TRAFFIC LIABILITY (A COMPARATIVE ANALYSIS)

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In view of the present legal systems, the problem of traffic liability appears to be solved according to three different bases. Some legal systems have accepted the principle of **liability based on fault;** others, the principle of **presumption of fault** and a third group has applied principles of **strict (absolute) liability.**

The first group is composed of **Anglo-American** [1] law; the second, **Italian** and – till the **Demares** case [2] - **French** law and in the latter, **German** and **Swiss** laws.

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1 The term **Anglo-American** law refers to "**Customary law**" in contrast to **Continantal law** meaning "**Codified Law**". **Common law** in capital denotes the source of Anglo-American law; whereas **common law** in general is used to indicate a common element (jus commune, droit commun, gemeines Recht) i. E. where codified law is based on **Roman Law.** Countries within the Continental legal system are also called "**Civil law countries**", e.g. Spain, France, Italy, Germany, Switzerland, and since 1926 Turkey.

2 **Youngs, R.** at 234 note 86; Civ 21 July 1982, 449.

In this brief analysis a part of liability based on fault will be discussed; the remaining two groups together with findings related with the Turkish law will be the subject of further studies [3].

I. Liability based on fault

A) English law

1. The 1930 **Road Traffic Act** (which was amended in 1972 and 1988), basicly depends upon the concept of **negligence** [4] . The act provides that, the driver of a motor vehicle will be held liable for damages given by motor vehicles; however the injured person, as a rule, has to prove the negligence of the driver. It is sufficient to prove that the driver has **neglected an important duty** [5] on the highway. English law, developed in an empirical manner by decisions that in some particular circumstances there was a duty and that in others there was none, by identifying categories of duties. The first attempt to rationalise these cases appeared in **Heaven v Pender**, by Brett MR, who established this formula:

" whenever one person is by circumstances placed in such a position with regard to another that everyone of ordinary sense who did think would at once recognise that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger or injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger".

In 1932 Lord Atkin in the case **Donoghue ve Stevenson** [6] stated his famous " **neighbour principle**":

"The rule that you are to love your neighbour becomes in law, you must not injure your neighbour, and the lawyer's question, (Who is my neighbour?) receives a restricted reply. You must take reasonable care to avo-

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3 For further information consult **Adal**, at 278 et seq.

4 **Negligence** in one sense is the synonym of **fault**; i. E. legal delinquency which results whenever a man fails to exhibit, the care which he ought to exhibit. The other **negligentia** which means carelessness, inattention; the omission of proper care or forethought.

5 **Street / Brazier / Murphy**, at 231 et seq.

6 **Street et al**. op. cit. supra at 173 note 11; (1932 AC 562, HL at 580).

id acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.

2. In some particular instances, the burden of proof has been modified in favour of injured persons. The courts have extended the standard of care expected of the defendant to such a degree that it is hardly distinguishable from strict liability. Thus, in **Daly v Liverpool Corporation** [7] a pedestrian who had been knocked down by a bus succeeded in a claim based on negligence. Stable J specifically stated in his judgment that in deciding whether a 67- year- old woman was guilty of contributory negligence in crossing a road, one had to consider a woman of her age, not a hypothetical pedestrian [8] . The learned judge continued "there was no culpable negligence on the part of the driver, but a motor car has today become a **deadly weapon**, and the standard of care and skill required by the law in a driver is very high indeed [9] . It is a standard which is impossible to harmonize with the discharge of the duties of drivers of public vehicles [10].

3. As for the acts of an independent third party there is no liability[11]. Road users have a duty of care towards other road users; if they do not conform to a **reasonable standard of care**, they breach that duty and they are liable for all harm foreseeably resulting [12].

After the decision of **Daly v Liverpool Corporation**, in **Nettleship**

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7 (1939) 2 All ER 142, **Youngs**, op. cit. supra at 250 note 190.

8 "A person who suffers from some disability or infirmity and who causes an injury to another will be assumed to be negligent, not because of want of care at the time of the accident, but because, being aware of his disability he allowed himself to be in the situation." Quotations taken from **Street**, et al. op. cit. supra at 238.

9 **Zimmermann, R**, at 1140.

10 **von Bar Christian**, at 561 note 371; **Zimmermann**, op. cit. supra at 1140 (4).

