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Book Review (reviewing Leon Green, Traffic Victims: Tort Law and Insurance (1958))

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BOOK REVIEWS

writer, are those directed toward stimulating wider ownership of stock through investment preferences, installment buying of blocks of securities, and dividend income insurance. But none of these intriguing suggestions—each of which poses herculean problems in theory and of implementation, to say the least—can be expected to receive serious critical attention until set out with more precision and detail. It is to be hoped that Mr. Kelso, to whom Mr. Adler attributes main credit for the economic analysis and proposals, will find an opportunity to do so, perhaps in his announced “comprehensive treatise on the theory of capitalism” of which the present slim volume is presumably in part a preview.

The preview, all in all, is a disappointment in spite of the attractiveness of its fundamental position and objectives. Unfortunately, its main effect may be to keep serious students of economic matters away from the coming attraction. One hopes not, because amidst its epic failures and recurrent conceptual rigidity the present work demonstrates some degree of the brilliant audacity of approach and unprofessional originality of ideas which are essential elements of important utopian writing. If these qualities are in any substantial measure attributable to Mr. Kelso, he is quite an unusual breed of corporation lawyer, and one from whom we should look forward to hearing again. In its present form, however, his statement of ideas and proposals would impress most lawyers as more of a first draft than a polished instrument ready for execution by a client. Nonetheless, insofar as it calls attention again to some fundamentally important aspects of the liberal tradition which tend to be overlooked, the work is a much needed and salutary reminder that perhaps thinking men can still choose a positive program whose central concern is economic and political freedom.

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There has been no teacher of torts in the last thirty years who does not owe a major debt to Leon Green for his energy, scholarship, imagination, and insight. And there are few law students whose education has not been significantly touched by his work. In brief we are all wiser because of him. The current volume, a publication of his 1958 Rosenthal lectures at Northwestern University, again places us in his debt. This is a significant book—it is significant because it records permanently and with vigor the final vote of so distinguished a student of tort law on the merits of that law as applied to the automobile accident. The vote is a clear and ringing “no.” It is announced with the opening sentence of the book which tells us that the book will “seek to demonstrate the obsolescence and futility” of the current law and will advocate “comprehensive compulsory loss insurance as a substitute.” It is impressive that after a lifetime
of study of negligence law, which he has done as much as any man to make intelligible and coherent, Dean Green is not only willing, but anxious, to stand up and be counted on the merits of that law. When a master of negligence law weighs it and so unequivocally finds it wanting, that is a highly relevant fact. And it is a fact which should commandeer a prominent place in future law teaching.

As a thundering vote then the book is successful and memorable. It is successful too as a further example of Dean Green's talent for writing about law in a vigorous, popular style. His pen is as gusty and irreverent as ever. "The res ipsa loquitur literature is so vast" he tells us, "that no one would attempt to read all of it." He pays his respects to last clear chance with this: "This simple doctrine as thus converted with its refinements plumbs all the metaphysical recesses of the law of negligence and the thousands of opinions devoted to its elaboration constitute a monument to the ability of the judicial mind to resolve an idea of the utmost simplicity into something so complex as to defy understanding even by the judicial mind that created it" (p. 71).

In the large the design of the book is admirable. There are perhaps three lines of approach to a compensation plan: to place it in historical context so as to suggest that it is the next step in the evolution of liability theory; to state the case against the workability of the negligence criteria when applied to the modern auto accident; and finally to state affirmatively the case for the compensation scheme proposed. The book follows such a pattern. Its first two chapters are devoted to the history, the third chapter states the case against auto negligence rules and practice, and the fourth and the final chapter of the volume gives us the compensation plan. The design thus promises a statement of the case for a compensation plan which will be commensurate in power with the significance of Dean Green's vote for it.

With some puzzlement I must confess that for me the book does not live up to this promise. Let me try to locate some of the sources of my discontent.

