-
ing in continental Europe a new and entirely alien idea of
liability represented by the German Workmen's Compensation
Act of 1884. German industrial employers were being required
by statute to shoulder part of the cost of accidental injuries and
deaths for their employees quite without reference as to whether
or not the employer was to blame for the tragedy. Under the
German Compensation Act it was enough that the victim was

2. Green, Judge and Jury, 106-143 (1930); Winfield, History of Negli-
gence in the Law of Torts, 42 L.Q. Rev. 184, 195 (1926); Malone, The Forma-
tive Era of Contributory Negligence, 41 Ill. L Rev. 151 (1946), No. 286 Ins.
L.J. 839 (1946).
an employee and that the accident occurred during the course
of his employment. In other words, the requirement of moral
fault as a condition to liability had begun to lose out on the
continent just at the moment it had gained its final hold on the
thoughtways of America.

Furthermore, the compensation movement was spreading
over Europe like wildfire. By the turn of the century the prin-
ciple of workmen's compensation had been adopted over prac-
tically all the continent and in the British Isles as well. 4 Ten
years later the great industrial state of New York had adopted a
compensation statute, and by 1913 at least twenty states, from
New Hampshire to Nevada, were securely within the compensa-
tion fold. These states represented more than half the popula-
tion of the nation. Moreover, the field of industrial accidents
embraced the great bulk of all personal injury litigation in that
year, 1913. At that time the automobile was still a comparatively
harmless newcomer and the great toll of traffic accidents on our
highways had not yet assumed serious proportions. Apart from
injuries and deaths suffered on the tracks of railways, there
was comparatively little accident litigation outside industrial
operations.

As matters stood, then, fault as an essential basis of liability
prevailed for practical purposes in only a comparatively small
area of the accident field. Within a short period of three years
the fault principle, which had so painfully won its way, found
itself suddenly forced into serious competition with the novel
and completely alien notion of absolute liability represented by
the workmen's compensation movement.

It was in this year, 1913, that Professor Jeremiah Smith
published in the Harvard Law Review his foreboding prophecy
that the requirement of moral fault, like the Valhalla of Norse
mythology, was destined for complete extinction. 5 After point-
ing out at length that the classical fault theory and the principle
of workmen's compensation are completely irreconcilable in
every respect, he then indicated that there is nothing peculiar
to the employment relationship which justifies treating the claim
of the injured employee in one way while the rights of a

4. Other foreign countries which enacted workmen's compensation laws
prior to 1902 were: Austria, 1887; Norway, 1894; Finland, 1895; Denmark,
Italy and France, 1898; Spain and New Zealand, 1900; Netherlands, Greece
and Sweden, 1901; Luxembourg, 1902.
5. Smith, Sequel to Workmen's Compensation Acts, 27 Harv. L. Rev. 235,
344 (1914).
stranger are adjusted according to an entirely different notion. For the same accident two diametrically opposed principles may be brought into play and the results for the various parties involved cannot be reconciled.

Although Professor Smith, true to the individualistic temper of his time,6 deplored the compensation movement, he readily conceded that the tide of workmen's compensation could not be stemmed. He asserted with confidence that the compensation principle and the fault theory of tort law could not continue to coexist side by side. As compensation becomes more entrenched and more familiar, he asserted, traditional tort theory will of necessity give way in all areas of accident law. He pushed aside any suggestion that workmen's compensation, resting upon a statutory foundation and directed toward a single social evil, could be isolated for employees' injuries alone. There will follow inevitably, he said, a spilling over of the no-fault principal into all areas of accident law. This was his prediction.

Then, like the Jeremiah of the old testament, he despairingly counselled the opening of the gate and a surrender to the invader, the "godless" principle of workmen's compensation. He showed how he believed the deterioration of the requirement of blameworthiness might take place. He expressed doubt that it would be openly abandoned in the decisions. He predicted instead that courts would continue to talk the language of fault while at the same time they would manipulate accepted theories so as to relieve plaintiffs of the practical necessity of introducing proof that fault actually existed. Absence of negligence would become a matter of defense. After throwing upon defendants the burden of exonerating themselves from blame, the courts would make this burden more and more difficult until finally it would become virtually impossible to discharge. In this way a gradual metamorphosis of tort law would take place, until finally the empty shell of moral responsibility would be cast aside and the new liability, resting on economic considerations alone, would emerge full-fledged. The principle of workmen's compensation would then become universal principle for all accidents, and tort law based upon fault, as it existed in 1900, would have disappeared.7


7. Smith, supra note 5, at 344, 368.
THE PROPHECY APPRAISED

To what extent, if any, has Professor Jeremiah Smith's prophecy been fulfilled? Certainly his ultimate prediction of the complete disappearance of fault has not yet been realized in this country. American courts still talk the language of negligence, and in most instances they state solemnly that the law requires that the victim prove the existence of carelessness or blameworthy conduct by producing evidence. In this country compensation is still restricted to workmen who are injured or killed in their employment, and more than thirty-five years elapsed after Professor Smith wrote before the compensation principle achieved universal recognition even in the field of industrial accidents.8 The advent of the motor vehicle shortly after Smith uttered his prophecy served to bring the immense field of automobile traffic accidents within the fold of established fault principles. On the surface, then, it appears that orthodox tort law based on moral blameworthiness of the defendant has held its own in the United States.

It is true that even before 1920 there was considerable advocacy for an extension of the principle of workmen's compensation beyond the industrial accident field. Reputable writers advocated the use of the new principle for all automobile accidents9 and also for injuries and deaths inflicted on both passengers and third persons through the operation of railroads.10 These advocacies increased11 until finally in 1928 the Columbia University Council for Research in the Social Sciences appointed a distinguished committee of judges, lawyers and scholars to study the problem of compensation for automobile accidents.12 After

8. Employee injuries and deaths in interstate railroad operations are still litigated according to a modified fault principle under the Federal Employers' Liability Act. In recent years there has been increasing agitation for the adoption of the compensation principle in this field. See 74 A.B.A. Rep. 108 (1949); Pollack, Workmen's Compensation for Railroad Work Injuries and Diseases, 36 Cornell L.Q. 236 (1951). The arguments against the proposed extension are set forth in Richter and Forer, The Railroad Industry and Work-Incurred Disabilities, 36 Cornell L.Q. 203 (1951).


12. The prominence and the diversified qualifications of the committee is indicated by the membership: Arthur A. Ballantine (Chairman), Joseph P. Chamberlain, Charles E. Clark, Miles M. Dawson, Walter F. Dodd, Victor F.
three years of intensive work, including an exhaustive investigation of cases and house-to-house canvassing for information on the aftermath of automobile accidents and personal injury litigations, this committee recommended in strong language that a statute modeled after the New York and Massachusetts Workmen’s Compensation Act be adopted in place of the law of negligence and other fault doctrine in the field of automobile accidents.\textsuperscript{18} The prestige and practical soundmindedness of this committee carried some weight in legislative halls throughout the country. In New York, Connecticut, Wisconsin and Virginia serious consideration was given to the adoption of the compensation principle for all automobile accidents, and a constitutional amendment to make possible such a scheme was introduced in the New York State Constitutional Convention of 1938.\textsuperscript{14} All efforts, however, have proved abortive. In no American jurisdiction has such a measure reached final passage, and liability based on fault still prevails with variation throughout this country. In England in 1932 a plan analogous to the one recommended by the Columbia Council was adopted by the House of Lords, only to be tabled in Commons.\textsuperscript{15}

\textbf{Changes in the Fault Concept Under Jury-less Systems}

From this brief account of the fate which has met all efforts to make forthright doctrinal changes in the United States and in England, it is clear that if we are to find a frontal attack upon the fault principle, we shall have to look elsewhere.

