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Philosophy and
the Accident

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"**accident** (æks_dent), *sb.* [a.Fr. *accident*: -L. *accidens*, -ent-, *sb.* properly *pr.* *pple.* of *accid-re* to fall, to happen." (O.E.D.)

Introduction

An accident may be defined as something which "happens". But since all happenings "happen", this is scarcely helpful. Things happen "deliberately", "intentionally", "predictably", "by mistake", "by chance", "unexpectedly", "through the inexorable workings of fate"; they are "providential", "unfortunate", "disastrous", "tragic" or "catastrophic". They may also be "haphazard" or happen "at random" or they may be "Acts of God". Where are we to fit "accidentally" into an adverbial taxonomy of happenings?

These qualifications belong to different categories. Some relate to agency and the ways in which our plans and projects compare with actual outcomes, e.g. "intentionally" and "by mistake". Others are epistemological - "predictably", "unforeseeably". We may be passing judgement on the value or disvalue of the event, as when, for example, we call it "providential" or "unfortunate". I want to argue that the concept of the accidental combines elements from all of these categories making claims, simultaneously, about agency, epistemology and value.

Let me describe an accident to you. On the 6th March 1987 at around 7.00 pm the Herald of Free Enterprise left the Belgian port of Zeebrugge bound for Dover. Shortly afterwards she capsized and sank, leaving 1/3 of the hull still above water. It seems that the bow doors of the roll-on roll-off ferry had been left open enabling water to pour on to the car deck. A ship's

officer, part of whose duties was to check that the bow doors had been successfully closed, was later found to have been asleep in his cabin at the time. The ferry company was also criticised for the lack of effective procedures and guidelines to ensure that this could not happen. Two hundred people were estimated to have lost their lives.¹

What made this an accident? Clearly none of the ship's crew or the operating company had intended or expected that this should happen. Nor had the ship been designed with the view that it would (though it was subsequently claimed that it, and ships like it, had not been carefully enough designed so that it would not). The incident was, however, far from being inexplicable. Indeed, given information about the design of the ship and state of its bow doors as it left the port, it could have been predicted that the ferry would sink. It was not predicted because it was neither intended nor expected that the bow doors would be left open. Even the sleeping ship's officer, though responsible for checking the doors, was not responsible for actually operating the closure mechanism and had no reason for believing that it had not been done. Perhaps neither he nor any other of the crew had any idea of the possible drastic consequences of leaving the doors open, though a naval architect could have told them. A naval architect would, however, have assumed that the doors would never have been left open. All the information necessary to predict the incident was available though it did not co-exist in any one person's head and was, therefore, effectively "hidden".

Why are we concerned about such accidents? We were concerned about Zeebrugge principally because of the loss of life. But total deaths from all causes in the preceding year came to 581,203 and in that year over 4,000 people committed suicide.² Suicide did not make the

¹ See *Keesing's Contemporary Archives*, 1987 and *Chronicle of the Twentieth Century*, Longman 1988.

² *OPCS Monitor*, 87/3

headlines that year, however, even though Zeebrugge was, and was expected to be, a one-off event and the problem of suicide remains with us on a continuing basis (3,893 deaths in 1991³). So loss of life cannot be the only factor here.

From this point of view it is interesting to compare the statistics on suicide with the homicide rate. Murder always hits the headlines and the detection, conviction and punishment of murderers is a perennial subject of public debate. Yet only 255 people were murdered in 1991⁴, compared to the 4,000 who committed suicide. This suggests very strongly that the degree of public interest and concern is not related only to the numbers involved. For the significant difference between suicide and homicide in this regard is the fact that suicides, for the most part, intend their deaths (at the time, and however misguidedly). Suicide is not seen as interfering in the control we normally think we exercise over the course and shape of our lives⁵ (despite the undoubted fact that at least some apparent attempts were not intended to end in death). Murder, on the other hand, is the paradigm case of such interference and it is easy to see how survivors of attempts and victims of other crimes of violence will often find that the most lingering psychological damage they suffer arises from the loss of autonomy they feel as a result.