Perhaps my complaint is simply that he did not write as long a book on these themes as I would have liked. At every point we move too fast, too much is left unexamined, too many difficulties are passed over in silence to make the book persuasive. Although the themes are large, the book itself is skimpy. Even within the space limitations he set for himself the allocation of emphasis is puzzling. Surely the compensation plan was intended as the climax of the book. Yet only seventeen short pages are devoted to it and five of these go simply to enumerating the plan. The case for the plan is so little argued and developed that it appears as kind of a postscript, an afterthought. And I cannot believe this was Dean Green's intention.

In contrast the devoting of so much of the scarce space to the history is curious too. For as he retells it the history does not seem relevant to his case, however interesting it is in its own right. There is much to the view that strict liability is both the most primitive and the most sophisticated criterion of
liability, and that liability thinking moves slowly in a grand circle from strict liability through expanding notions of liability for fault back to strict liability re-interpreted and re-argued in an insurance risk bearing context. One might therefore use the history to argue for a historical momentum toward a compensation scheme and to suggest where we stand at the moment in a trend curve. But this does not seem to be Dean Green's chief point. The history is seen as the negligence revolution of the early nineteenth century, which is for the benefit of burgeoning American enterprise, and which is followed by the negligence counter-revolution of the twentieth century with ever expanding liability coverage, which is for the benefit of "the victims." But the compensation plan is urged, not as the natural evolution of this movement,¹ but rather because the coverage of modern law is wholly inadequate, because "most of the victims of the highways are left outside the protection of the law altogether" (p. 81). There is thus a considerable unresolved tension between the thesis of Chapter 2, that there has been a dramatic counter-revolution in liability coverage, and the thesis of Chapter 3, that a compensation plan is an urgent necessity because so few victims of accidents are covered by modern law.²

The history, however, is interesting in its own right. Dean Green sees a clean plot line: the shift away from strict liability which is so dramatic as to require explanation, and the counter-revolution which is equally dramatic and equally requires explanation. The explanation of the first shift, which he carefully hoards for the end of the chapter, is the familiar one of giving a subsidy to young American enterprise. The explanation for the second shift is the re-awakened concern for the individual victim as risks increase and as industry comes of age. He plays a neat trick with labels arguing that it is the early period in which the group interest and not that of the individual is paramount, and the later period in which society prizes the individual. But this is more a rhetorical flourish than a real point and illustrates mainly how ambiguous all such large characterizations in terms of individuals and group interests are.

The retelling of the history is in some ways quite effective. The famous Green insistence on functional accident categories such as railway crossing accidents is helpful here; a nice sense of young America on the move comes through the early pages; and he is careful to make clear that the liability shifts are not the result of intervention by a judicial ruling class but are expressions of popular will. But he does the history in just enough detail to be tantalizing and unsatis-

¹ Dean Green does say in the preface that "another revolution is in progress" and the "revolution" is mentioned again on page 77. But the point of Chapters 3 and 4 is that the current system has run its course and come to a "dead end" and that an "experiment" is now needed.

² The tension is noted briefly in Chapter 3 but we are left merely with the statement that while in many areas "the law has become exceedingly exacting in shifting the victim's loss to enterprise," many decisions indicate that "the courts are still not aware of the motor age" and that thus "in its most important area" negligence law "stumbles along wholly incapable of providing remedies for the ever-mounting toll of traffic casualties." Pp. 80–81.
factory; that is, the detail is sufficient to reveal the difficulties in imposing any simple pattern on the development of the common law over a century or more and to reveal also how inadequate the occasional appellate case is as an index of broad historical change.

It is perhaps a tribute to this part of the essay that so many questions crowd the mind. Was there enough of a tested tort scheme prior to 1800 to provide much of a baseline to measure the negligence revolution against or was negligence developed as soon as inadvertent harm became a recurring problem? Were there enough reported cases even during the heyday of Dean Green's negligence revolution to tell us much about the incidence of liability? Does not the career of defamation or conversion indicate that the law has moved with painful slowness toward a unified set of liability criteria? Do the short time spans between such events as Brown v. Kendall (1850), Byrne v. Boadle (1863), Davies v. Mann (1842), Rylands v. Fletcher (1868), Ryan v. N.Y. Central (1866), and Lord Campbell's Act (1846), mark a shift in basic attitude? Is the subsidy to young industry so plausible an idea after all? Do not the respondeat superior imposition of strict liability on enterprise and the negligence limitation begin to flourish at about the same time? And does it make much sense to give a subsidy to all enterprise as an aid to enterprise? Do not the opinions in Rylands indicate that the court had no clear overall view of liability theory at that date? How does the American rejection of Rylands fit with the counter revolution? What about the dating of Palsgraf, or of the auto guest statutes, or the failure to adopt comparative negligence legislation? Are not most of the examples of expanding liability simply rational completions of the negligence principle rather than inroads upon it? And while we are explaining trends, why have we been so slow in moving toward a compensation plan or even toward compulsory liability insurance?