The problem of compensation for automobile accidents is universal, despite the fact that here in the United States we feel the impact of the problem more acutely because of the tremendous amount of motor vehicle traffic that prevails on our streets and highways. But automobiles have suddenly made life more dangerous everywhere in the world, and the lawyers and judges

\begin{footnotes}
\item Grad, Recent Developments in Automobile Accident Compensation, 50 Col. L. Rev. 300, 318, n. 79 (1950), No. 330 Ins. L.J. 492, n. 79 (1950).
\item Butterworth, Road Accidents: The Compensation Problems, 14 J. Comp. Leg. & Int. L. 159 (1932).
\end{footnotes}
of foreign countries have had even more difficulty than we have had in adjusting their legal machinery to the new problem.

Their task has been more difficult than ours because continental law has not had the benefit of the jury, which, in this country, outside Louisiana, can serve to absorb much of the shock of any transition away from fault liability. When our American negligence law fails to meet the demand of an automobile infested society our judges can humanize our doctrines simply by passing more and more of the problems of liability into the hands of the lay juryman. In this way the rugged and uncompromising doctrines of common law find a most effective counterfoil in the non-legal and human impulses of the jurymen. In other words, for the plaintiff the common law of torts looks much tougher on paper than it proves to be in the courtroom. We enjoy the practical advantage of being able to retain our formal doctrines virtually intact in the law books and yet revolutionize the practical application of those doctrines by the way we administer them.

Continental law, on the other hand, sounds more flexible and perhaps looks better on paper. But if a major alteration is required under any civilian system, the doctrines must be completely overhauled by the legislature or the courts. Here in America a frontal attack upon the requirement of negligence would not become necessary until we have completely exploited the possibilities of using the jury as a foil. In cases where the plaintiff is unable to muster up more than a possible suggestion of negligence the court can nevertheless submit the case to the jury and depend upon the jurymen to ignore largely the issue of fault, particularly if the defendant is insured or is otherwise able to stand the loss by reason of his prosperity. Therefore, formal changes in our tort law are frequently little more than legislative or judicial confirmations of habits of thinking that jurymen have followed for years. This was true of the statutory abolition of the fellow servant rule in this country. Long before that evil rule was abolished by legislation jurymen had followed the practice of ignoring it in reaching their verdicts. The same is true of the issue of contributory negligence, which,

16. "It is a current forensic commonplace that a very effective method of destroying in action an unjust or unpopular rule of law is to delegate its application to the jury." Morgan, Some Observations Concerning Presumptions, 44 Harv. L. Rev. 906, 909 (1931).
17. Green, Judge and Jury 122-123 (1930).
in some states, such as Mississippi and Wisconsin, has finally been abolished by statute. Every practicing lawyer in a common law state knows that if the jury gets the issue of contributory negligence, it will probably ignore the plaintiff's fault, except as a factor to be considered in reducing the amount of the verdict.\(^\text{18}\) In the entire field of accident litigation the jury has been remaking the law in many areas. In some respects the jurymen have been ahead of the judge and legislator for over a hundred years.\(^\text{19}\) This observation is to a large extent true of the basic requirement of negligence or fault. It is not likely to be formally abolished in this country until after the possibilities of recourse to the jury have been exploited to the fullest extent possible.

It is natural, therefore, to find that the first radical changes in fault doctrines have taken place in those countries whose accident law is administered by the judge alone, and where reform must take place through outright doctrinal change.

**THE EMERGENCE OF ABSOLUTE LIABILITY FOR MOTOR VEHICLE ACCIDENTS IN FRANCE**

The most surprising developments on the European continent in the law relative to motor vehicle accidents have taken place in France. In that country an obscure article of the Civil Code has suddenly been resurrected and completely reinterpreted by the French courts so as to result in virtual absolute liability for the driver of a motor vehicle. In France the traditional fault basis of liability is in danger of complete extinction in the automobile accident field.

The law of torts in France is contained in three or four brief articles of the French Civil Code. Principally these are Articles 1382 through 1384 of the Code Napoleon. They appear almost verbatim as Articles 2315 through 2324 of the Louisiana Civil Code of 1870. Article 1382 of the French Code lays down the broad principle that tort liability is based on fault.\(^\text{20}\) Thus French law starts with the same assumption as the common law of 1900—no blameless person should be held for any harm

18. See the very acute observations of an able and experienced trial judge in Ulman, *A Judge Takes the Stand* 31 (1933); Malone, *Contributory Negligence and Landowner Cases*, 29 Minn. L. Rev. 61, 62 (1944).
20. Art. 1382: "Any act by which a person causes damage to another makes the person by whose fault the damage occurred liable to make reparation for such damage." (Italics supplied.)
which he could not have avoided. There must be an evil intention, or recklessness, or at least that failure to use reasonable care which we and the French call negligence or imprudence. For nearly a hundred years after the adoption of the code no French judge, lawyer or writer doubted that this requirement of fault was essential in nearly every case of injury. Also, just as in this country and in England, the plaintiff was obliged to introduce affirmative evidence of fault as a part of his case.

Particular attention is called to another article in the French Civil Code which follows almost on the toes of Article 1382. This is Article 1384, which (with certain additions not important for present purposes) provides "A person is liable not only for the damage which was caused by his own act, but also for the damage caused by the acts of persons for whom he is responsible, or the acts of things which he has under his care." It is this part relating to liability for things with which we are presently concerned.

Up until the closing years of the last century it was assumed that this article was merely an elaboration on the familiar fault principle of Article 1382. It was assumed that a person should be made liable for the damage caused by an inanimate thing under his care if the thing was carelessly kept, maintained or operated by him, or if he had knowledge of its dangerous condition and failed to take proper precautions, but not otherwise. In fact the highest court of appeal, the Court of Cassation, expressly so held in 1870. No one dreamed at that time that this innocuous sounding provision of the Civil Code could serve as the germ of an entirely new specie of liability in which the fault of the defendant would be immaterial.

The first indication that the French courts were prepared to depart from the fault requirement where the injury was caused by some inanimate thing came in a decision in 1896. A boat engineer named Teffaine, working for defendants, owners of the boat, was killed when the boiler exploded. The facts tended to indicate that there was defective welding for which the boiler

21. See, for example, Fenet, Recueil Complet des Travaux Préparatoires du Code Civil 478, 487-490 (1836) (discussion by Torrible).
22. Painvain c. Deschamps, S.1871.I.9. In this case plaintiff was injured by the unexplained explosion of a laundry boiler. He instituted suit under Article 1384. The court refused to hold defendant liable because plaintiff had not introduced affirmative evidence of fault. It is noteworthy that even under the common law plaintiff could probably have relied upon res ipsa loquitur. See cases collected in annotation, 23 A.L.R. 484 (1923).
manufacturer was responsible, but which, admittedly, was not discoverable by the boat owners. Teffaine's widow sued under Article 1384 and she was allowed recovery against the owners. They were not permitted to defend on the ground that the accident was due to the carelessness of the boilermaker, nor were they allowed to show that the defect in the boiler was hidden. The court observed that where an injury is inflicted by some object or thing under the defendant's care, the defendant is absolutely liable for the loss. It announced that when suit is instituted under Article 1384 only two defenses are available: The defendant might show that the accident was due to an unforeseen event, or to an Act of God. But a showing of absence of negligence was not enough.

