You Can’t Spell “America” Without C A R

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Nora Freeman Engstrom, *When Cars Crash: The Automobile’s Tort Legacy*, 53 Wake Forest L. Rev. 293 (2018).

For the past century, the car accident has served as the paradigmatic (über-?) tort. What does this tell us about tort law’s past, present, and future? Nora Freeman Engstrom’s elegant and informative When Cars Crash offers some highly illuminating reflections on this question.

Engstrom starts with the facts. In the U.S., millions of car crashes each year generate upward of 30,000 fatalities and countless injuries. Only heart disease and cancer account for more life-years lost, and the toll is particularly severe for teens and young adults. On the litigation side, many more lawsuits are filed, and more dollars paid out, for car accidents than for any other type of accident. Car wrecks also appear to generate a higher percentage of frivolous or at least overstated claims—think here of the stereotypical “whiplash” plaintiff. Thanks to the presence of settlement formulae established by repeat players, including plaintiffs’ lawyers and insurance adjusters, these suits tend to be resolved quickly and cheaply. When trials happen, they are brief and straightforward. Car accident plaintiffs who go to trial win more than half the time but generally recover modest amounts—$16,000 on average.

So the first lesson is that, even within the domain of accident law, suits for car crashes operate in distinctive ways. The second moral of the story, for Engstrom, has to do with tort reform. Roughly half a century after workers’ compensation statutes displaced a great deal of negligence litigation over workplace accidents, the next great step was supposed to come in the form of auto no-fault. However, after some enthusiasm and successes in the early 1970s, the movement stalled. With due credit to Gary Schwartz, Engstrom first notes that no-fault’s failure to sweep the nation was nonetheless important to the development of negligence doctrine: in an effort to weaken the campaign for no-fault, auto insurers dropped their resistance to the shift from contributory negligence to comparative fault. She then entertains an intriguing counterfactual. Suppose auto no-fault had taken root nationally. Along with workers’ compensation, would this have spelled the death knell for tort law as we know it? What would have counseled against the adoption of similar plans for medical errors, slips and falls, and product-related injuries?

Engstrom next considers the importance of automobile accident litigation to doctrinal development. She observes that the modern torts canon is filled with opinions rendered in car accident cases: *MacPherson v. Buick*, *Baltimore & Ohio Railroad v. Goodman*, *Pokora v. Wabash Railway*, *Henningsen v. Bloomfield Motors*, and *Dillon v. Legg*, to name a few.[1] She also suggests that negligent entrustment claims (involving defendants who allow incompetent drivers to use their cars), as well as decisions holding owners who leave their keys in the car liable for accidents caused by thieves, made an important contribution to the emergence of the category of claims that Robert Rabin has dubbed “enabling torts.”

Finally, Engstrom observes that close attention to negligence litigation over car accidents confirms the suggestion made by some scholars that the tort system has distinctive contributions to make even in a heavily regulated area such as auto safety. Here, she focuses on litigation brought against GM by the parents of Brook Melton, who was killed in 2010 in the crash of her Chevrolet Cobalt. Thanks to the diligence of Melton’s parents and attorney, it was discovered that, for several model years,

Chevrolet—with the knowledge of at least some of its engineers—had installed a defectively designed ignition switch. The defect allowed car keys attached to heavy key chains to slip out of the ignition while the car was operating, thereby disabling its power steering, brakes, and airbags. Although the relevant regulatory body (NHTSA) was aware of data suggesting a suspicious pattern of air bags failing to deploy in Cobalt accidents, it dithered. As a result of the Meltons' suit, GM incurred a substantial fine, fired numerous employees and reorganized its engineering division, and implemented a privately run scheme to compensate victims. Here, and presumably elsewhere, Engstrom suggests, it is old-fashioned negligence litigation that is needed to bring to light information crucial to deterring wrongdoing, compensating victims, and enhancing safety regulation.

The topic of *When Cars Crash* is an important and timely one, given (as Engstrom notes) what may prove to be the impending transformation of motorized transportation through the use of autonomous vehicles. Moreover, in its fair-minded and illuminating comparison between tort and non-tort alternatives in the car accident context, it reminds us of the continuing value of the law-and-society approach to tort scholarship. Like her colleague Rabin, Engstrom in her work combines historical erudition, institutional sensitivity, and superb judgment, while providing a remarkably clear view of a complex yet fundamental topic.