Accidents are also interventions in the control we (perhaps wrongly) believe we have over the large part of our lives. They frustrate and, sometimes, vitiate our plans and projects for ourselves. This is precisely because they are neither intended nor expected. The clearest

³ *OPCS Monitor*, DH2 92/2

⁴ *Op. Cit.*

⁵ A perception reinforced by the decriminalisation of suicide by the Suicide Act of 1961.

evidence that this is what concerns us about them lies in the extensive apparatus we set up in the attempt to control accidents or to ameliorate their worst effects. Legal recovery is possible in tort or negligence and there are also statutory procedures for compensation. The criminal law in part aims to prevent and/or to deter criminal injuries and damage, and there are numerous institutions set up to foster accident prevention generally, health and safety at work, in the home and on the roads.

Of course, not all interruptions to the control we have over our lives are, or would naturally be described as, accidents. We do not worry about strokes of good fortune. It is not just lack of control that matters, but the intervention of pain, misery, distress and loss. Our reaction to this is often a need to blame, to ascribe responsibility. Sometimes this is bad faith - the attempt to evade our own responsibility - but it can also be a rational search for a responsible agent which can be prevented from allowing such a thing to happen again. Sometimes a sense of justice or fairness is involved. Misfortunes are an affront to our worth and dignity. Those who allow accidents to happen fail to treat those potentially harmed with respect, showing, apparently, an absence of that care to which we are entitled because we are, or ought to be, as important as anyone else. When human agents are involved, accidents are, *prime facie*, failures of respect or care or both, until it can be shown that there was no negligence.

Accidental Death: The Scale of the Problem

In 1991 total deaths registered were 570,044, a crude rate of 11.2 per thousand population. As might be expected, more than half of these were aged 75 and over, and in this group the commonest cause of death was heart disease. In people younger than this (15-64 yrs) cancer was the most frequent cause of death, accounting for 36,907 of the 97,194 deaths in this age

range. But of the 1,165 5-14 year olds who died in 1991, 587 died in accidents, and accidents were also the most frequent cause of death in those aged between 15 and 34 (2,870 out of 9,490, compared to the next most common cause of death - cancer - which accounted for 1,459). For those between 35 and 44 years old, accidents were the third commonest cause of death but still nearly as significant in numerical terms as cancer and heart disease. Only in those aged 45 and over do accidents steadily decline in importance compared to the others, becoming the eighth most frequent cause of death in those aged 85 and over and the seventh overall.⁶

It is easy to be misled by such figures. The mortality rate for human beings is 100%. The risk of dying as one gets older is increased not just by external, contingent factors, but by the very fact of getting older. The significance of accidents as a cause of death lies not in their relative number but in the fact that they are not linked to increasing age, though they are age-related, as we have seen. They are the most significant cause of death in age groups whose risk of death from other causes is otherwise very low. From the age of 1 until 34 you are more likely to die in an accident than from any other cause.⁷

One may speculate about the reasons for this, though the evidence is suggestive. Of the 4,408 people who died in motor vehicle traffic accidents in 1991, the single largest group comprised young men aged 15-24 (959). Accidents kill more children under 4 than any other cause and motor vehicle accidents account for nearly half of those accidents.⁸ Separate figures for accidents at work and sporting and leisure accidents are not available, but these must take their

⁶ Source: *OPCS Monitor*, DH2 92/2, 7 July 1992

⁷ *Op. cit.*

⁸ *Op. Cit.*

biggest toll of those who are most involved in them, i.e. those of working age who are relatively fit and active. Industrial accidents almost certainly affect younger workers more than others because younger workers are also more inexperienced and less responsible.

Accidents and Social Class

Accidents as a cause of mortality are also related to social class, which is rather more surprising. The Black Report found that, when infant mortality was measured against parents' occupational class, the most marked gradients were for deaths from accidents and respiratory disease. Infants (children up to twelve months of age) in social class V were five times as likely to die from accidental causes than those in social class I. Similar disparities were noted in children from 1-14 years and in adults (though in the latter group it is far more marked in men than in women).⁹ The reason for this is, the authors conclude, that

"Households in occupational classes IV and V simply lack the means to provide their children with as high a level of protection as that which is to be found in the average middle-class home. This can mean both material and non-material resources."¹⁰

And also

⁹ The Black Report, in *Inequalities in Health*, ed. Peter Townsend and Nick Davidson, Penguin 1988, pp.44-48 and ch.6.

¹⁰ *Ibid*, pp.119-120.

