

A LITTLE-NOTICED THEORY IN THE LAW OF TORT: BORIS STARCK'S THEORY OF GUARANTY

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If any endeavor is presently out of fashion, it is certainly that of trying to reduce the law of tort to a single theory. The quest for an integrating principle has been called a pursuit of futility.¹ Modern scholars have lost the illusion that fault, or duty, could be a common element in all torts. Even the current idea that enterprises, or persons who engage in abnormally dangerous activities, or own or operate dangerous instrumentalities should bear an absolute liability by reason of their risk bearing capacity has been subjected to careful scrutiny by Professor Clarence Morris and found to have only qualified value.²

Yet, it seems worthwhile to consider a theory advanced by the French jurist, Professor Boris Starck. Although this theory received little attention when it was first expressed, in 1947, in a 500-page thesis,³ it presently appears to exert more attraction, perhaps because of the author's considerable influence on his students at the University of Paris. It has also strongly inspired the provisions relating to torts in the Code of Obligations of the Malagasy Republic.⁴ This theory, it is true, does not pretend to reduce tort law to a single idea such as fault, duty, risk, or damage. In fact it is fundamentally dualist. On the other hand, it departs from the contemporary trend of pragmatism, in that it ventures to build the law of tort on two pillars—fault and guaranty—and to define by rational arguments the fields which should be covered by each of those notions.

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¹ James, *Tort Law in Midstream: Its Challenge to the Judicial Process*, 8 BUFF. L. REV. 315, 316-25 (1959).

² C. MORRIS, TORTS 246-53 (1953); Morris, *Hazardous Enterprises and Risk Bearing Capacity*, 61 YALE L.J. 1172 (1952).

³ B. STARCK, ESSAI D'UNE THÉORIE GÉNÉRALE DE LA RESPONSABILITÉ CIVILE CONSIDÉRÉE EN SA DOUBLE FONCTION DE GARANTIE ET DE PEINE PRIVÉE (1947) [hereinafter cited as ESSAI]. The essentials of Starck's thesis are set forth in B. STARCK, DROIT CIVIL, OBLIGATIONS nos. 58-90 (1972) [hereinafter cited as OBLIGATIONS]; Starck, *Domaine et Fondement de la Responsabilité sans Faute*, 56 REVUE TRIMESTRIELLE DE DROIT CIVIL [REV. TRIM. DR. CIV.] 475 (1958).

⁴ These provisions, articles 140-55 of a 1965 statute, have been incorporated as articles 204-19 of the more general *Loi du 9 Juillet 1966 Relative à la Théorie Générale des Obligations*. For a short analysis, see Tunc, *La Responsabilité Civile dans Trois Récentes Codifications Africaines*, 19 REVUE INTERNATIONALE DE DROIT COMPARÉ 927, 930-31 (1967).

The purpose of this Article will be to present Professor Starck's theory and try to assess its value.

I. THE THEORY

Professor Starck's theory is based upon a distinction between the various injuries to which a citizen is subjected in society.

There are many injuries against which, in principle, the law does not afford any protection, for the simple reason that they are the natural and unavoidable consequences of the exercise of rights by other citizens, or more commonly of the enjoyment of individual freedoms.⁵ Thus, one usually is at liberty to open a new business, which will compete with existing ones. One is at liberty to try to obtain a certain position or to marry a certain girl (or boy), thus depriving others of obtaining the position or the coveted person. One is at liberty to bring a lawsuit against someone else, thus obliging him to all the costs and worries of a defense. One is at liberty to publish an unfavorable judgment on a play, a book, a piece of art, a legal or philosophical theory, or a product—notwithstanding the wound to the author's or producer's pride and, perhaps, important financial consequences. One is in principle at liberty to advocate a strike or to engage in a strike. The citizen has no automatic protection, no guaranty, against the damages resulting in such cases from the exercise by his fellow citizens of their individual freedoms. Neither is he, however, unconditionally exposed to these damages.⁶ He may expect his fellow citizens to exercise their freedoms fairly, to abide by "the rules of the game" of the society. In the case of unfair competition, for instance, he will be able to claim damages. Thus, in the fields of damages presently considered, fault appears as the social regulator of activities. "*On vit toujours aux dépens d'autrui*", wrote Jean-Paul Sartre. I must bear the harm caused me by my competitors or my neighbors unless they have committed a fault, that is, not behaved as good citizens, conscious of their social duties and mindful of others' equal rights and freedoms.

The situation is different when someone suffers a physical injury to his person or to his property.⁷ His fellow citizens are not free to kill him, nor to destroy or damage his tangible property. Against such harms the law should provide automatic protection. Society should guaranty to every citizen his personal integrity, the integrity of his spouse and relatives, and the integrity of his tangible property. And when it has failed to protect him, it should at least assure him auto-

⁵ OBLIGATIONS, *supra* note 3, no. 66.

