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General introduction: legal change? Railway and car accidents and how the law coped with them

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1 Railways

The development of railways is one of the defining features of 'the Long Revolution' which introduced the industrial age. The possibility of transporting goods and persons cheaply and in very large numbers was crucial for the whole process. The constant expansion of railways, which made distances 'shrink' as never before, posed enormous challenges to the social, economic and legal fabric. Huge amounts of capital were needed, and this need was met by forming corporations and adopting novel techniques of corporate financing. Railway projects became a prime object of speculation. Again, when railway lines had to cross several territories in a single country, the need for trans-border agreements boosted trends towards economic and political unification. Clashes of political and financial power, local and national interests, made for high drama. Railways were also to become giant, nationwide employers. All in all, the sheer amount of capital needed, the size of areas and territories affected and the number of people employed made railways a very special case. In short, the 'railway-ization' of western societies was part and parcel of the Industrial Revolution, which restructured these societies throughout the nineteenth and twentieth centuries.

Like all new technologies, railways entailed new risks. The success story of railways was accompanied by a sad tale of numerous railway accidents, many on a terrifying scale. The personal injuries resulting from this aspect forms the topic that this book considers. How did the legal system react to the occurrence of so many railway accidents? In this volume, the contributors have tried to answer this question by looking at a number of selected countries, namely England, France, Germany, the Netherlands, Spain and Sweden. Do the legal developments in these countries show similar patterns? Can we determine what drove legal change?

In what respects were railway accidents 'new'? Why could the law not handle them in just the same way as all other accidents had been? After all, carriages or stagecoaches had been involved in collisions for centuries, and the law had reacted appropriately. Two issues, neither entirely new, seem to predominate. The first issue was that liability for 'ordinary' accidents depended on fault, or *culpa,* and this fault requirement was inappropriate where the state of the (new) technology made (some) accidents unavoidable. If the accident was unavoidable, how could an individual be at fault? The second issue was one of scale: the running of a railway was no longer a local matter, but rather called for large-scale organizations. This made it difficult for victims to single out any particular individual who could perhaps be blamed, and even if a culpable individual could be identified, it was more likely than not that he would be personally unable to meet the liability arising from the accident. Could one then sue the railway company? This was an issue of 'vicarious liability' (*respondeat superior*), and it was an issue because, in general, at least within certain systems, an employer was liable for a delict caused by an employee only if the employer had been careless in choosing or supervizing him.

A caveat must be inserted here: there were many different types of railway accidents. Damage might be caused to the goods being carried or to property with which trains collided. Victims of personal injuries could be passengers or bystanders, some on platforms, others on crossings. Railway employees themselves formed another major group of victims.[1] The classic instance of a grain field going up in smoke due to a spark from a train's chimney was but one case of many, and is dealt with at length in another volume in this series.[2] The legal issues could be very different depending on the type of accident. Most notably, passengers and persons who had handed over their goods to be transported by rail could rely on

[1] For example, the 1877 British Royal Commission on Railway Accidents reported that from 1872 to 1875, on average, 1,308 people were killed each year on the railways, and a further 4,236 were injured. More than half of these were employees of the railways (on average, 741 deaths each year and 2,252 injuries). In 1875, 3 employees were killed for every 1,000 people working on the railways. German studies also show that injuries to employees of the railway companies from 1851 to 1879 on average accounted for 76% of all injuries suffered from railway accidents. By various means, employees were excluded from the compensation offered to passengers. Furthermore, it was shown that about 90% of accidents were caused through their own fault. See the English and German reports below, pp. 13 and 86 n.42.