The upshot then is that Dean Green does as well and perhaps better than anyone else could in handling the history in so brief a compass, but that unfortunately so brief a try serves mainly as a reminder of how useful it would be to have a full blown history of American tort law.

The third chapter which is ostensibly devoted to marshalling the case against the current auto negligence system begins promisingly with a profile of the factors that affect auto safety and of the many rules the human driver is expected to observe; there is something said about the difficulties of proof, about

3 Dean Green himself seems virtually to agree with the latter view on pages 27–28.

4 Dean Green notes as a puzzle that there were very few personal injury or property damage suits, apart from traffic cases, prior to 1850. "Why, aside from the few passenger and collision cases," he asks, "were there so few law suits?" Pp. 28–29.

5 Brown v. Kendall and the Ryan case are cited as evidence for the revolution in Chapter 1, and Davies v. Mann is mentioned as a "counteracting doctrine." Byrne v. Broadle, Rylands, and Lord Campbell's Act are cited as evidence for the counter revolution in Chapter 2.
delay in litigation, and about the pressures for settlement. But there is much more said about a point Dean Green has long made familiar and which seems something of a luxury here—the shift of power from trial court to jury to appellate court and the judicial obsession with proximate cause. The advent of the personal injury trial expert is noted, and suddenly the chapter is at an end concluding with vigor that we can thus see that the negligence system "has run its course. Something better must be found."

There is of course much that can be said about the unworkability of a criterion as subtle as negligence in the auto accident context and under the pressures of insurance; and even more that might be said about the difficulties of modern damage law. But Dean Green's description makes the driving of our 70,000,000 vehicles seem beyond the capacity of all but a few steady nervied mechanical geniuses and makes the judging of due care in driving seem totally beyond the experience of the ordinary man. More important he shows almost no interest in damages despite the contemporary controversy over awards; and most important, he presents a queer view of the settlement process when there is insurance. Somehow he seems to echo the Columbia Report thirty years ago when it was describing the plight of the victim of the uninsured motorist. And somehow he has decided to pitch his case for compensation on gross inadequacies of coverage. The result is that the indictment of the current system is more by fiat than argument.

But it is the crucial final chapter on the compensation plan proper that leaves me least satisfied. My difficulties go not to the plan, which is clear and simple, but to the economy of analysis with which it is presented. Compensation plans for traffic accidents have been in the air, and in the books, for a long time now, going back at least to Arthur Ballentine's admirable article in 1916. And thanks

Although Dean Green does not rest his case on delay, it is worth observing that court congestion is a poor reason for changing basic legal rules. This point is more fully examined in Zeisel, Kalven, Buchholz, Delay in the Court (Little Brown and Co., 1959).

He notes three familiar consequences of liability insurance. First, that most claims are handled by settlement rather than litigation, although apparently not without "great injustices"; that insurance is normally not disclosed to the jury but is known by it nevertheless thus taxing the integrity of the negligence system; and that the presence of insurance has served to recruit highly trained specialists to the negligence bar. Pp. 77-80. Nevertheless he argues that the majority of motor accident victims are not covered by law today. It is almost startling to juxtapose here the wry prediction six years ago of Clarence Morris that if a compensation plan is to come, it will be largely the result of the desire of defendant interests to limit current liability. Morris, Torts 373-74 (1953).