⁶ *Id.* no. 72.

⁷ *Id.* no. 67.

matic compensation from the person who caused him the injury. It is true that such injuries often occur, not by a deliberate action of the tortfeasor or through any fault, but as a result of statistically unavoidable error, or sometimes even by pure misfortune. No one can claim that he will drive his car without ever causing injury to someone else. Yet one is free to drive a car in accordance with the regulations. The situation however is basically different from the one considered in the preceding paragraph. Unless a fault has been committed, every citizen must suffer the harm which necessarily flows from his fellow citizens' exercise of their freedoms. But he does not have to suffer without compensation personal injury or property damage caused by another, even if the other person was acting legally and without fault. The simple idea that everyone should be fully protected from others' interference in his life, limb, and tangible property (and in the life and health of his spouse and relatives) could replace personal liability with fault in most of its application, as well as liability for injury by animals and for inanimate objects under one's control.⁸ Only some exceptions would need to be provided for the few persons who have a right to cause physical harms: the surgeon, the executioner, the boxer, the citizen who acts in self-defense or in defense of someone else.⁹

Before any appraisal is made of Professor Starck's theory, its originality should be underlined. The traditional approach to the law of tort, at least since the nineteenth century (the past is more obscure¹⁰) was from the point of view of the author of the damage: "The general principle of our law is that loss from accident must lie where it falls, and this principle is not affected by the fact that a human being is the instrument of misfortune."¹¹ More recently, a current of thought has questioned this approach and, with variations sometimes significant, suggested that the victim of an injury be indemnified, unless there were a reason to let him bear the loss. Professor Starck's originality is to admit that both approaches are valid in certain fields and to determine their legitimate domains by distinguishing not between the various acts, activities, behaviors, or instruments which may give rise to an injury, but between the various harms which may

⁸ The endeavor bears some similarity to a more recent one: Calabresi & Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

⁹ OBLIGATIONS, *supra* note 3, no. 68.

¹⁰ See Malone, *Ruminations on the Role of Fault in the History of Torts*, in *THE ORIGIN AND DEVELOPMENT OF THE NEGLIGENCE ACTION 1* (Dep't of Transp., Automobile Insurance and Compensation Study 1972); James, *Analysis of the Origin and Development of the Negligence Action*, in *id.* 35; Peck, *Negligence and Liability Without Fault in Tort Law*, in *id.* 51; Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537, 539 (1972).

¹¹ O.W. HOLMES, *THE COMMON LAW* 94 (1881).

be suffered. Professor Starck certainly belongs to a modern stream of thought, but he concedes the validity of the traditional one for non-physical harms, particularly harms to economic and moral interests (for example, honor, privacy, and freedom). Even within the field covered by the guaranty principle, he would suggest an increased liability in case of fault, for reasons of justice and deterrence, since the criminal law can intervene only in exceptional cases.¹²

II. A TENTATIVE APPRAISAL

Professor Starck's theory is attractive in many respects. It is based on relatively simple, but sound, ideas. Its main value may be that (while being to a certain extent a return to the law of trespass) it gives legal expression to what is certainly a very deep and general yearning in the contemporary world: man's aspiration to security. The "right to social security," expressed by a number of constitutions and international agreements,¹³ is itself a particular expression of a more general expectation. In an affluent society, it is hard to admit that a citizen may be left without support when he has been injured by the act or activity, even non-faulty, of another or by a thing belonging to another.¹⁴ It is common knowledge in most countries that juries, and even professional judges, do their best to indemnify injured parties through an extension of the concepts of fault or negligence. The distortion of the law due to this desire to indemnify the injured is seen in France where 95 percent of the pedestrians injured in traffic accidents receive compensation even though research has shown that 70 percent were solely victims of their own fault.¹⁵ It is true that the courts sometimes recognize fault on the part of the victim in the accident and theoretically apportion the liability on the basis of comparative negligence. When this is the case, however, the physician reporting to the court, and the court itself, often successively overestimate the injuries, the result being that someone solely the victim of his own fault receives more than the deserved compensation for the harm

¹² OBLIGATIONS, *supra* note 3, nos. 77-80.

¹³ See J.J. DUPEYROUX, *SECURITÉ SOCIALE* nos. 37-44 (4th ed. 1971).

¹⁴ An experience of the present writer a few years ago is illustrative. He was giving oral examinations to students raised by one of his colleagues in the cult of the fault principle. All the students expressed, most of them certainly sincerely, the feeling that the fault principle was a necessary foundation of society. Then a concrete case was put to them. A storm of exceptional violence had uprooted trees which had: (a) injured a passing pedestrian; (b) flattened a parked car. No student had any hesitation on the solution: they all favored compensation of the harm, even though the French "liability for damage caused by things" is set aside in the case of *vis major*, and even though it was stipulated for hypothesis (b) that the damage was only to an inanimate object which was currently covered by insurance.