This decision threw the French law into a state of confusion and raised innumerable problems which were not resolved for the next thirty years. To any English lawyer of that time the Teffaine case would not have come as a surprise; for in 1865, thirty years earlier, in the famous case, Rylands v. Fletcher, the English House of Lords had announced that any one who keeps upon his property a dangerous thing whose tendency is to explode or otherwise escape, keeps the thing at his peril. One might fairly suspect that the new interpretation of Article 1384 of the French Civil Code was influenced in part by the English rule. But this important distinction should be borne in mind: the English law had not yet fully accepted the fault principle at the time of the Rylands v. Fletcher decision. The common law was then still in a transitional state, and Rylands v. Fletcher was supported in principle by a respectable body of earlier authorities. On the other hand, the French had assumed for a century that fault was required. Furthermore, the Rylands v. Fletcher doctrine was restricted to things of an unusually dangerous character which were not in common everyday use, and it has been applied with increasing caution during recent years.

24. The defendant argued: (1) The liability for the acts of things imposed by Article 1384 is restricted to injuries done by animals and ruinous buildings. These two sources of harm are dealt with specifically in Articles 1385 and 1386 of the French Civil Code; (2) the boiler was not under the care (garde) of defendants at the time of accident.

25. 3 Hurlstone & Coltman 774 (1865), L.R. 1 Ex. 265 (1866), affirmed L.R. 3 H.L. 330 (1868).


while the new interpretation of the French Article 1384 applies
to any injury inflicted by any thing under the defendant's care,
however innocuous the thing might appear to be.

A better explanation of Teffaine's case lies in the fact that it
involved an injury to an industrial worker. Years before the
decision was handed down the neighboring Germans had adopted
the first workmen's compensation act in history, and at the very
moment Teffaine's case was under consideration the English were
favorably debating a similar statute which was adopted the fol-
lowing year. It is not unlikely that the French court of appeal
felt that it would be wise to protect the French worker from
the dangers of industrial machinery by so interpreting this
article of the French Civil Code as to produce a result similar
to that which would have been achieved under the compensation
acts in neighboring countries. The very next year witnessed the
passage of the French Workmen's Compensation Act, and many
of the more conservative French scholars began entertaining the
hope that the Teffaine case could be regarded as a legal anomaly
which merely gave evidence of the need for a compensation
statute, and would now promptly be forgotten.

For nearly twenty years it appeared that this hope would
be fulfilled. The Teffaine case was explained in various ways:
Sometimes it was said that where an injury is occasioned by a
thing which is in the care of the defendant a presumption of
fault is raised by Article 1384, but that this presumption amounts
merely to an inference of negligence, allowing the defendant the
privilege of rebuttal by showing that all due care was used by
him. This would be equivalent to the doctrine of res ipsa loquitur
as used in England and this country. In fact the French courts
did talk in terms of presumption of fault, rather than presump-
tion of liability.28

The hopes of the more conservative French jurists, that
Article 1384 might be regarded as raising merely an inference of
fault, might have been realized if it had not been for the advent
of the automobile during the first decade of the present century.
The first French cases dealing with traffic accidents applied the
familiar fault principle of Article 1382. It was assumed that the
injury was caused by the act of the driver rather than the act

Liability in Europe, 79 U. of Pa. L. Rev. 271, 276-280 (1931). The writer is
indebted to this excellent study for much of the material in the present
paper dealing with French law.
of the vehicle (the thing), and the victim was required to introduce affirmative evidence of careless driving.

Up until after the first world war all efforts by plaintiffs to rely upon Article 1384 in traffic cases failed, except in one type of situation: Where the automobile was unattended at the time of the accident and the human agency of the defendant was in no way responsible the court allowed the plaintiff to recover by showing that his injury was caused by the thing, that is to say, the automobile. In such a case he did not need to establish fault. This, however, was regarded as a somewhat exceptional situation. 29

However, many French writers did not overlook the possibility that the ordinary traffic accident could be regarded as the inevitable result of the presence of motor vehicles on the highways, and hence these accidents by and large should be attributed to automobiles—things—rather than to the specific acts or defaults of the drivers. They urged that it should be immaterial whether the vehicle that inflicted the injury was at the time being operated by a driver or was unattended. If this argument were sustained, the result would be that the person having a motor vehicle in his charge would be absolutely responsible under Article 1384, irrespective of how carefully he may have been driving.

But this theory received no sign of recognition by the courts until 1924. In that year the Court of Cassation handed down a much controverted decision in the case, Bessières v. Abeille Auto Company. 30 The defendant auto company had leased its car to a person named Saverne. While Saverne was driving he was obliged to swerve the car violently in order to avoid striking a bicyclist. This strain broke the steering mechanism of the car, caused it to leave the highway and crash into the front of a shop where it injured the plaintiff. The court found as facts that the steering mechanism was not defective and that the strain of the sudden swerve was not due to any carelessness on the part of the driver, Saverne. The trial court refused to apply Article 1384 because the breaking of the steering wheel could not be imputed to the machine alone, but was due to the manner in which the car was being operated. This, as we have already seen, was the position which had been adopted consistently since

29. Id. at 281-283.
the advent of the automobile. On appeal, the Court of Paris held that Article 1384 did apply, although the court offered no explanation as to why this should be so under established jurisprudence in a case where the machine was being operated by a person at the time of the accident. However, the same court found that the presumption of fault raised by Article 1384 was rebutted by the showing that the machine was not defective and the further showing that fault could not be imputed to the owner or the operator. If this holding had been sustained, the French law of automobile accidents would probably today be about the same as it is in England and in the United States, except that the burden of showing absence of fault would rest upon the defendant. However, the judgment of the Paris court was set aside by the Court of Cassation. This tribunal agreed with the Paris court that the case was properly brought under Article 1384. It disagreed with the latter court, however, in its holding that a showing of absence of fault or defect of the vehicle served to rebut the presumption raised by that article. The Court of Cassation applied the same rule that had been announced in Teffaine's case twenty-six years earlier and said that the only defenses available when the injury is caused by an act of a thing are that the accident was due, not to the thing, but to an unforeseen event, or to an Act of God.

For six years following this case the French law of automobile accidents was in a state of hopeless confusion, due principally to the fact that the decision was susceptible of several diverse interpretations. One group of jurists insisted that the court intended to apply Article 1384 to vehicles which were being driven at the time of the accident only if some defect in the machinery, even though hidden, caused the accident. Others insisted that all auto accidents fall within Article 1384 and that the court intended to impose virtually absolute liability on the driver and owner. This sharp diversity of opinion was reflected in all decisions of lower courts during this period, and the law was completely unsettled for six years on the most prolific source of litigation in France.31

Confusion became so rampant that a final solution of the problem was required in the form of a test case before all the several chambers of the Court of Cassation sitting en banc. This came in 1930.32 The accident that gave rise to this famous piece

of litigation was of the common variety of traffic accidents. It was chosen deliberately as a cause célèbre because of its typicality. The truck of the defendant, a department store, operated by its employee, ran over and injured Lise Jand’heur, a little girl. A suit based on Article 1384 was brought on her behalf by her father. Both the trial court and the intermediate court of appeal held that Article 1384 has no application where the vehicle is being operated by a human agency and that in such a case the injury must be attributed to the act of the driver, not the vehicle. Hence Jand’heur should have brought his suit under Article 1382 and should have established affirmatively the negligence of the driver.