The plan is briefly outlined in some 19 steps. Pp. 87-91. The chief features are that every vehicle must be covered by a "comprehensive loss insurance policy" as a condition for obtaining a license, that the policy covers any person injured through use of the vehicle, that awards are to be on the basis of common law damages except for a $100 deductible and the exclusion of pain and suffering "as such although as an impairment of the physical body" such losses would "necessarily be included." The jury would disappear and provision is made for having cases initially heard by masters. No settlement of any claim will be final without court approval.
to the Columbia Report, the English Labor Party, the province of Saskatchewan, Judge Marx and Albert Ehrenzweig there are different models aplenty to compare. What we need at this late date is not the drafting of a plan to prove that it is possible to utilize the compulsory insurance principle to produce a compensation scheme. We have known that for half a century. What we need is thoughtful comparison of the alternatives among plans and careful examination of the policy issues they raise. Insurance is indeed a powerful device but it is not magic; it does not make all the issues which have traditionally concerned tort law evaporate. In fact it adds some new ones. What we need therefore is discussion of these issues with the same care and rigor and critical sense that we have lavished on common law cases and doctrines. And it is this that Dean Green on this occasion insufficiently gives us.

All plans have in common two basic features: compulsory insurance and recovery in some amount by virtually everybody. From one view the great thing is to achieve these objectives and the rest is mere detail. But that view is, I think, wrong. For as we look more closely at such details as who pays for the plan, at what level the awards are to be, and how much it will add to current insurance costs, we are not tinkering with details—we are exploring and testing the underlying rationales for the compensation principle. Surely it makes some difference whether we view the plan as insuring ourselves against the accidents others may cause us or as insuring others against the accidents we may cause them. Surely it makes some difference whether we will keep awards low enough so as not to increase current insurance costs, for then we are not augmenting the insurance fund to produce the increased coverage but are distributing it differently, and the coverage for all of the victims is thus achieved at the expense of some of the victims. Surely there is an inextricable tie-in between costs and award level so that the price for higher awards is a higher license fee for the freedom to drive an automobile at all. Surely we take a big step when

9 I wish that Dean Green had placed his proposal more explicitly in the context of prior proposals, for it completes an interesting pattern. The Columbia plan and the Ehrenzweig scheme are designed to keep awards low at something of a minimum subsistence level and thus to not increase the costs to a driver who is already insured; the Saskatchewan plan also provides for a low award recovery for all victims but adds to it a full common law recovery for victims of negligent drivers, thus in effect adding compulsory liability insurance on top of the Columbia plan, and the English social insurance works out in much the same way. Under this second approach no victim would be worse off under the plan than he was at common law. The English system in addition reaches its result by a use of statewide social insurance which transcends the ad hoc problem of the auto accident. Finally Dean Green would in effect carry the Saskatchewan plan one big step further by providing an approximate common law recovery for everybody. There is, it must be admitted, a refreshing simplicity and directness about this.

10 There is of course always the chance that the simplicity of controversy under a compensation plan would lower lawyers' fees and thus provide some offset to increased costs, a point which the Columbia Report stressed and which Morris has effectively discussed. Morris, Torts 357 et seq. (1953). But it is particularly questionable whether the Green plan would yield much savings on this score since the damage issue would remain much as it is at present. Research on the Jury Project indicates that in at least half of the cases which go to trial, damages are at least as controversial as liability and this percentage would increase substantially under
we move from the merits of compulsory insurance keyed to liability for negligence to compulsory insurance keyed to nothing more than the ownership of an auto. Surely if we view the auto accident as an inevitable and natural hazard of modern life it is puzzling why we single out this one group of hazards from the many we are daily exposed to for such major state intervention. Surely from the point of view of tort theory there is still force to Jeremiah Smith's old complaint that if we are to use the compensation principle for one group of inadvertently caused harms it is inconsistent not to use it for the rest. Surely there is something left to the old common law idea that we should not have to pay the premiums to protect ourselves against harms negligently caused us by others. In brief if the rationale is really compulsory accident insurance, it raises interesting and controversial issues of sumptuary legislation because it is a kind of compulsory thrift, and it also raises queries as to what is so special about the auto accident. If the rationale is that some one else should pay for accident insurance for us it raises even more insistently the questions of who, and of why the auto and not cancer. And if the rationale is still keyed to imposing strict liability on the actor for creating risks, we will find some accidents will now not be covered, that the negligence of the victim is a stubborn consideration, and that we have not moved as far as we thought from the traditional debate as to the merits of strict liability. It may well be true that any form of compensation plan is an improvement over what we have at present. But even if it is true, it does not relieve us of the task of isolating our premises and seeing how far they take us.