"Men engaged in manual occupations routinely confront a much higher degree of risk to health and physical well-being in their work than their non-manual counterparts. These risks are manifold. They may result in direct loss of life either suddenly in the form of accidents or in an attenuated manner through long-term exposure to dust or poisonous substances in the workplace."¹¹

The Report makes this striking observation:

These substantial differences demonstrate the non-random nature of these events. While the death of an individual child may appear as a random misfortune, the overall distribution clearly indicates the *social* nature of the phenomena.¹²

We think of accidents as random events, as things which just happen without a pattern. It is, therefore, rather surprising to realise that they are not distributed among the population randomly, but according to factors which we recognise as social ones, i.e. as factors thrown up by the nature of the society which we have created. That means that we are, as a society, collectively responsible (if not liable - see below, pp.9-10) for that distribution because it shows that it is in our power to change it. This responsibility is clearly collective rather than individual, not only because no single individual can have caused it, but also it lies beyond the power of any single individual to change it. The old legal principle of tort law, that where there is no fault, a loss should lie where it falls, seems wholly inapplicable here, if this is correct. For

¹¹ *Ibid*, pp.123-124.

¹² *Ibid* p.119.

such losses seem not to fall at random, but on specific groups of people to whom the rest of society owes a duty of care to protect, so far as it is able.

Another way of putting this might be to point out that, although accidents have always been seen as raising technical problems of prevention and avoidance, they also have an inescapably ethical and political dimension which has to do with our collective responsibility for the groups they most affect. That, in turn, raises questions about how we, as a society, deal with the consequences of the pattern of accidents for which we are responsible. I have looked, so far, only at accidents and mortality. Clearly that is only the tip of an iceberg of which illness, disability, distress, discomfort and physical and financial loss will form by far the greater part. Are we to continue to let such losses lie where they fall, or, if not, how is compensation to be arranged? On whom should the cost of taking such preventative measures as might be effective fall? In 1991, 4,408 people died in road traffic accidents.¹³ They were all avoidable. Banning motor cars, lorries and motorcycles would have saved all of those lives, though at a considerable cost. Are those lives worth that cost? Clearly we do not think so, or we would have paid it. Or, perhaps, the idea that they are avoidable has never occurred to us.

Causation and Accidents

There is a view that everything which happens has a cause, that a cause is something which determines or necessitates its effect, i.e. that an effect follows *necessarily* from its cause. Therefore everything which happens, happens necessarily, i.e. could not have happened

¹³ *OPCS Monitor*, DH2 92/2

otherwise. This is determinism. It is not the same as fatalism. Fatalism is the view that what will happen *will* happen whatever anyone tries to do; what is fated is unavoidable. Determinism, on the contrary, says what is done *will* affect what will happen. If action A is performed, it will cause C, D and E to happen. If on the other hand B is performed, then F, G and H will happen, but C, D and E will not. However, it is true, according to determinism, that the outcome of the choice between A and B is determined in advance of the choice by its preceding conditions. A fatalist will say "I'm fated either to pass this exam or fail it, so it does not matter whether I revise or not, whatever is fated will happen." For a determinist this is quite wrong. Determinism says that if I do not revise then my failure will have been caused by my lack of revision. If I do revise and I pass, then my passing will have been caused by revising. So it matters whether I revise or not. But it is also true according to determinism that whether I revise or I do not revise is caused by some prior fact, such as my laziness which in turn is caused by my genetic make-up or my upbringing and so on.

Both the fatalist and the determinist might be thought to agree that nothing is ever an accident. For the fatalist this is because there is a grand design, a pattern of events which will occur whatever anyone does to prevent it. This may be correct, but it is important to realise that it is not the same view as determinism and would not follow even if determinism were true. Fatalism is a matter of faith for there is no evidence that would support it. It may even be wholly vacuous since it would seem to be compatible with any future possibilities whatsoever.

For the determinist there is no grand design but, nonetheless, it might seem that nothing happens by accident. If everything is determined then there is an internal necessity in events that could, in principle, make them predictable, if we knew enough about them and the laws which govern their behaviour. Thus, nothing happens which could not have been foreseen.