¹⁵ Tunc, *Traffic Accident Compensation: Law and Proposals* ch. 14, § 78, in 11 *INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW* (1971).

suffered. It is apparent, therefore, that, as Professor Starck asserts, "The idea of guaranty responds to the modern world's need for security."¹⁶

It should be pointed out that Professor Starck's theory would protect the victims of accidental harm¹⁷ and would provide the needed rationale for the revolution in tort law which has occurred in this area.¹⁸ Furthermore, the fact that liability insurance coverage has already been extended to this area may well ease the burden of bearing liability.¹⁹

Moreover, this theory is probably a much less radical departure from the existing law than it initially appears.²⁰ Precisely because of the common aspiration to security and of the response of the judiciary to that aspiration, a rule of law recognizing the idea that every encroachment on the integrity of persons and properties should be compensated, except in a few specific cases, would probably greatly simplify the administration of tort law, while nevertheless amounting to little more than a restatement of the law as it is, or as it tends to be.

While Professor Starck's theory possesses unquestionable merit, it also has definite limitations. From a theoretical point of view, the distinction between the various harms to which the citizen is exposed has a dubious foundation. Why should one be protected in his body and not in his honor? in the grief that he feels when he loses a relative and not in the grief that he feels when the play on which he has worked for years is destroyed by an incompetent critic? Why should he be protected in his tangible property but not in the value of busi-

¹⁶ OBLIGATIONS, *supra* note 3, no. 74.

The theory also seems to conform to moral requisites. A Catholic priest, De Naurois, with a double education as jurist and moralist, has reached conclusions parallel to those of Professor Starck. He contends that commutative justice obliges anyone who has infringed another's right, whether by fault or not, to compensate the harm done to him. The mere interests resulting from freedoms (for instance, the interest of a trader in keeping his customers) also deserve protection. The protection of mere interests, however, is necessarily weaker than that accorded to rights, because everyone's freedom competes with the freedom of the others. Thus, De Naurois, like Professor Starck, considers that a certain field, defined from the point of view of the victim, is governed by a guaranty principle, while another one is governed by the fault principle. Even the delimitations of the respective fields of guaranty and fault are approximately the same. De Naurois, *Juristes et Moralistes en Présence des Obligations Interpersonnelles de Justice*, 1963 NOUVELLE REVUE THEOLOGIQUE 598; De Naurois, *L'Obligation de Réparer le Dommage Causé Injustement (Responsabilité Délictuelle du Fait Personnel): Essai de Confrontation des Théories Juridique et Morale*, in MELANGES OFFERTS À JEAN BRETHE DE LA GRESSAYE 545 (1967).

¹⁷ There has been a substantial amount of writing on this question. See P. ATIYAH, ACCIDENTS, COMPENSATION AND THE LAW (1970); G. CALABRESI, THE COSTS OF ACCIDENTS (1970); T. ISON, THE FORENSIC LOTTERY (1967); R. KEETON, VENTURING TO DO JUSTICE (1969); James, *supra* note 1, at 325-33; Jolowicz, *Liability for Accidents*, 1968 CAMBRIDGE L.J. 50.

¹⁸ OBLIGATIONS, *supra* note 3, no. 73.

¹⁹ *Id.* nos. 82-86.

²⁰ *Id.* no. 70.

ness? The author answers that economic and moral harms are bound to occur as a result of the conflict of competing activities.²¹ But, is it not also true that accidents are bound to occur as a result of driving, or of industrial activities? The difference, of course, is that a business activity necessarily and permanently harms competitors, while driving only creates a permanent *risk* of injuries. The difference is thin. Furthermore, a competent and impartial critic is bound to harm a number of the authors whose works he reviews, and thus may be compared to a driver, who is statistically bound to occasion accidents. This is not to say that the distinction is unsound, but only to show that its rationale has not been clearly explained.²²

Furthermore, in practice the distinction is not always clear—perhaps precisely because its foundation is uncertain. Problems of defining the limits of each field frequently arise. One may wonder, for instance, where to place nervous shock (and the miscarriage following it) or the strain and nervous illness caused by a persistent or recurrent noise. One may ask the same question about harms caused by drugs, cigarettes, or irradiations. Professor Starck, to whom these questions have been submitted, considers a nervous shock a physical damage. Harms suffered as a result of noise, however, would entail guaranty only if the noise were excessive²³—a departure from the fault principle. Conversely, producers of cigarettes or drugs dangerous even when taken according to normal prescriptions, should guaranty the harms suffered. These may be valid answers, but if the courts were to attempt to apply the theory, new questions would continually arise and the courts would be forced to strain to provide coherent answers.