When we reach the compensation principle it is apparent that tort law, which begins as purely private law, has elided over into the area of public law. Perhaps the torts teacher is thrown off balance by this shift away from his customary lines of analysis. In any event it is a puzzling truth, which Dean Green's volume underscores, that the literature on the compensation reform has not been impressive. This has been especially true of the opponents of such reform and Dean Green may perhaps have thought it sufficient, as his note references suggest, to limit himself to answering their objections which as he says "are reminiscent of the arguments against compulsory education and compulsory vaccination."

the increased coverage of the Green plan. It might be noted too that the removal of delay is effected under the plan simply by the addition of judicial manpower in the form of masters—a remedy that is available without the plan.

11 What little Dean Green has to say in support of his plan is found on pages 92–95 and 98–99. He thinks it would cost less or at least not more than current insurance, though I find it difficult to see why. But he is clear that the cost is justified because "it is no more important for a person to operate a car than it is to protect his neighbor and himself." He is explicit too that workmen's compensation with its inadequate and rigid award schedules is not the proper model today. And he is explicit that awards less generous than those he advocates would still be "far superior to the limited protection" provided today. He thinks there is nothing to the point that insurance dulls deterrence here; and that deterrence against the truly negligent, if there are any such, is better done by the criminal law. Since, he argues, we really can't say in the automobile case who is careful and who is not, there is nothing to the
But it is still the Columbia Report of a generation ago which is the most thoughtful discussion of the problem. And the last chapter of Morris on Torts in 1953 or Albert Ehrenzweig’s little book *Full Aid Insurance* in 1955 or the introductory chapters to the second volume of Harper and James in 1956 prove more useful than *Traffic Victims* in isolating and dealing with the issues.

Perhaps the ultimate source of my discontent with this book derives from differences in the attitude of Dean Green and myself toward a fault-negligence approach to liability. Dean Green's position is eloquently clear—the fault principle is outmoded and impractical and nonsensical. I agree that it has many difficulties, but among the possible big ideas for allocating liability it seems to me to make enough sense to always deserve serious attention. And this view is reinforced because fault is so deeply held a category of thought in our culture and because also of the difficulties in whatever ideas fault competes with. But in any event Dean Green's attitude toward fault explains much of his emphasis. Since in Chapters 1 and 2 he cannot believe fault was being taken seriously, he must find other explanations for the history of liability. In Chapter 3 fault is so erratic a criterion that it explains why so many deserving victims are outside the law today. And in Chapter 4 since fault is nonsense, there is no real need to pause to justify liability costs that go beyond fault. If I find the issues he deals with more perplexing than he does, it may well be that fault is to blame.

I end as I began. I am grateful to Dean Green for numerous past insights, I am grateful for the clarity and force of his vote against the current negligence system, I am grateful for his aid in legitimating a place for major reforms in the teaching of tort law. His plan is an interesting addition to the models already on record. But I cannot down the regret that what might in his hands have been a great book has turned out this time to be only a reasonably good one.

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point that the careful are forced to pay for the careless. My guess, although the text is far from explicit, is that he sees this as accident insurance—hence the reason the car owner should pay is in the end because he or his family is so likely to be the victim of the auto accident and it is thus for his benefit. I agree that an arresting case can be made for compulsory accident insurance and that this approach avoids many of the perplexities which come from continuing to view the problem as one of extending liability. But compulsory accident insurance has some healthy perplexities of its own, for none of which Dean Green pauses.

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This will be both less and more than a book review: less, because it lacks (*inter alia*) timeliness, the book having been published in 1957; more, because in addition to some comment on the book it will include a report on an experiment in the use of the book as a vehicle for the admiralty course.

The instructor who sets out to select a coursebook for admiralty encounters