Everything which happens, happens necessarily and, therefore, not accidentally. This is a mistake. An accident is not something which *cannot* be foreseen, but something which *was not* foreseen. Just because something *can* be foreseen does not mean that it will be. Accidents are not uncaused events; an uncaused event is a miracle, not an accident. We expect an accident to have causes. Once one has occurred the first thing we do, if it matters enough to us, is to look around for what caused it in the hope that we will then be able to prevent its occurring again.

There is also something odd in the implication that what is determined can always be foreseen. For what does "determined" mean here? It does not, in most causal contexts, mean "logically necessary". What is determined is not foreseeable in the sense that it can be logically deduced. As Hume pointed out¹⁴, causal statements are not logically necessary, whatever other kind of necessity might be attributed to them. Genuinely logically necessary statements are tautologous - they are truisms - and seldom have the cognitive content of genuine causal statements. "It is either raining or it is not", or "All black birds are black" are two typical examples of logically necessary statements which tell us virtually nothing about the weather or ornithology. Such statements are entirely foreseeable and it is easy to see why they are. Those causal statements which come closest to the firmness of the logically necessary tend to be both very general and rather abstract: "Raising pure water to a temperature of 100° under normal (sea-level) atmospheric pressure will cause it to boil." This is based on the regularities of ordinary experience purified by qualification and idealisation in order to preserve it from falsity. Thus we come close to making it definitionally - and hence logically - true of water that this is how it behaves. The necessity is ideal rather than actual, though, for we know that many different factors can intervene in practice to falsify such a claim - the water will not be pure, neither the

¹⁴ L.A. Selby-Bigge (ed.), *Hume's Enquiries*, Clarendon Press, Oxford, 1962 (2nd.edn.), pp.23-33.

temperature nor the pressure can be guaranteed, and so on. Ordinarily, the causal claims we make are even more subject to qualification and exception: "Wearing silver jewellery will turn your skin black". Often this is so; it depends on the purity of the silver, the sweatiness of the skin, the length of time the article is worn, the closeness of its contact with the skin, and so on. It therefore, quite often, is also not so. Such a claim is more useful as a retrospective explanation - a diagnosis - than a prediction of what will happen. "The black mark on your finger is caused by the silver ring you were wearing; it is not life-threatening. It will wash off." It might still be claimed that the defeasibility - or even impossibility - of prediction in such cases is due to ignorance and that, in principle, whether your silver ring will leave a black mark on your finger is *foreseeable* even if not actually foreseen. But foreseeable *by whom?* Many

things we fail to foresee we know, nonetheless, to be foreseeable because, on other occasions we have foreseen just that, or a relevantly similar thing. But, equally, we know that we, ordinary human beings, are not able to foresee many things; they are not

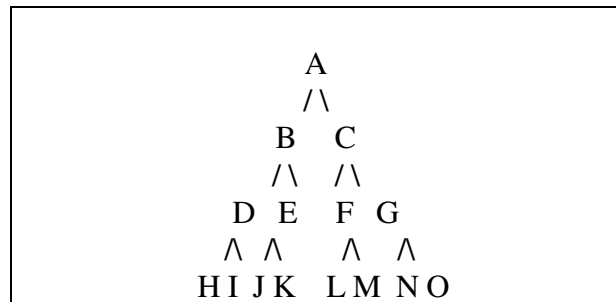


Figure 1

foreseeable *by us*. They are too remote in the future or depend on the correlation of too many variables for us to be able to predict them. But that does not, of course, mean that we think they are not determined; they do have causes and their causes are sufficient to explain their occurrence.

Chaos Theory raises other problems¹⁵ with foreseeability and causation. Except in very simple cases events occur not in causal chains but in trees which proliferate exponentially. We should not look on causes like this: A causes B which causes C which causes D ... etc., but like this: A

¹⁵ See, for example, James Gleick, *Chaos: Making a New Science*, Heinemann 1988.

causes B and C; B causes D and E whereas C causes F and G; D, in turn, causes H and I, E causes J and K, F causes L and M and G causes N and O; and so on. Within three steps the single cause A has produced eight independent effects each of which will produce two more making sixteen in all and so on. This is a simplified model which assumes that each cause will have only two effects. This seems unrealistically small and the causal tree is likely in reality to be even more complex than this. The claim is that any action will, in a very short space of time, have had so many consequences which themselves will have had consequences that even the most unimaginably large and powerful computer could not track or model them. Reality is not foreseeable, not because events are not caused, but because it is so complex as to be beyond the computations our predictions would require.