11 **Street** et al. op. cit. at 287.

12 Cases **Vaughan v Menlove** (1837) Bing NC 468 at 475; **Heaven v Pender** (1883) 11 QBD 503 at 507; **King v Phillips** (1953) 1 QB 429 at 441; **Street** et al, op. cit. supra at 237.

v **Weston**, a learner driver was held liable to compensate a friend who was teaching her to drive, because of her failure to conform to the standard of an experienced driver [13].

In **Henderson ve Henry E Jenkins & Sons**, the owners of a lorry were held to be negligent, even though a layman could not have discovered the fault [14].

4. Another instance applied in favour of the injured person is the application of **res ipsa loquitur** [15] . The effect of **res ipsa loquitur** is to afford **prima facie evidence** [16] of negligence.

The concept of **res ipsa loquitur** was formulated in the case **Scott v London and St Katherine's Docks Co** [17] by the following lines:

" There must be a reasonable evidence of negligence. But where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care [18] ".

Elements required for the application of the rule are, as follows:

the doctrine is dependent on the absence of explanation; i. E.if the court finds on the evidence shown how and why the event took place, then

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13 **von Bar Christian**, op. cit. supra at 405 note 476; 529 note 158.

14 (1969) 3 All ER 756, **Youngs**, op. cit. supra at 250 note 192; the sudden failure of brakes on a lorry owing to a corroded pipe in the hydraulic braking system was held to impute negligence to the owners; **Street**, et al. op. cit. supra at 259 note 17.

15 The thing speaks for itself.

16 **Prima facie**: At first sight; on the first appearance, a fact presumed to be true unless disproved by some evidence to the contrary. **Prima facie evidence:** Evidence which if uncontradicted is sufficient to sustain a judgment in favour of the issue which it supports, but which may be contradicted by other evidence.

17 (1865) 3 H&C 596, Ex Ch. **Street**, et al. op. cit. supra at 258 note 13.

18 comp. the case **Lloyde v West Midlands Gas Board** where Megaw LJ said "I doubt whether it is right to describe **res ipsa loquitur** as a 'doctrine'." I think that it is no more than an exotic, although convenient phrase to describe what is in essence no more than a common-sense approach, not limited by technical rules, to the assessment of the effect of evidence in certain circumstances, **Street**, et al, at 258 (C).

there is no room for inference [19].

the harm must be of such a nature that if proper care had been taken it would not ordinarily happen; the courts have applied the doctrine to things falling from buildings and to accidents resulting from defective machines, apparatus or vehicles [20] . It applies to motor cars mounting the pavement [21].

The definition of Erle CJ referred to accidents happening **in the ordinary course of things** in the case **Mahon v Osborne**, raised the issue whether this means that it must be **a matter of common experience**, and therefore the experience of the expert is irrelevant [22].

the means causing the accident must be within the exclusive control of the defendant; if the defendant is not in control, **res ipsa loquitur** does not apply. In **Turner v Mansfield Corpn** [23].

" The plaintiff driver of the defendant's dust cart was injured when its back raised itself up as the plaintiff drove it under a bridge. It was held that since the plaintiff was in control it was for him to explain the accident and since he could furnish no evidence from which negligence could be inferred, he failed" [24].

5. After the law Reform (Contributory Negligence) Act of 1945 **contributory negligence** [25] does not afford a complete defence but simply reduces the extent which the plaintiff has been contributorily

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19 In **Barkway v South Wales Transport Co Ltd**, where the tyre of an omnibus burst and the omnibus mounted the pavement and fell down an embankment, **res ipsa loquitur** did not apply because the court had evidence of the circumstances of the accident and so was satisfied that the system of tyre inspection in the garage of the defendant was a negligent one. Yet the word "explanation" must be qualified by the adjective "exact".; **Street**, et al. at 259, note 18.

20 **Street**, et al. op. cit. supra at 259, (2) note 1.

21 **Street**, et al. op. cit. supra at 259 (2) note 2.

22 (1939) 2 KB 14; **Street**, et al. op. cit. supra at 259 note 5.

23 **Street**, et al. at 260 (3) (a) note 10.

24 comp. with **Street**, et al. op. cit. supra at 260 (3), (a) notes 11 and 12.