When appeal was taken before the Court of Cassation the entire matter was debated at great length, and all the conflicting cases and the divergent opinions of the commentators were presented to the court. The opinion was an unusually lengthy one and it filled eighteen pages of the printed reports. The court first reaffirmed the proposition that where suit is properly instituted under Article 1384 the defendant cannot excuse himself by showing his freedom from negligence. The opinion then was directed toward the disputed question of whether the article applies where the vehicle was being operated by a driver and the accident was not due to any defect of the machine, such as faulty brakes or steering wheel. The court concluded in unmistakable language that the car—the thing—is as much under the care of the operator when it is being driven as when it is standing still unattended, and that the accident is due to the act of the machine at such a time even though the act of the machine is in turn attributable to the conduct of the driver. Therefore, the conduct of the driver, whether careful or careless, can be ignored, and absolute liability imposed under the article in question.

This monumental Jand’heur decision, then, made clear beyond any doubt that the driver of a car is absolutely liable for all hurts inflicted through the operation of his vehicle. The decision has been accepted and applied without dissent in all French traffic cases since 1930. The term “fault” or “presumption of fault” has disappeared in decisions interpreting Article
1384, and the courts now speak of a "presumption of responsibility" which can be rebutted only in the rare cases where an Act of God or an unforeseen event is established as the sole cause of the accident.

Corollary doctrines have been modified so as to comport with the new interpretation of Article 1384. Where two vehicles collide and both are injured it has been argued that the mutual liability of each driver to the other which would follow under an application of this article should operate so as to effect a cancelling out, and that Article 1382, with its fault basis, should control. This argument, however, was rejected in another famous case in 1941 before the Court of Cassation. The court held that each is responsible in full under Article 1384 for the harm done the other. A similar modification has taken place with reference to the established French doctrine of faute commune or comparative negligence. It is a matter of common knowledge that where suit is instituted under the "fault" article, 1382, the contributing fault or carelessness of the victim does not entirely preclude his recovery, but his own negligence is considered merely in mitigation of damages. The same rule prevails in England and also in this country under the Federal Employers' Liability Act and in a few American jurisdictions, such as Mississippi and Wisconsin. What effect is to be given the victim's fault where suit is instituted under Article 1384? Counsel for defendant have argued that where the victim caused the accident by his own carelessness, the mishap should not be regarded as having been caused by the defendant's vehicle—the thing—and that that article should not apply. But this argument has not met with favor in the courts. They have adopted the position that in the average traffic accident case both the motion of the vehicle and the conduct of the victim combine to produce the accident. Therefore the defendant in charge of the vehicle is still liable without refer-

33. Dame Veuve Delcayre c. Messal, D.1933.I.57 (March 20, 1933). Lawson observes that this decision, although logically indefensible, can be justified under the observation that liability insurance is more prevalent than insurance against collision. Hence under the rule of Delcayre's case the whole of the loss is more likely to fall upon insurance companies than if the contrary position had been adopted. Lawson, Negligence In the Civil Law 58 (1950).
34. Turk, Comparative Negligence on the March, 28 Chi-Kent Rev. 189, 239 (1950).
ence to his fault, and the carelessness of the victim serves only to mitigate the amount to be recovered. In so holding, the courts are, in effect, comparing plaintiff's negligence with defendant's absolute liability. This process is more appropriately called "comparative causation," rather than comparative negligence.

It is clear, then, that a gradual process of manipulation of doctrine by the French courts has brought about the astounding result that owners and operators of motor vehicles must pay for the hurts and damage inflicted by such vehicles irrespective of whether the driver or owner was or was not at fault. The prevailing principle is the same as in workmen's compensation. It is a recognition of the fact that the presence of motor vehicles on the highways creates a peril for all persons who are exposed to their operation, and that those who get the benefit of such vehicles must be prepared to pay the accident cost which is necessarily involved, just as the consumer or user of goods or services produced by industry must bear the inevitable risk of accident that follows in the wake of industrial operations.

Such a principle cannot, of course, operate without terrific hardship on the motoring public unless the medium of liability insurance is available to absorb and distribute the cost of this risk upon all drivers and car owners. At the time of the development of the new interpretation of Article 1384 automobile liability insurance was not compulsory in France. It has been estimated, however, that by 1938 ninety-five per cent of all French automobilists were voluntarily insured. The present Commission for the Revision of the French Civil Code is considering compulsory liability insurance for all automobilists, coupled with an arrangement for an unsatisfied judgment fund.

In comparing the present French law of auto accidents and the familiar principle of workmen's compensation, it is noteworthy that the French rule goes far beyond the usual employer's liability act in two important respects: first, the person in charge of the vehicle is responsible without reference to fault for the full damages which were suffered by the victim both with

respect to his person and to his property. The defendant is not entitled to the benefit of the very modest compensation schedule provided in the typical compensation act. Second, it is noteworthy that the French liability for the acts of things is not restricted to the acts of automobiles or other dangerous pieces of industrial machinery. The new interpretation of Article 1384 is not limited to situations in which there is an apparent justification for institutionalizing the risk of accident, as in workmen's compensation. The article is as easily applied in theory to a Seltzer bottle, a chair, a ladder, or any other apparently harmless object which on some occasion happens to inflict injury either while standing alone or while in the hands of its possessor, who may be either an industrialist or a simple domestic user. The ramifications of this strange new interpretation of Article 1384 have not yet been fully explored by either the courts or writers, but it is obvious that the implications are many and are of far-reaching effect. No other system of law has gone so far.

It is obvious to the common law lawyer that the law of France has been transformed through a painful process of law-making by the courts in the face of legislative indifference. The process shows readily through the thin disguising veil of "interpretation." The path of the development discussed above is strewn with leading cases such as have always marked the evolution of the common law. Judicial ingenuity, the constant reinterpretation of old precedents, and the drawing of distinctions between cases make this chapter of French jurisprudence a study of a technique with which students of the common law are more familiar than are civilians.

Other countries whose codes are modeled after the French have generally refused to follow unreservedly the newer French interpretation of Article 1384. Reluctance to follow the lead of the French courts is manifest in Spain, Quebec, Belgium, Egypt, and other countries which have code provisions similar to the

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"In order to apply Article 1382 it would be necessary to assume a collision between two nudists. Even here there may be some jurist who would say that the body is a thing under the care (garde) of the will, and as a result we must apply Article 1384 in every case of a corporal act by man!"

Ripert, Note to L'Affaire Jand'heur, D.P. 1930.1.57. (This freely translated statement is extracted from its context and should not be accepted literally as expressing the considered point of view of the learned jurist, Ripert. It does, however, epitomize the concern being manifested by French scholars over the possible implications of the new jurisprudence.)
French Article 1384. Some of these countries, however, have enacted special laws relative to automobile accident liability.\textsuperscript{41}

It is now profitable to deal briefly with the law of a few foreign countries which have enacted express statutory provisions dealing with specific dangers of the machine age and which have abolished for these fields the requirement of fault either in whole or in part.