If accidents were to be defined as caused but unforeseen events, therefore, then it would seem that everything is an accident, if Chaos Theory is correct. This is clearly absurd. In the first place, even within Chaos Theory, predictability *does* exist, albeit within a relatively restricted time-frame; how restricted depends, presumably, on the complexity of the phenomena in question. In the second place some totally unforeseeable events, such as the timing and extent of the hurricane force winds which occur on average every two or three hundred years in this country, tend to be classed as "Acts of God" rather than accidents. The reason for this is that human agency is not involved. It seems to be true that accidents, as they are normally thought of, involve some kind of error in human action and where we reclassify "Acts of God" as accidents, it is because we wish to emphasise the involvement of human error in making them worse than they would otherwise have been if not in actually bringing them about.

The cause of a great famine in India may be identified by the Indian peasant as the drought, but the World Food authority may identify the Indian government's

failure to build up reserves as the cause and the drought as a mere condition. .¹⁶

It seems to be true, therefore, that events have causes and, if that is all determinism means, then determinism is probably true. If determinism implies, in addition, that all events are, in principle, foreseeable, then it is probably either false or vacuous. But that does not mean that we will always be wrong in our expectations about what will happen, only that those expectations are probabilistic not certain and that we have to deal with likelihood not necessity here. Accidents are not uncaused events, nor is it true that, if every event has a cause, there can be no true accidents. Accidents are caused but unexpected events (or the repercussions of events) involving human agency, events whose likelihood we did not see or, if we did, did not rate very highly.

Responsibility and Accidents

But clearly, not all unexpected events are accidents even when a human agent is involved. Someone who attacks and seriously injures another may not expect them to die; but if they do, and they do so as a result of the attack, it would hardly do to call their death an accident. For though the death may not have been foreseen, it ought to have been and only a refusal to consider consequences could have failed to encompass it. This is the difference between carelessness or negligence and recklessness, between failing in a duty of care we owe to others and disregarding it altogether. The line is often difficult to draw and in many cases it is drawn out of policy or pragmatism rather than principle, but it distinguishes the accidental from the

¹⁶ H.L.A. Hart & A.M. Honoré, *Causation in the Law*, Clarendon Press, Oxford, 1959 (repr. with corr. 1978), (pp.33-4).

malicious and deliberate and, in doing so, distinguishes compensation from punishment.

Nonetheless, it is clearly too simple to suggest that we divide events involving human agency into those for which someone is responsible, and the rest which are accidents. Certainly it is true that the paradigm case of something which is *not* an accident is the deliberate action which brings about what it was intended to achieve or, at the least, what was not unlooked for. So the accidental is closely tied to the idea of *control*, as was noted earlier (see above, p.3). What we control successfully is non-accidental; the accidental appears where there is imperfect control or no control at all. But this does not mean that we have no responsibility for what we do not control, for it is also obviously true that accidents *can* be someone's responsibility, blame can be attributed for bringing them about.

We need to make a distinction which ordinary language does not make entirely clear but which is nevertheless uncontroversial - between responsibility and liability. We may be responsible for things for which we are not liable, for which we may, for example, have a good excuse or a defence. (It is also possible, though this is rarer, to be liable for things for which we are not, in a strict sense, responsible as, for example, when we assume liability for the actions of another as parent, guardian or, sometimes, employer). In this sense we are *responsible* for those things which only happened because we acted, or failed to act, as we did. The rest - what would have happened anyway whatever we did - we are not responsible for (though we may, rarely, be liable for some of them). The class of things for which we are, therefore, responsible is a very large one since it includes the non-occurrence of everything we failed to do as well as the results of what we did do. Thankfully, though responsible, we are not *liable* for everything in that class; it includes many things for which we may neither be blamed nor praised. There is no single reason for or explanation of this, but an example may make it clearer. We are

causally responsible for all the results of our failure to do things, but we are only liable where we had a positive duty to do them. Many philosophy students will have unmarked essays this evening because of my failure to mark them. The only students to whom I am answerable, however, are those whose essays I have a duty to mark. I am not to blame for the rest.