25 **Contributory negligence:** The act or omission amounting to want of ordinary care on the part of the complaining party, which, concurring with defendant's negligence, is **proximate** cause of injury. In most of the states in American law, the concept of **comparative negligence** has replaced the doctrine of contributory negligence.

negligent [26].

In order to establish contributory negligence, the defendant is under the burden of proving the following facts:

a) the injury of which the plaintiff complains resulted from **the particular risk** to which the plaintiff exposed himself by virtue of his own negligence [27].

b) the negligence of the plaintiff contributed to his injury [28]

c) there was negligence on the part of the plaintiff [29].

6. As negligence was accepted as a criteria for road traffic accidents liability [30] later developments in favour of a stricter liability were forced to rely primarily on breach of statutory duty [31], a duty of care in negligence [32] so impossibly stringent in trespass [33] that it could only be avoided in circumstances in which an absolute liability system would also classify it as an inevitable accident [34].

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26 **Butterfield ve Forrester case** (1809) 11 East 60 where Lord Ellenborough declared "One person being in fault will not dispense with another's using ordinary care for himself. Two things must concur to support this action, an obstruction in the road by the fault of the defendant, and no want of ordinary care to avoid it on the part of the plaintiff "; **Street**, et al, op. cit. supra at 280.

27 **Jones v Livox Quarries Ltd**, (1952) 2 QB 608, CA, **Street**, et al, op. cit. supra at 282 note 5.

28 **Stapley v Gypsum Mines Ltd** (1953) AC 663 at 677, **Street**, et al, op. cit. supra at 283 note 14.

29 **Jones v Boyce**, (1816) 1 Stark 493, **Street**, et al. op. cit. supra at 287 note 7.

30 This has been the application since **Holmes v. Mather** (1875), LR 10 Exch. 261; Diplock J in **Fowler v Lanning** (1959) 1 All ER 290, 297, **von Bar Christian**, op. cit. supra at 405 note 474, **Letang v Cooper** (1964) 2 All ER 929, **Street**, et al. op. cit. supra at 25, 31, 77.

31 case **White v Broadbent and British Road Services** (1958) cited in **von Bar Christian**, op. cit. supra at 405 note 475 acting in compliance with rules of the Road Traffic Act is not proof of sufficient care.

32 **Nettleship v Weston** case supra note 13 where a driving pupil was judged according to the standards of an experienced driver, even in respect of her teacher's injuries; comp. supra note **14 Henderson v Henry E Jenkins & Sons** case.

33 Quotation from **von Bar Christian**, op. cit. supra at 405.

34 **Ng Chun Pui v Lee Chuen Tat** (1988) RTR 298, PC, **Street**, et al. op. cit. supra at 241 note 10.

The solution in England has been classified as unsatisfactory. Lord Denning has stated that:

"..... In the present state of motor traffic, I am persuaded that any civilised system of law should require, as a matter of principle, that the person who uses this dangerous instrument on the roads, dealing death and destruction all around, should be liable to make compensation to anyone who is killed or injured in consequence of the use of it. **There should be liability without proof of fault** [35] ".

35 **Zweigert / Kötz**, at 667; also at 679 the Report of the Royal Commission on Civil Liability and Compensation for Personal Injury (1978) where it has been stressed that in Britain that of every £ 100 paid in premiums by motorists only £ 55 goes to victims; the rest is eaten up in court and lawyers' fees, the administration costs of insurers, and the sums paid to their agents.

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ABBREVIATIONS

AC	Law Reports, Apeal Cases.
All ER	All England Law Reports
Bing. N. C.	Bingham's New Cases
CA	Court of Appeal
Civ.	Cour de cassation, civil chamber
comp.	compare
CJ	Chief Justice
East	East's English King's Bench Reports
Ed.	Edition
e.g.	exempli gratia: for example
et al.	et alii: and others
et seq.	Et sequentia: and following
Exch.	English Exchequer Reports
H&C	Hurlstone&Coltman, England
HL	House of Lords
i. E.	id est: that is
J	Judge
KB	Law Reports, King's Bench Division
LJ	Lord Justice (Court of Appeal Judge).
LR	Law Reports
note	foot note
op. cit.	op. citato: in the same work cited
PC	Privy Council
QB (D)	Law Reports, Queen's Bench Division
RTR	Royal Term Reports, King's Bench Division
Stark	Stark's English Reports
supra	cited previously
v	versus