The determination of the person charged with the guaranty is another point which remains obscure in many cases. If a bottle of carbonated beverage explodes in the hands of the customer in a self-service store and injures another customer, Professor Starck's theory teaches us that the latter should be indemnified, but does not say by whom: by the first customer? by the store owner? by the producer of the beverage? by the producer of the bottle? Of course, the question could be decided solely on the risk bearing capacity of the parties involved.²⁴ This answer, however, has no connection with Professor Starck's theory and reveals that the theory cannot be considered a comprehensive one.

²¹ *Id.* nos. 69, 71.

²² Cf. Kayser, *Les Droits de la Personnalité: Aspects Théoriques et Pratiques*, 70 REV. TRIM. DR. CIV. 445, 456-57 (1971).

²³ See ESSAL, *supra* note 3, at 162-95.

²⁴ See C. MORRIS, TORTS 246-53 (1953); MORRIS, *Hazardous Enterprises and Risk Bearing Capacity*, 61 YALE L.J. 1172 (1952).

Similarly, in creating an absolute liability, the theory ignores the merits of property insurance.²⁵ These merits are such that the main feature of the recent traffic accident laws and proposals is to build the compensation system as much as possible around one-party insurance, that is, insurance for one's own injuries.²⁶

Nor does the theory make any provision for avoiding the hardship to the person charged with the guaranty when he is not covered by liability insurance, as in a situation where liability insurance is not customary. Unless the conclusion is accepted that in the modern world every reasonable man should obtain comprehensive liability insurance coverage, a general absolute liability would require the courts to always consider the possibility of mitigating damages²⁷—a possibility which runs somewhat contrary to the idea of full guaranty.

Finally, the writers and commissions which favor coverage for all accidental losses²⁸ would point out that Professor Starck's theory does not guaranty compensation in most cases of home accidents. The theory would require indemnification only when some instrumentality has been found defective. Obviously, then, one would not be entitled to recover against the producer of his bathtub because he slipped in it and injured himself. Of course, it may be that the quest for complete security is an illusion. But there is certainly a contradiction in basing a theory on the idea of security but failing to provide compensation for an important class of accidental injuries.²⁹

Thus, Professor Starck's theory presents certain weaknesses which would make one reluctant to advocate its adoption, even in a country like France, where tort law is codified in five articles of the Civil Code! One would, at least, want to wait and observe its efficacy in the Malagasy Republic where, subject to some modifications, it is being applied. The theory would, further, probably encounter great skepticism in the United States, where doctrinal writing on tort law has attained a high degree of sophistication, and where the interplay of tort law and economics has been explored at some depth; it would

²⁵ For a discussion of the significance of property insurance to risk bearing theory, see C. MORRIS, *TORTS* 250-51 (1953).

²⁶ See Tunc, *supra* note 15, § 197.

²⁷ For a comparative study of the mitigation of damages, see Honoré, *Causation and Remoteness of Damages* Ch. 7, § 101, in 11 *INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW* (1971); Stoll, *Consequences of Liability: Remedies* Ch. 8, §§ 155-74, in 11 *INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW* (1972).

²⁸ E.g., T. ISON, *supra* note 17; ROYAL COMMISSION OF INQUIRY, *COMPENSATION FOR PERSONAL INJURY IN NEW ZEALAND* (1967); SELECT COMMITTEE ON COMPENSATION FOR PERSONAL INJURY IN NEW ZEALAND, *REPORT* (1970); Franklin, *Replacing the Negligence Lottery: Compensation and Selective Reimbursement*, 53 *VA. L. REV.* 774 (1967).

²⁹ Although traffic accidents cause twice as many deaths per year as home accidents (56,400 vs. 27,000 in 1969), the proportion is reversed for disabling injuries (2,000,000 vs. 4,100,000 in 1969). NATIONAL SAFETY COUNCIL, *ACCIDENT FACTS* 3 (1970 ed.).

appear as a typically French logical construction with little possible relation to life.

In the present writer's opinion, such a judgment would not, however, be entirely justified. Professor Starck's theory deserves to be viewed, first, as a bold and somewhat futuristic restatement of the law from a bird's eye view³⁰ and, second, as a *theory*, perhaps even as a *philosophy*—a set of rules which, while not appropriate for embodiment in the statutory law of an industrialized nation, can and should nevertheless inspire the development of the law of tort, even if the latter needs more refinement. Considered as such, Professor Starck's ideas are certainly a valuable contribution to the modernization of the law.

³⁰ Cf. OBLIGATIONS, *supra* note 3, nos. 88-89.