[2] See M. Martin-Casals, *The Development of Liability in Relation to Technological Change* (Cambridge University Press, 2009).

contract, whereas all other victims had to rely on the regime of liability in tort. This, in turn, could be different depending on whether personal injury or damage to personal property was at stake, and quite different laws again might apply where the damage was to landed property (the *actio negatoria* of the civil law systems was available even in the absence of fault). In some systems, the liability regime could also depend on whether the railway was state-run or operated by private enterprise. These categorizations were not all drawn along the same lines in all countries. Hence, there was no single issue of 'the' railway accident. Rather, there was a multitude of issues arising from incidents involving trains – varying from country to country – that in retrospect we see as merely facets of the challenge to the legal system brought about by technological progress and its various consequences. This book has deliberately focused on personal injuries. The parallel volume on *The Development of Liability in relation to Technological Change* includes a discussion on property damage caused by sparks emitted from steam trains.[3]

Turning to the outcomes of the particular research undertaken for this volume, the first finding is the most surprising: in responding to the issues arising from railway accidents, the legal systems did not 'change' at all – the requirement of fault and the structure of vicarious liability remained very much as they had been before the issues relating to railways ever presented themselves or had been more or less resolved.

The legal system had been challenged, but it met the challenge not by changing, but rather by 'branching out'. New instruments, developed ad hoc, adjusted the traditional system to the specifics of the railway agenda. In short, instead of 'changing', the law evolved by using some traditional instruments, adapted slightly for the specific area where the needs were novel. The basic rules were not altered. Over time, there was a shift in the balance between the traditional rules and their special 'offspring' with the result that the 'newer' rules came to seem the more 'natural'. In the long run, indeed, this may amount to a complete replacement of the old rules by the new ones. To begin with, however, legal change does not seem to take the form of altering the existing law, let us say, of delict, so as to make the rules look any different.

For this 'branching out' of new solutions designed to respond to the novel issues that presented themselves, the law used already well-established instruments. Nothing was created *ex nihilo*. The instruments employed varied from country to country, depending on the different

[3] See Martin-Casals, *The Development of Liability in Relation to Technological Change*.

legal cultures. France mainly relied on the tightening of public safety regulations, whose breach entailed liability to make compensation. In Germany, railway victims benefited from alterations made by the courts and legislator in the rules regarding the burden of proof. Legislators in some countries (Sweden among them) introduced laws to overcome the problem of an underdeveloped vicarious liability. The statutory introduction of strict liability was another response, but by no means a universal one.[4] A common feature of all these measures was their falling back on well-established legal instruments. None of these measures as such were 'new': reversals of burden of proof, regulations as the basis of a tortfeasor's liability and even strict liabilities were not unfamiliar. The handling of railway accidents was improved by the use of established legal concepts. Even the provision of better compensation for railway employees through the workmen's compensation schemes used a newly created but general set of concepts. The challenges of the railway sector provoked nothing that could rate as a distinct legal 'invention'.

Much is commonly made of the introduction of strict liability. Some see it as a turning point, a radical departure from the traditional structures of tort law, and the foundation of an alternative, more 'modern' system of liability in tort. Nothing could be further from the historical truth. Strict liability had been around for a long time before it was invoked to help railway victims pursue their claims more effectively. The civil law systems knew a number of actions based on strict liability rather than fault. All that legislators needed to do was to take the concept of strict liability and employ it for the statutory regulation of railway accidents. The theoretical confrontation of fault and strict liability has been overrated, by both the champions of fault as the alleged sole basis of all tort liability and the champions of strict liability as the allegedly better way of dealing with accidents. Fault and strict liability can both be subjected to qualifications and exceptions (reversals of burden of proof on one hand, defences of *force majeure* and contributory negligence on the other) so as to permit liability to be fine-tuned depending on the circumstances. It is interesting to note that the efforts of theorists, from the mid twentieth century onwards, to promote strict liability as a general new model for a more progressive 'tort' law failed to persuade the legislators to follow them.

[4] Compare, in particular, Germany with England or Spain: see below, pp. 80–90, 15–17 and 153–70.