\textbf{GERMAN STATUTORY LIABILITY FOR TRAFFIC AND TRANSPORTATION ACCIDENTS}

German law, like that of France, starts with the general assumption that fault of the defendant is an indispensable prerequisite to recovery in a tort action.\textsuperscript{42} However, Germany has led the continent of Europe in forthright legislative change to meet the challenge of the hazardous machine-age. It is familiar knowledge that the Germany of Bismarck initiated the now universal workmen's compensation movement, and that by the middle of the 1880's the German employer was made absolutely liable for all injuries to his employees. It is not so widely known, however, that the evolution of workmen's compensation was a comparatively late step in the German progress toward absolute liability for the peculiar dangers of industry and traffic. As far back as 1838 a German statute, which, with certain modifications in 1871, still prevails today, imposed absolute liability upon all railroads for all personal injuries and deaths inflicted through the operation of trains.\textsuperscript{43} The operator was permitted to show that the injury was due to an Act of God.\textsuperscript{44} The same statute provides that the absolute liability which it imposes does not exist where the accident was due to the fault of the victim himself. Here, however, the courts have adopted an interpretation that has deprived this provision of its original meaning. Germany, like France, has the principle of comparative negligence, whereby the fault of the victim is considered only a matter in mitigation of damages. The German courts have

\textsuperscript{41} Premier Congress International de L'association Henri Capitant pour la Culture Juridique Francaise 471 (Quebec), 503 (Egypt), 555 (Japan), 565 (Morocco), 579 (Netherlands) (Montreal 1939).

\textsuperscript{42} 2 Motive zu dem Entwurfe eines Burgerlichen Gesetzubuches Amtliche Ausgabe (1888) II, pp. 727-728; V. B. w. St., 95 R.G.Z. 268, 271 (Reg. iv. z. 5, Dec. 12, 1918). See also German Civil Code § 823 (1896); 2 Arminjon, Nolde, Wolff, Droit Comparé § 530 (1950).


\textsuperscript{44} Reichschaftlichgesetz, op. cit. supra note 43, at § 1; Enneccerus, Kipp, Wolff, op. cit. supra note 43, at § 246, 14.
brought this principle into action in railway cases under the statute we are discussing where the defendant railroad was morally blameless and the victim was careless to some extent. Accordingly the victim of a railroad accident recovers in any event, but receives a reduced amount if he was guilty of contributory negligence himself. Here again, as in France, we have the notion of comparative causation, as opposed to comparative negligence.

In 1909, when the automobile was still a sputtering toy, the legislature of Germany adopted a somewhat similar measure with reference to the liability of the owner and driver. Here, however, the statute was less extreme than the Railway Liability Act. First, it relieved the victim of an automobile accident of the necessity of affirmatively establishing negligence in order to establish a prima facie case. Furthermore, if the injury or death was due to a defect in the car or its mechanical operation, the defendant was not permitted to exonerate himself by showing that he was ignorant of the danger or even that he had made all requisite inspections of the vehicle. If, however, the defendant could convince the court that the vehicle itself was in satisfactory condition, he was permitted to resist the claim by establishing the fact that the car was being operated with all the care required by the circumstances. In this respect the German law is not as exacting as we have found it to be in France. It is also noteworthy that the German Automobile Act does not apply to vehicles which are incapable of moving at a tolerably rapid speed. Furthermore, the damages recoverable are arbitrarily limited in the act.

**SHIFTING THE BURDEN OF PROOF**

At this point it may be recalled that Jeremiah Smith predicted that the breakdown of fault would probably begin with a shifting of the burden of proof to the defendant. That is to say, he would be required to exonerate himself from blame. This prediction has been fulfilled completely in nearly every country

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45. Ibid.
48. Id. at § 246, I.5 (a). See also the rather cumbersome terminology of Section 7 of the statute (supra note 46).
51. P. 234, supra.
outside the United States and England. Irrespective of how the various foreign statutes may differ otherwise, they share this common characteristic—the burden of proof no longer rests on the victim. Outstanding examples are the statutes of Italy\(^\text{52}\) and Switzerland.\(^\text{53}\) Although the general tort law of these countries proceeds on the usual premise that the plaintiff must allege and affirmatively prove the fault or negligence of the defendant, yet special statutory provisions relieve the victim of an automobile accident of this necessity. This type of statute is becoming increasingly familiar on the North American continent. If one does no more than drive from Detroit across to Windsor, Ontario, he will find that the burden of proof has been shifted from the victim to the driver by express statutory provision in all cases except where two vehicles collide and mutual injury is suffered, or where the victim is a guest in defendant's vehicle.\(^\text{54}\) Lawyers who, in this country, are tempted to complain when the doctrine of *res ipsa loquitur* is applied to a rear end collision or to a vehicle that leaves the highway and inflicts injury may do well to pause and recall that these exceptional situations constitute the general rule for all auto accidents in most countries outside our own.

**The Development of Absolute Liability in Other Countries**

We may now turn to the second aspect of Professor Smith's prediction. It will be recalled that he stated that once the burden of proof had been placed upon the shoulders of the driver or owner of the vehicle, the task of discharging this burden would be made increasingly difficult until finally it would become impossible for the defendant to exonerate himself from liability. It is this latter aspect of Smith's prediction which seems to be in the process of fulfillment in countries outside the Anglo-American legal sphere. The differences between the various provisions are considerable, but in practically every country the burden of exoneration is becoming increasingly difficult in one way or another.

We have seen that in France proof of absence of fault on the part of the driver or owner is almost completely unavailing.

\(^\text{52}.\) Italian Civil Code, Art. 2054 (1942); 2 Arminjon, Nolde, Wolff, *Droit Comparé* 65, § 375 (1950).


In Germany, attempts to prove absence of fault in connection with the condition of the vehicle are equally ineffective, although a showing of due care with reference to driving itself affords a defense. In neither of these countries can the defendant avail himself of the contributory negligence of the victim as a defense, although this may be shown in mitigation of damages.

When we turn to the law of other nations we find similar differences. In some countries the defendant is virtually an insurer, as he is in France. Article 1913 of the Civil Code of Mexico, provides in substance that a person who makes use of machines, instruments or substances which are dangerous either in themselves or by reason of the velocity which they develop, is liable for the damage caused, although he did not act "illegally" (that is, wrongfully or negligently). He is, however, permitted to set up as a defense the gross fault of the victim.

This Mexican provision, which at first seems striking, is in effect similar to the familiar English principle of Rylands v. Fletcher, extended in two respects. The Mexican provision covers injuries to the person, while Rylands v. Fletcher is usually, although not always, limited to injuries to land. Second, Rylands v. Fletcher has been restricted by the English courts to activities which are unusual and which involve hazards beyond those normally expected in life. Hence, that doctrine does not embrace injuries inflicted by motor vehicles in traffic, since automobiles are not regarded as offering unusual perils. The Mexican provision, of course, does apply to automobile accidents.

It is safe to assume that the Mexican Article 1913 was not inspired by the doctrine of the Jand’heur decision, since that decision came in 1930, two years after the enactment of the Mexican Code of 1928.

The Mexican provision is strikingly similar to the method of attack adopted in the Soviet Russian Code of 1923. It will be recalled that the present Mexican Code marks the culmination of revolutionary activities and the increasing socialization of the Mexican Republic, and a borrowing from Soviet law is fairly to be expected.