It is important to realise that doing and not doing is not the same as acting or omitting to act. There are things I may do just as effectively by failing to act or refraining from acting as by acting. One significant example of this is the duty I have to take care in my dealings with others not to harm or injure them unjustifiably. Thus, though there may be many harms which people suffer through my failure to prevent them, I am only liable for those I had a duty of care to try and prevent. And here, a failure to act may amount to doing something - being negligent - for which I am to blame¹⁷. I can, therefore, be responsible not just for the accidents which happen to others which I have caused, but also for those which I both failed to prevent and might, reasonably, have been able to prevent. The concept of negligence is, therefore, of first importance in the consideration of the accidental. For the deliberately brought about is, by definition, non-accidental. That for which no one is responsible or liable *might* be accidental, but is more likely to be an act of God, i.e. an event with no human contribution at all. Nonetheless, the locus of interest in most cases ties the accident to related notions of blame, compensation and prevention and it is, therefore, the negligently caused accident which is in question.

Contracts and Accidents

¹⁷ Karl Figlio, in P. Weindling (ed), *The Social History of Occupational Health*, Croom Helm, 1985, p.183.

Figlio¹⁸ defines an accident as "as unforeseen event which is also expected" (p.180). It must be said, however, that Figlio's paper, though challenging and interesting, is not a model of clarity. For he also says that accidents can only be formulated as "distinct events" once social relations become contractually based and a "...field of natural expectation is ... invaded by retrospectively predictable but unforeseen events..." (p.181). So are accidents "expected" or do they *invade* (i.e., presumably, *violate* ?) "a field of natural expectation", (i.e. are they *unexpected*)? Later he adds (p.184) that in traditional cultures "Nothing could happen by accident, when every event is scrutinised for its place in the dense fabric of expectation." (I.e. *everything* is expected, so nothing can be accidental?) The truth is that accidents are both expected and unexpected. There is the statistical regularity of *kinds* of accidents within given populations and time-frames together with the unforeseeable (or, at least, unforeseen) nature of particular *accident instances*.

What Figlio seems to be concerned with is this. The world is not static but in flux. Its history is constituted of sequences of events which change the state of things through time. Countless many such events occur but not all of them are or are accounted accidents. A leaf falls from a tree and lands on the ground. A cat leaps to catch a bird. Someone at bus stop flags down a bus and catches it. All of these events change the world in a very minor way and none of them are accidents. They simply happen. Accidents occur, according to Figlio, when we have expectations, formed or inchoate and unexplicit, which are then violated by the unforeseen but, probably, foreseeable.

¹⁸ *Op. Cit.*

It follows from this that the idea of an accident only gets off the ground in formal, legal terms once the legal notion of a contract becomes the normal way of regulating relations between individuals. Because only with a contract can we have a set of expectations about how things ought to be, in the normal way, which forms the background for the specific agreement - the set of duties and rights - which forms the contract itself. Why is this so? To answer that question, we must step back a little way and ask what a contract is.

Legally the concept of a contract is very complicated, but basically it is a formal promise which is intended to have legal consequences. A promise is, usually, made by virtue of a *speech-act*¹⁹ - a form of words which does not describe or, necessarily, accompany an action, but is, itself, an action of a kind. To say "I declare you man and wife" is not to *describe* an act of marrying someone, but to *perform* it. Likewise, to say to A "I promise to X", is all that one need do for it to be the case that one has made a promise to A. However, there may be many occasions when saying "I declare you man and wife" is not sufficient for a legal marriage to have taken place. There are also a number of *background conditions* which need to hold. The words need to be uttered by the right person - a minister of the Church of England, for example, or a Registrar - in the right place, the persons concerned must be free to marry, a licence must have been obtained, etc. In the same way, *saying* "I promise to X" only amounts to making a promise where the right context exists - both parties must understand what the words mean, the promisor must not be coerced or in any other way not fully consenting, and so on. In the case of what we might call a "moral" promise, these conditions are a little vague and the limiting cases undefined. A "legal" promise, or contract, on the other hand is much more tightly specified - the promisee must offer the promisor a *consideration* in return for the promise, for example,

¹⁹ The classic text on speech-acts is J.L. Austin., *How to Do Things With Words*, Oxford University Press 1962.

and both promisor and promisee must intend to create not just mutual rights and responsibilities, as in any promise, but legally enforceable ones.