2 Motor cars

The story of the motor car, likewise seen from a legal perspective, is different and much more dramatic. The advent of the automobile, though likewise a technological invention and a social novelty, was much less conspicuous than the invention of the railway. For locomotives, a completely new grid of railway lines had to be laid out, whereas cars initially ran on existing roads long used by carriages, horsemen and pedestrians. Cars called for no expensive and extensive infrastructure, so there was no need for large-scale financing operations. No giant corporations sprang up to invest in and operate motorized traffic, and there were none of the speculative bubbles that had accompanied many railway projects. The beginnings may have been quite humble – the first cars were used by individuals rich and adventurous enough to engage in an expensive, avant-garde hobby – but the imprint that automobiles were to leave on the development of societies throughout the twentieth century was absolutely indelible. Railways certainly contributed crucially to the overall transformation of economies and societies from the mid nineteenth century onwards, but the long-term impact of the automobile on the lives of individuals and also on societies as a whole was probably greater. As the automobile became ubiquitous, society had to respond in new, unprecedented ways, for instance, to give just one example, in town planning and building. All in all, the motor car cut deeper into the social fabric than the train.

Just as the growth in automobile traffic was gradual, so the development of the applicable law took much longer than the process of responding to railways. The outcome, however, is truly remarkable. Nowadays, road accidents seem to be handled almost everywhere in a sort of 'systemic', quasi-bureaucratic way. This is largely because the issue of liability has become entwined with insurance. Insurance companies, active internationally as well as nationally, are at the core of today's system. The actual participants of an accident rarely confront each other on the question of compensation; their insurers take these issues in hand and apply very efficient standard procedures which they have reciprocally agreed, 'knock-for-knock' agreements between insurance companies being the most striking feature of this system. Insurers are in constant contact with car manufacturers (who are also involved by their possible product liability), drivers' associations and legislators, and their role in the handling of road accidents has long had to be taken into account whenever changes in the law are to be made. In many countries, social security systems are also involved in the 'systemic' handling of accidents, especially those involving personal injuries.

One sign of the increasingly bureaucratic approach is the way that, in many countries, the role of contributory negligence has changed. To begin with, contributory negligence was an 'all or nothing' defence, consonant with the aim of early civil procedure to establish which of the litigants was in the wrong. Nowadays, contributory negligence has become just another factor in assessing the compensation due to the victim, a development in line with the tendency of bureaucratic procedures to introduce mitigation and proportionality.

The system of differential insurance premiums depending on drivers' accident records, and other factors did introduce some novel elements of incentive and deterrence. Indeed, the 'behavioural control' of car drivers may today rest as much on the premium system as on the traditional imperatives of tort law. The system is complex, and the private-law liability regime is but one element in it – a crucial element, admittedly, but one embedded in an elaborate insurance system.[5]

The legal change we can observe here is not, or not mainly, the gradual erosion of the fault requirement. Those focusing on this element alone could rightly conclude that there was little or no 'change' at all. What is new, indeed, is the institutional framework, the expert bureaucracies that handle road accidents by applying standard procedures, operating in the light of the macro economic effects of road accidents and an unrelenting interest in increasing road safety. This 'institutionalization', the emergence of this complex 'collective' or quasi-bureaucratic system for road accident compensation, is a true innovation of the twentieth century.

How did we arrive at the present position? Let us first try to discover what must have been the primary stimulus for legal change, and then look at the actual process. The systems devised by all the countries considered here are remarkably similar, despite the numerous differences in the legal detail of their respective tort laws and the resulting 'path dependencies'. The systemic interplay of insurance companies seems to work well, even if the liability laws are quite different. This leads to the conclusion that the driving factor has been a common sociological feature rather than this or that legal rule.

The main force driving this process, it seems, was not so much the 'injustice' of the tort laws as they stood at the beginning of the twentieth century (indeed, one could argue that in most countries the changes in driver's tort liability have been quite modest) but rather that the massive number of road accidents made it imperative to adopt a swifter, more

[5] On insurance systems, see esp. below, pp. 43–8, 61–3, 104–9, 204 and 211–14.