For this reason, a brief excursion into the Soviet law relating to personal injuries may be of interest. One would be inclined at the outset to assume that the requirement of fault as a condi-

55. A.L.I., Restatement, Torts, § 520(b) (1938).
tion to liability would be entirely alien to communist ideals. The notion that one should be held only for his own blameworthy conduct and that in the absence of negligence the risk of accident should lie where it falls, reflects an individualistic attitude that is more characteristic of the philosophy of capitalism than of the completely socialistic state where distribution of wealth according to need is the prevailing philosophy. However, the accident law of the Soviet does not entirely confirm this assumption. The matter of accidental injury is controlled by two provisions of the Soviet Civil Code, Articles 403 and 404. The first of these, Article 403, is not unlike the typical codal provision found elsewhere on the continent. Liability is made dependent upon the existence of fault, at least in the sense that the defendant can excuse himself by showing that all due care was used. Although Soviet writers complained at first that this requirement of fault reflects bourgeois ideas, it nevertheless has persisted and now controls the bulk of Soviet tort litigation outside the field of industrial and traffic injuries.

The second provision, Article 404, provides in substance that individuals or enterprises whose activities involve increased hazards for persons coming into contact with them, including railroads, tramways and industries, shall be absolutely liable for the harms that are inflicted. The only defenses in the case of such ultra-hazardous activities are Acts of God or the gross contributory negligence of the victim. This Article 404 has been interpreted by the Soviet courts to cover injuries inflicted through the operation of motor vehicles.

From this it is apparent that the approach in Mexico and in Soviet Russia is the same. In both nations the ordinary dan-

56. Soviet Civil Code § 403 (1923): "Anyone causing injury to the person or property of another must repair the injury caused. He is relieved from liability, if he proves that he could not prevent the injury, or that he was privileged to cause the injury, or that the injury arose as a result of the intent or gross negligence of the person injured."

58. Id. at 500.
59. Soviet Civil Code § 404 (1923): "Individuals and enterprises whose activities involve increased hazard for persons coming into contact with them, such as railways, tramways, industrial establishments, dealers in inflammable materials, keepers of wild animals, persons erecting buildings and other structures, and the like, shall be liable for the injury caused by the source of increased hazard, if they do not prove that the injury was the result of force majeure or occurred through the intent or gross negligence of the person injured."
gers of non-mechanized living are treated differently from the special hazards that arise in industry and transportation. However, in any consideration of Soviet tort law we must bear in mind that damages recoverable under the Soviet articles serve only to supplement the benefits payable to the victims under the very complicated system of social insurance that prevails in Russia and which covers accident loss from all sources. This social insurance does not compensate the victim to the full extent of his lost earnings, and the damages which he may recover in a tort action are generally limited to an amount sufficient to fill in this gap.\textsuperscript{61} This suggests that if the benefits of the social insurance system were enlarged so as to afford full coverage, there would be no further need for a tort law to cover personal injuries in Soviet Russia. As a matter of fact, the impact of an extensive social insurance system upon private tort liability is becoming a problem of increasing complexity in England, where such a system also prevails.\textsuperscript{62} Finland, Norway and Denmark have statutes imposing liability without reference to fault for injuries caused by motor vehicles.\textsuperscript{63}

It is obvious that fault, or negligence, is playing an increasingly insignificant role in the determination of automobile accident disputes. In the commentaries of foreign writers the same story appears and reappears, namely, that modern traffic and transportation is the source of increased perils to the safety of human beings, and that the activity itself, whether it is the operation of locomotives or busses or even the driving of a private car, should pay for the increased number of hurts and deaths which the activity has brought about.

This, of course, is an aspect of the law of workmen's compensation—the substitution of the notion of inevitable and indigenous risk in place of the older idea of moral blameworthiness. But the modern idea of workmen's compensation goes further than this. It embraces additional features. The most important is the fact that workmen's compensation substitutes the idea of modified scheduled losses in place of the broad concept of tort damages. It is felt that if the employee victim is to enjoy a recovery from his employer for every hurt he experiences in the

\textsuperscript{61} Hazard, Personal Injury and Soviet Socialism, 65 Harv. L. Rev. 545 (1952).

\textsuperscript{62} Friedmann, Social Insurance and the Principle of Tort Liability, 63 Harv. L. Rev. 241 (1949).

course of his employment, it is fair that the amount which he recovers should be somewhat limited. In workmen's compensation damages for pain and suffering go out the window, and, further, the employee must be satisfied to accept a limited indemnity which will replace only a part of his lost earning power. This aspect of compensation—the part which is most favorable to the defendant—has not as yet been recognized in the countries discussed where the requirement of fault has disappeared or is disappearing in transportation litigation.

The Frenchman who recovers under Article 1384 without being required to establish the carelessness of the driver whose car struck him will recover damages as complete in every respect as the American victim of an auto accident in Chicago who spent hours on the witness stand in an effort to convince the jury that the defendant was negligent. The nearest approach to the limited recovery which is characteristic of workmen's compensation will be found in the German statute referred to earlier which imposed absolute liability upon railroads. That statute prescribes a maximum sum which can be recovered under its provisions, but this is hardly comparable to a typical compensation schedule.

THE SASKATCHEWAN AUTOMOBILE INSURANCE ACT

Strangely enough, if we wish to see the principle of workmen's compensation applied in its entirety to automobile accidents of every description we must turn, not to some of the more daring European nations, but to a remote province in Canada—the Province of Saskatchewan. It is here that Jeremiah Smith's prediction has been fulfilled in every minutia. Here in Saskatchewan is the proving ground for a method of handling traffic accidents that bears little resemblance to any other system on earth.

A radical experiment in motor vehicle liability of the type under consideration was possible in Saskatchewan without too much risk either in terms of benefit or of cost to the motorist because of the few number of vehicles in the province and the absence of extreme congestion on any of its highways. In 1948—the latest year on which reliable figures are available—there were only about 167,000 vehicles registered. At that time there were more 1929 model cars and trucks than any other on the Saskatchewan roads. During the winter months of extremely cold weather motor traffic grinds to a virtual halt outside the larger centers. For example, during the three months period from January
through March 1950 there were only about three hundred accidents involving personal injuries.

The urge to experiment in the automobile accident field can be attributed to the rather unusual political party known as the Cooperative Commonwealth Federation which has been in power in Saskatchewan since 1944. This party represents a coalition between the advocates of an agrarian movement and certain labor groups supporting socialist principles. The party advocates government ownership of public transportation and public utilities, and also insurance.

In 1945 the government appointed a committee to study the problem of compensation for automobile accidents. The Saskatchewan committee concluded that liability based upon fault or negligence offers an entirely inadequate solution for traffic accident problems.64

The various arguments which have been advanced in support of the abolition of negligence or fault follow a standard pattern. It is frequently urged that the type of conduct which is commonly characterized as negligence by the law, such as heedlessness or lack of capacity to respond quickly to emergency situations, is typical of automobile driving in general, and no valid objective can be gained by specially penalizing the driver who happens to manifest this common shortcoming at a time when it results in injury.

Negligence in traffic has long ceased to be regarded as conduct which is morally condemned by society. Often it is nothing more than a violation of some arbitrary traffic regulation which has little moral significance. We cannot hope that by imposing liability for these shortcomings we will encourage drivers to be more careful. Neither can we maintain with frankness that it is fair to hold the negligent driver in expiation for his sins.