While I find Engstrom's observations and conclusions largely convincing, I would push back on some. For example, I don't agree that the "enabling torts" category was forged in the furnace of car accident litigation. But that's mainly because I would deny that there is any such category. Indeed, as Ben Zipursky and I have detailed elsewhere, several types of car-accident cases— including cases in which cell-phone manufacturers and banks that lend money for the purchase of automobiles are categorically spared from liability for 'enabling' negligent driving—indicate that use of the label "enabling torts" involves a vast and distorting overgeneralization.

Predominantly, however, Engstrom's insightful inquiry leaves me inclined not to quibble but to join in by considering other ways in which the primacy of the auto accident has mattered to the development of tort law. At the risk of being myopically academic, I would suggest that car crashes have cast an equally long shadow over tort theory. Although the seed of the idea was planted before the heyday of the motorcar, the notion that modern tort law *just is accident law* surely owes a lot to the prevalence of litigation over car accidents.

Here's one way to make my point: Judge Guido Calabresi's landmark book could easily have been titled "The Costs of *Car* Accidents." Recall the opening passage of its first chapter: "The last few years have seen a rebirth of interest in accident law. Popular reaction to the increasing number of automobile accidents and rising automobile insurance rates, as well as attempts by some insurance companies to deal only with preferred risks, has made automobile accidents and insurance controversial political issues."[2] Clearly, Calabresi was writing in reaction to car accidents and to the emergence of auto no-fault plans. Equally clearly, his thinking partook of the regulatory mentality of the "Great Society" era. On this approach, one starts with a social problem—here, the problem of car accidents—then figures out what technologies, legal or otherwise, can best solve it. Liability, Calabresi argued, is such a technology.

Like rubbernecking motorists, many contemporary tort theorists have been badly distracted by car accidents. Fundamentally, tort law is about *wrongs*, not accidents or losses, and tort theory is about something more than the choice between negligence and strict liability, or between negligence and compensation systems. It is one thing to recognize that, empirically, the car accident has for decades been the "it" tort, and that such accidents often involve the commission of the particular wrong of negligence. It is quite another to suppose that negligence law – not to mention tort law as a whole, which covers everything from battery and defamation to conversion and fraud – is best understood as law for the deterrence of accidents and the compensation of accident victims.

Of course, the tort of negligence is frequently committed by means of conduct—including momentarily inattentive or aggressive driving, or the production of vehicles that turn out to be unreasonably unsafe—that is not highly culpable or blameworthy. (Often, however, it does involve grave misconduct, such as driving while seriously intoxicated.) The lesser culpability of standard instances of car-related negligence, combined with the use of routinized claims-resolution processes, renders superficially plausible the thought that a body of tort law dominated statistically by car accidents cannot be a law of wrongs. Still, the thought is mistaken. Even when not punishable or highly blameworthy, careless driving that injures another is the violation of a substantive standard of safe conduct set by courts out of concern to protect basic human interests, and to reinforce and clarify equally basic correlative responsibilities.

It is no "accident" that parents and teachers emphasize even to very young children the importance of being careful not to injure one another. Taking care not to injure is a fundamental form of moral responsibility; one that reflects the fact that, as we go about our lives focusing largely on our own interests, we must nonetheless give due regard to aspects of others' well-being. And, of course, when children reach driving age, these lessons about taking care are only amplified, for driving is among the most dangerous activities of which the vast bulk of ordinary citizens partake. It is thus not the least bit surprising to find that a duty to avoid injuring others through imprudent conduct, including a duty to avoid injuring through imprudent driving, is a wrong not only in our positive morality but a wrong recognized in our law. When a car-accident victim sues for negligence, just as when a plaintiff sues for battery or fraud, she is not acting as a private attorney general, nor is she applying for benefits from an accident-victim relief fund. She is exercising the legal power that tort law confers on victims of the legal wrongs that it recognizes to obtain redress from those who wrong them.

1. Others could of course be added: for example, Martin v. Herzog and Tedla v. Ellman on negligence per se.
2. Guido Calabresi, The Costs of Accidents: A Legal and Economic Approach (1970).

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