efficient way of handling the compensation issue. It takes a great deal of time and money to resolve accidents in court, where disputed issues of causation, fault and the quantum of damages often call for expert evidence. The growing number of accidents made it very difficult for the legal systems to handle each and every case on an individual basis. The need for enhanced efficiency in dealing with these large numbers was obviously very influential in the production and selection of possible solutions. There comes a point where mass matters, as Clausewitz observed.[6] In the case of road accidents, it was not technology as such that called for legal innovation, but rather the sheer mass of occurrences that needed to be resolved every day. (It is true that road traffic became much safer, thanks to constant efforts, but this effect was more or less outweighed by the steady increase in the number of cars on the roads.) It may well be that the strongest argument for non-fault (strict) liabilities is not so much that they produce a more just result (although a case can well be made that they do), as that by eliminating fault (a matter of controversy in almost all cases), they make it easier to settle claims for compensation. It was surely the urgent need for efficiency, in the face of an ever-increasing number of cases, that caused the gradual adoption of more schematic, bureaucratic and standard procedures for handling road accidents.

While bureaucratization, relying on the insurance industry, is a common feature of all legal systems we have looked into, the traditional peculiarities of the different tort systems have proved to be astonishingly resistant to change. The requirements for compensation claims still differ considerably from country to country. This is true even after several interventions of the European Union. We take this not only as signifying a strong path dependency, but also assume that, for the overall functioning of the bureaucratic system, the delicate details of the rules on tortious liability may be of limited importance only.

While the various legal systems all moved in much the same general direction, one country stands out: all along, Sweden seems to have reacted more swiftly to the new challenges. In 1975, it also took what is perhaps the next logical step in the development, namely to remove the relationship between car driver or owner and the victim from the issue of compensation altogether and to establish a state fund from which victims claim compensation. It is tempting to ask why Sweden has been readier than both a common law country like England and all the civil law countries to discard doctrinal concerns. Courts and legislators, car manufacturers

[6] C. von Clausewitz, *On War*, trans. J. Graham (London: Trübner, 1873), Vol. VI, Ch. 27.

and insurers (and their respective pressure groups), and drivers and their associations.

If the need for greater efficiency was the driving force for development, how did the legal systems 'react' to this exigency? The evolution of our very elaborate, complex systems for compensation, involving the interaction of a multitude of institutional actors, has been a slow process in which courts, doctrinal writers and legislators, as well as insurance companies, have contributed to the emergence of ever-more refined settlement techniques. 'Grand schemes' to reform the field of road accident compensation, not so very different from the sort of no-fault systems now in place in a number of the systems studied here, were occasionally advanced (mostly by doctrinal writers). But there was never any serious attempt to enact such schemes.[7] Perhaps it was too much to expect legislators to create, in one stroke, a complex system that calls for the delicate interaction of a multitude of 'players': insurers, drivers and pedestrians.

If the changes in the handling of road accidents occurred in a piecemeal way, the overall effect has proved momentous. Most of the legal techniques involved were already familiar in the early twentieth century, but no one then could have conceived or planned the elaborate interplay of insurances which today takes care of road accidents. The territory was uncharted, but the legal systems ended up by navigating it with remarkable success. Gradualism is a characteristic of legal developments, but it does not stand in the way of very considerable changes, changes brought about by a prolonged series of ad hoc solutions without any prior master plan setting out the overall direction. One is put in mind of the concept of evolution, a powerful process characterized by many slight alterations, taking place without any clear idea of what is to follow.

[7] For example, there were debates in the 1930s proposing a no-fault insurance scheme for motor-vehicle accident victims in France (Picard 1930), Germany (Trendel 1935), Spain (1934) and Sweden (a Bill in 1938): see below, pp. 61–2, 107, 177 and 205–6. By contrast, some leading academics were particularly important in promoting ideas. This was more true of legislation on roads than the development of railway legislation (mainly because universities were so small in the nineteenth century); see, for example, Ivar Strahl (below, pp. 206–7) in Sweden in the 1940s and 1950s, influential mainly because he chaired a number of committees that led to legislative proposals. André Tunc was also important in France, strongly influenced by his stay in the United States in the early 1950s (see below, p. 65). Early proposals in Sweden (1957) and France (1965) failed because the insurers were not happy (see below, pp. 208–9 and 64–5). But the Swedish reforms of 1975 were supported by insurers, and the French reforms of 1985 were not opposed by them (see below, pp. 210 and 67–9).