It has been pointed out that the effort to determine who was at fault in a typical automobile accident is largely a matter of guesswork engaged in by judge and jury after listening to unreliable testimony of witnesses whose attention at the moment of accident was probably not close, whose estimate of speed and distance are notoriously inaccurate, whose memory of what they did see is not dependable, and whose statements are often in hopeless conflict with each other.

The practice of attempting to fix liability in terms of who was to blame is wasteful and is productive of no benefit to society which can offset the disadvantages of delay, expense, and the capricious character of the outcome, all of which follow in the wake of the use of the fault or negligence concept. So run the arguments of those who advocate liability without reference to fault in traffic cases.

A second conclusion of the Saskatchewan committee relates to the inadequacy of existing financial responsibility laws and voluntary liability insurance, including even such recent innovations as assigned risk plans, and unsatisfied judgment funds. The committee strongly advocated compulsory insurance as a state undertaking which would permit the underwriter to impose premium surcharges when deemed advisable. This compulsory insurance should be integrated with the registration of vehicles in an effort to keep unqualified drivers off the road.

This report led to the passage of the Saskatchewan Automobile Accident Insurance Act of 1946, which, with certain amendments in 1947, 1948, and 1949, is the controlling law of the province today. This act contains fifty-seven major sections with almost innumerable subsections and schedules. Only a brief survey of the more vital provisions of the measure is possible here.

Every car owner in Saskatchewan is required to register his vehicle in order to drive lawfully upon the highways of the province. As a condition to the registration of his vehicle he is required to show that he has paid his premium and is duly insured under the Accident Insurance Act. No policy is issued to him, but he receives instead a certificate of compliance. The terms of the insurance are all prescribed in the act itself. The portion with which we are presently concerned designates as beneficiaries all persons who suffer loss resulting from bodily injuries sustained through accidental means as a result of driving, riding in or upon, or operating a moving motor vehicle, or

65. Saskatchewan Stats. 1946, c. 11; Saskatchewan Stats. 1947, c. 15; Saskatchewan Stats. 1948, c. 15; Saskatchewan Stats. 1949, c. 11. The entire act is reprinted in Report on Automobile Liability Insurance by Legislative Research Committee of North Dakota 174-243 (1950); An excellent summary of the act appears in 31 J. Comp. Leg. & Int'l L. 29 (3 ser. 1949). See also Grad, Automobile Accident Compensation, 50 Col. L. Rev. 300, 320 (1950).

The Saskatchewan statutes, as amended above, will be referred to hereafter as the Automobile Accident Insurance Act, 1947.

66. Automobile Accident Insurance Act, 1947, note 65, supra, at § 3(1).
as a result of a collision with or being struck, run down or run over by a moving motor vehicle.67 This includes the driver himself, all occupants of the vehicle and also third persons who are injured through its operation.

The important feature of the act, of course, is that the insurance does not merely cover injuries for which the certificate holder would be held liable for damages in an action at law. It creates a claim in favor of anyone who is injured by a moving registered and insured vehicle, irrespective of how carefully it may have been driven. The claim is not to be asserted against the driver or the certificate holder, but against the state insurance fund. Insofar as this portion of the act is concerned, it neither creates an action for damages against the driver or owner, nor does it affect any cause of action which otherwise might be maintained against him. In short, it is state insurance, payable from a fund made up of premiums charged against all owners of registered vehicles. It differs basically in only one respect from the English social insurance system which also affords accident compensation coverage: under the Saskatchewan Act the protection is paid for by those who make use of motor vehicles, rather than by the taxpayer at large.

The Saskatchewan scheme falls squarely within the principle of workmen's compensation because the risk creating enterprise (which under workmen's compensation is the industry, and under the Saskatchewan act is the operation of motor vehicles for any purpose)—this enterprise is required to support the accident cost that experience has shown flows from it. Again, as in workmen's compensation, the risk is spread through the medium of insurance. There is little difference, except in form, whether the claim is asserted against the insured owner of the car or directly against the insurer as under the Saskatchewan act. In either event, the liability has become entirely impersonal and it is paid from a common fund supported by premiums from all who benefit from the enterprise of operating motor vehicles.

In view of the fact that the victim makes his claim for an insurance benefit, rather than damages, it was easy to limit the amount and duration of the benefit by a schedule in the act. In this respect the Saskatchewan legislature has followed the general model of the typical compensation statute. Benefits fall into four established groups: weekly indemnity for loss of in-

67. Id. at § 16(1).
come, supplementary allowances in connection with this indemnity, arbitrary lump sum payments for a loss of eye or limb, and death benefits. The provisions are in general much more modest than the corresponding provisions of a modern compensation act.

The determination of loss of income with reference to the population at large will obviously offer more administrative difficulties than a corresponding determination of loss of wage which must be made under the average workmen's compensation act. The victim may be a professional man, an enterpriser, a housewife, or perhaps an unemployed person. However, the fact that the maximum weekly payment allowed under the act is only twenty dollars\(^6\) minimizes the difficulty of ascertaining what the earnings were for the preceding year, which is the basis adopted under the Saskatchewan act.

Special provisions also afford some assistance. For instance, in the case of an injured farmer, who may lose his entire crop if he were involved in an accident at harvest time, or who had suffered crop loss the previous year by reason of drought, hail, or insects, it is manifestly unfair to compute his loss in terms of actual cash earnings of the previous year. In order to compensate for this, and also to relieve the administrative burden, the act establishes a conclusive presumption that the farmer's past yearly earnings were at the maximum recognized by the act, namely, twenty dollars\(^6\).

The injured housewife presents a unique problem for a compensation schedule of this kind. She is not a wage earner in the commonly accepted sense; yet if she is disabled by accident, her entire household suffers. Her case receives arbitrary treatment under the Saskatchewan act. She is entitled to twelve dollars and fifty cents a week for a period of six consecutive weeks if she is totally disabled. This is to assist the household in procuring substitute services during the initial period following the accident.\(^7\)

If a claimant is totally and continuously disabled he is entitled to wage indemnity, determined and limited as above, for a period of fifty-two weeks.\(^7\) If he is only partially disabled, the compensation is graded downward according to the formula

\[^{68}\text{Id. at § 18(1).}\]
\[^{69}\text{Id. at § 18(4).}\]
\[^{70}\text{Id. at § 18(3); Id. at § 2, para. 11.}\]
\[^{71}\text{Id. at § 18(1).}\]
familiar to us under the Workmen's Compensation Statute in terms of the difference between earnings before and after the accident.\footnote{72} In the case of the totally disabled person, compensation may continue after the fifty-two week period until the claimant has received a total of twenty-four hundred dollars.\footnote{73} No such additional allowance is provided for the victim who is only partially disabled. It is noteworthy that the indemnity equals the whole amount of the lost weekly wage, instead of an arbitrary sixty-six and two-thirds per cent as found in the average workmen's compensation statute. It was felt that the arbitrary limit of twenty dollars weekly, and the shortness of the period during which compensation is payable, makes any further limitation unnecessary.