A characteristic of all speech-acts is that, although it may be possible to give a complete specification of the *positive* conditions necessary for the act in question to have been performed, there are also *negative* conditions it is not possible to specify completely. This is because the negative conditions can be summed up by saying that the background conditions must be normal (for the act in question). What this means, in effect, is that things must be, more or less, as those involved take them to be. If I promise to lend you £50 next week, not knowing that next week I shall be bankrupted by the unexpected collapse of the stock market, or you promise to collect my dry cleaning next Tuesday not knowing, because I also did not know, that someone else has already collected it for me, then those promises do not hold. Whether we would say that they are "negated", "compromised" or simply laid aside (whether, that is, we would say they were never actually made, though they seemed to be, or whether, though made, they no longer hold good) ordinarily is left unclear because it does not matter, the effect is the same. In legal cases this may not be so, and it may be vital to decide whether a contract is "void", "illegal", "voidable" or simply "unenforceable"²⁰. Much of the "Law of Contract" is devoted to the examination of masses of case-law in order to determine what the "normal" background to the making of a contract is and what the legal consequences might be of it being violated in particular kinds of ways.

Thus the notion of a "contract" implies acceptance of a correlative notion of what constitutes the "normal", the background against which it is possible to make *any* contract and the background

²⁰ A.G. Guest (ed), *Anson's Law of Contract*, Clarendon Press, Oxford, 1969 (23rd ed.), p.7.

against which *this* particular contract is made. It is against this background that the notion of an "accident" can be delineated by contrast, for an "accident" is precisely what a violation of that background is.

As Figlio notes without commenting on it, the move towards contract as a framework for regulating human relations dates from the Enlightenment with the development of individualism as an ideology of human nature. Before that point, what we might now call "accidents" were seen as "symbolically important indicators of social integrity and disruption". As such, they are expected:

"Something like that was just about to happen and not necessarily to anyone in particular, though 'just deserts' might frequently be commented upon. An injury, an illness, or some other misfortune, brings relief from the rising community temperature. Nothing could happen by accident, when every event is scrutinized for its place in the dense fabric of expectation."²¹

The shift from this communitarian perspective to the individualistic one which the dominance of contract presupposes was an improvement only for those strong individuals whose situation allowed them to take full advantage of it. The ideology of contract assumes, in other words, an equality of power between contractors which is notably absent in most employment contracts now as then. Thus the law of tort, developing alongside contract, assumed that, unless fault could be demonstrated, "the loss lies where it falls". In a society of equals, where else should it fall? Accidents, no longer incorporated into the fabric of communal life, are hazards which befall individuals who must remain uncompensated unless an author of their misfortune can be

²¹ Figlio, *op. cit.*, p.184.

found. It would not, therefore, be possible for an employee to sue an employer for an injury incurred in the course of employment unless malice or gross negligence could be proved. Since, in addition, it was standardly assumed that workers undertaking risky employments voluntarily undertook to run those risks, it is not surprising that, in Figlio's words "the relationship with respect to compensation for injury between employer and employee was skewed in the employer's favour".²²

Figlio would seem, then, to be asserting the claim that it is with the development of the contractual relationship that the possibility of an accident was created²³. It would have been clearer had he maintained that what it makes possible is the legal idea of an accident, of something that is, though an accident, still legally actionable. This was not straightforward simply because of the need to provide a legal remedy whilst at the same time preserving the idea that an accident was no one's fault. What this did, in Figlio's own words, was to legitimate the notion of "accountability without culpability"²⁴, i.e. liability without responsibility. This was a radical departure from the governing principle of tort law - that without fault, the loss must lie where it falls, and it represents a significant moment in the historical evolution of the ideology of law, which Figlio does not comment on.

What, in effect, happened in the historical period that Figlio refers to, was a move towards creating employer responsibility for terms and conditions of work by writing the assumption of

²² Figlio, *op. cit.*, p.182.

²³ "My argument is that the growing prominence of contract relationships and contract law, mainly from the sixteenth century for the general case, and the nineteenth century for master/servant relationships, established the possibility of an accident." Figlio, *op. cit.*, p.183.