The main development just described has taken place in the field of private law at large. Insurance contracts are instruments of private law, and most insurance companies are private law entities. The legislator has fine-tuned the role of insurers in the handling of car accidents, most notably by making insurance against liability compulsory and by granting the victim an *action directe* against the insurance company. If one refrains from unduly emphasizing such interventions, one could say that the private law systems have proven of enormous vitality in progressing towards efficient solutions. Seen from a traditional point of view, the result is somewhat paradoxical: whilst still operating with private law instruments, the overall system now has a decidedly bureaucratic character.

Public law, however, has also played its part. When we consider the responses of the different legal systems, we can see the importance of the interplay of public law regulation with private-law liability regimes. Sensible safety regulations can diminish the number of accidents and reduce the amount of damage caused. Drivers, required by statute to obtain a licence, found their conduct at the wheel increasingly regulated in ways that restricted their previous liberties. For example, drink-driving rules imposed standards of conduct on drivers, and the compulsory use of seat belts constrained the freedom of passengers as well. Legislators have increasingly required manufacturers to make their vehicles safer or incur liability for defects, and the safety of roads was increased (with the introduction of traffic lights, pedestrian crossings, speed limits and speed bumps). Such preventive measures are obviously preferable to tinkering with liability regimes, which mostly come into operation when the damage has been done. It is true that the risk of incurring liability constitutes an incentive to careful driving, but it remains doubtful how effective such mechanisms may be.[8] Though legislators obviously preferred to adopt 'direct' measures as a means for 'behaviour control' rather than rely on the untested effectiveness of tort law, regulatory and liability regimes do interact, and private law has always been shaped, to some degree, by public law regulations. The Edicts of the Aediles provide the best-known examples: those Roman public law regulations, designed to repress unfair practices in the Roman slave and cattle markets, eventually had a great effect on the private law relating to

[8] See P. Cane, *Atiyah's Accidents, Compensation and the Law* (7th edn, Cambridge University Press, 2006), 426–8.

the seller's liability for latent defects.[9] In the case of road accidents, the violation of safety regulations became a new and increasingly important basis of liability in tort, as well as for the defence of contributory negligence.[10]

What were the respective contributions of courts, legislators and doctrinal writers to this process? The answer varies from country to country. Doctrinal writers, being able to 'think outside the box', often came up with grand schemes, and if they appeared too far-reaching for immediate implementation, quite a few of them were vindicated by later developments, sometimes with a considerable time lag. Two writers whose names cannot be ignored in any European history of car accident law are Strahl (in Sweden) and Tunc (in France).[11]

Courts can only naturally make improvements step by step, and supreme courts (which alone can effectively move the law forward) can do so only if the 'right' case comes up by way of appeal. Even landmark cases usually turn only on narrow points, the French *Jand'heur* decision (1927/1930) perhaps being an outstanding exception.[12]

As to legislators, they also seem to be, in general, reluctant to endorse any of the grand schemes proposed, though their 'reaction time' is not usually so long as to justify a charge of legislative inertia.

3 International influences on legal development

Another interesting feature emerged from a comparison of the law of different countries. Even though developments generally took place within the framework of legal systems set up by the 'nation state', there has been a constant exchange of ideas between various jurisdictions. Technological novelties occurred at different times in different countries, so the late comers could conveniently profit from the experiences of the 'early adopters'. Legal developments in England, where railways originated, were taken up by the Prussian legislator, whose statute in turn became a model for the Netherlands and Italy.[13] The European Community has, of course, greatly intensified the reciprocal knowledge of events in other member states, but there were fruitful exchanges even before the European Community tried to harmonize our legal developments. No 'national' story would be complete if it failed to recognize such infusions from other countries. In this

[9] See W. Buckland, *A Textbook of Roman Law* (3rd edn, Cambridge University Press, 1963), 491.
[10] See below, pp. 92, 153–8 and 192. [11] See below, pp. 206–9 and 95.
[12] See below, p. 61. [13] See below, p. 129.