The supplementary allowance to which I have referred is for the purpose of defraying at least in part medical expenses involved following the accident. The amount of this allowance is determined at the absolute discretion of the insurer, except that the maximum is established by a schedule in the act, which lists designated injuries and medical services and prescribes the maximum allowable in each instance in much the same manner as in the ordinary hospital insurance policy with which we are all familiar.\footnote{74} Two hundred and twenty-five dollars is the highest amount set in any instance.

Lump sum benefits for loss of eye or limb are entirely supplemental to any other benefit to which the claimant may be entitled.\footnote{75} The most serious loss listed is that of both eyes, for which two thousand dollars is allowable.

Death benefits are distributed according to a scheme similar to those provided under workmen's compensation acts. It is sufficient to say here that a widow receives three thousand dollars, and the same is true of an orphaned child where there is no widow. Where there is more than one dependent, the allowance is increased by six hundred and twenty-five dollars for each such additional dependent until a maximum of seven thousand dollars has been reached.\footnote{76}

Here, then, is the compensation scheme in full application to ordinary traffic accidents with fault eliminated and a schedule

\footnotesize{72. Id. at § 18(1); Id. at § 18(2).}
\footnotesize{73. Id. at § 18(1)2.}
\footnotesize{74. Id. at § 19(1) and Schedule A.}
\footnotesize{75. Id. at § 17(3).}
\footnotesize{76. Id. at § 20.}
provided which follows that of workmen's compensation on a slightly more conservative basis. The driver's or owner's tort liability is left untouched. The application of the act does not exclude the victim's remedy for damages for negligence. In this respect the model of workmen's compensation is not followed. A certain measure of relief, however, is afforded the defendant. The act provides that where a judgment for damages is secured against a registered owner or driver, there shall be deducted the amount to which the victim may be entitled under the compensation provision of the statute. This represents the same general type of adjustment between social insurance and tort damages which was mentioned earlier in connection with the law of Soviet Russia. Since the Saskatchewan motorist can be subjected to a damage claim for personal injuries or damaged property despite the compensation scheme, the state has seen fit to require that he insure against this liability also, and this insurance is likewise carried with the Government Insurance Office. Like the required premium for the compensation insurance the payment for this liability insurance is a necessary condition to the securing of a registration certificate for the vehicle. Under the compulsory liability policy claims for personal injury are limited to five and ten thousand dollars, while property damage is limited to one thousand dollars, with a one hundred dollar deductible provision. This latter feature is unusual in liability insurance.

One may feel that this is quite enough compulsory insurance to impose upon the owner of a registered vehicle even in an area where the strong arm of the government can compel insurance coverage. However, the Saskatchewan government has not stopped here. It is observed that damage to an owner's vehicle is not recoverable under the compensation feature of the act, which is limited to personal injury. Neither is such damage covered under the liability policy unless the driver was at fault. Furthermore, where no negligence can be shown, the compensation liability for personal injuries is severely limited by the schedule. Thus, there is a need for ordinary collision insurance, as we know it in this country. Perhaps the need is even greater in Saskatchewan, because the province is almost entirely agri-
cultural and motor vehicles have become indispensable pieces of farm equipment. Extensive damage to a farm truck could produce disaster for a farm family whose income is as low as that which prevails in the province. Thus, added to the compulsory and the liability insurance is compulsory collision, fire and theft coverage, all of which are subject to a one hundred dollar deductible provision.80

The procurement of all this insurance is required of the vehicle owner, and it is paid for by him for the privilege of taking his car or truck onto the highway. The premium cost for this combination of compensation insurance—liability insurance, and insurance against collision, fire and theft—is fixed in terms of the age of the vehicle to be registered, and the insurance fund is supplemented by the imposition of a license fee of one dollar for each driver. It is surprising to note that the single registration premiums for all combined coverages for a private vehicle ranges from four dollars fifty cents to ten dollars per year, depending on the age of the vehicle.81 The average premium is about seven dollars.

It is difficult to compare this extremely low rate with the prevailing rates for similar insurance in this country. First, the rate is affected by the fact that we are dealing with social insurance operated by the government. This greatly affects the cost. Not only is the profit element eliminated, but operating costs are materially reduced by reason of the fact that advertising and solicitation is unnecessary. The premium is collected on or before March 31st of each year at the time the vehicle is registered and the insurance remains in force during the period of the effective registration. The issuance of a formal policy is unnecessary under the scheme. In 1949 the ratio of expenses incurred to premiums written was only slightly over eighteen per cent.82 This may be compared with the average fifty per cent loading factor characteristic of private insurance in the same field in this country.

The social insurance character of the Saskatchewan act has affected the premium on private vehicles in other important

80. Id. at Part III.
81. These figures are based upon a study by Arthur L. Bailey, Chief Actuary of the Insurance Department of the State of New York, made on behalf of the Legislative Research Committee of North Dakota, and are set forth in the Report on Automobile Liability Insurance of that group (published by State of North Dakota, 1950). See also Grad, Automobile Accident Compensation, 50 Col. L. Rev. 500, 523 (1950).
respects. First, there is a substantial differential between the low premium for private vehicles and the premium for industrial and commercial cars and trucks. The differential may seem strange at first blush, but under a social insurance plan government feels it is entitled to assume that the increased premium for commercial enterprises will be passed along the channels of trade in the form of an increased charge to the ultimate consumer or user. Therefore, the higher rates for commercial vehicles are regarded in Saskatchewan as socially justifiable. This, again, is nothing more than a natural corollary of the workmen’s compensation principle when applied to a new field.

Second, the premium rates for private vehicles are the same for both rural and city owners, despite the differences in accident experience. This, of course, would not be possible under private competitive insurance. The net effect is that the farmer subsidizes the urban driver to a small extent.

The low premium rate is greatly affected by the fact that traffic is almost unbelievably light in Saskatchewan. This is due to the sparseness of population, the poor state of rural roads, and the severe winter conditions which virtually drain the highways of cars outside the urban centers for three months.

Every report on the Saskatchewan plan indicates that it is working satisfactorily and is financially sound, despite the unbelievably low premium rate. Over the four-year period from 1946 through 1949 the average loss ratio between premium earned and losses incurred was only about sixty-five per cent. If we add to this the expense factor of eighteen per cent, it is clear that a surplus is accumulating in the insurance fund which the government prepares to use either to reduce premiums further or to add to benefits.

Private insurance is still possible under the Saskatchewan scheme. Surprisingly enough, a study has revealed that private carriers are maintaining their volume and in some cases are increasing this substantially each year. Of course, however, private insurers are not happy over the Saskatchewan plan.

83. Id. at § 49.
84. Id. at § 37.
85. Many of the objections of private insurers are clearly sound. See, for instance, the report of the Wawanesa Mutual Insurance Company of Manitoba which has been able to increase its business substantially despite the state insurance plan. This report points out that in several reports the effect of the act is to require private insurers operating in the liability field to subsidize the state system. No. 332 Ins. L. J. 702 (September 1950).
Last year the Legislative Research Committee of North Dakota made a careful study of the Saskatchewan scheme. The North Dakota legislature was interested in an estimate of the premium cost of such a scheme in North Dakota. For this purpose the committee secured the services of the Chief Actuary of the New York State Insurance Department. The study was made on the spot, after a lengthy consideration of all factors that could affect the comparative rates in the two areas. It was estimated that the Saskatchewan compulsory coverage as described could be maintained for private vehicles in North Dakota under state insurance for about seventeen dollars and forty cents.\footnote{86 Id. at § 57.}