²⁴ Figlio, *op. cit.*, p.181.

a safe working environment into the implied terms and conditions of the employment contract. This represents a shift in what is seen as the proper scope of law, a shift from arbitrating disputes between free and equal individuals to engineering and improving social conditions as an agent of society.²⁵ We have, in other words, moved on from the ideology of individualism which created contract law to a social conception of law which, far from *creating* the idea of an accident, as Figlio claims, actually *abrogates* it. For if an accident is something which happens in the space between cause and motive, something for which a human agent is responsible but not, necessarily, liable, then the panoply of legislative instruments and legal devices which constitutes current public and employment law fills that space. Everything which happens is someone's liability, even if no one's fault. This notion is, at present, imperfectly realised. But the law is working towards its realisation and the pressures exist for it to continue. Atiyah has argued that the case for 'no-fault' compensation is unanswerable on moral and logical grounds and that even on policy and economic grounds it is exceedingly plausible.²⁶ Brazier makes a similar case for the field of medical compensation.²⁷ The reaction to the Zeebrugge accident was to campaign for a corporate manslaughter charge against the owners for the first time in English law, because it was clear that no *individual* was liable for the harm caused.

It would seem that the circle is closing and the social conception of the accident as no accident at all is returning²⁸. It is not precisely the same, of course. No return ever is. We do not now see injury and illness as symbolic of the health of the community, but as signs of the justice of

²⁵ See, e.g., Roscoe Pound's *Social Control through Law*, Yale University Press New Haven, 1942.

²⁶ Atiyah, P.S. & Cane, P., *Accidents, Compensation and the Law*, Weidenfeld & Nicolson, London 1987 (4th ed.)

²⁷ Margaret Brazier, *Medicine, Patients and the Law*, Penguin Harmondsworth, 1992 (2nd ed.).

²⁸ See Figlio, *op. cit.*, p.184, and above, p.20.

the state. If no one else is liable, then the state is. And if nothing can happen for which no one is liable, then there are no true accidents any more.

As Rawls put it:

The natural distribution is neither just nor unjust. ... What is just and unjust is the way that institutions deal with these facts. ... The social system is not an unchangeable order beyond human control but a pattern of human action.²⁹

Conclusion

Accidents, then, are interventions - *slippages* - in the control we attempt to exert over the course of lives. As such, they feel random, unpredictable and threatening and we, inevitably, try and minimise their impact as far as we are able. That they are not as random as they appear is shown by the fact that they exhibit a pattern which matches certain social profiles, namely age and class. Accidents are more prevalent amongst the young and the poor than amongst the old and the rich. They are, therefore, socially rather than randomly distributed and are, thus, an inescapably social phenomenon. Though accidents feel unpredictable, there is no reason in theory to think that this is so. Indeed, statistically speaking, we know it to be false. Accidents are not *unforeseeable*, but only *unforeseen*, and then, only unforeseen in the particular, not the general case. In 1990 4,898 people died in motor vehicle accidents. In 1991 the figure was 4,408.³⁰ It seems entirely predictable that the equivalent figures for 1992 and 1993 (when they

²⁹ John Rawls, *A Theory of Justice*, Oxford University Press, 1972, p.102. See also Mary Midgley, "The Flight from Blame", in *Philosophy*, vol. 62, 1987, pp271-292.

³⁰ *OPCS Monitor*, DH2 92/2.

become available) will show only minor variations from these. What we do not and cannot know is to whom, exactly, these accidents will happen.

The ability to foresee accidents, though it may make us *responsible* (in the sense that we are in a position to do something, however little, about them), does not necessarily make us *liable*, however. Liability is incurred only when there is also a duty of care, when there is, in other words, the possibility of negligence. What has been noted above is a shift in the conception of who has that duty. Whereas, from the Enlightenment to comparatively recent times, that duty has been conceived of only in terms of the individual, from the nineteenth century there has been a growing tendency, reflected in the quotation from John Rawls, to think of that duty as belonging to society through the medium of the state. Increasingly, the state is being held liable both for policies designed to reduce the incidence of accidental death and injury and also for compensating those who suffer it. The state is, in other words, being held liable for attempting to reduce the impact that the accidental has on people's lives. It is worth noting that the ideology of the conservative administrations in both the U.K. and U.S. since the early 80's is in direct opposition to this tendency, inclining, as both do, to reassert the responsibility of the individual for his or her own welfare. It will be interesting to see which will prove dominant in the long term.

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