

John Barleycorn Must Pay

*Compensating
the Victims of
Drinking Drivers*

Paul A. LeBel

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*To Cindy and Lisa,
for being there
and
for being them.*

Preface

This study began in the summer of 1987 as a law review article, and it quickly grew beyond the limits that any law review editor could be expected to publish. As the project turned from a law review article into a book, the nature of the intended audience underwent a transformation as well. I have tried to strike a balance that serves readers who have formal legal training and readers who do not. The former will undoubtedly find some of the explanations of basic concepts too simple. While the book is addressed to a general readership of people who are concerned about the drinking-driver problem in contemporary society, I hope that it contains enough that is new and interesting to reward the attention of even the experts in tort law and accident compensation.

In part 1, I examine a number of the major options available under current tort law to shift drinking-driver accident losses from the injured party to either the drinking driver or some third party. I identify the principal shortcomings of each option, and I present a detailed overview of the policy considerations that underlie the adoption or the rejection of these various options. The remainder of the book then draws on part 1's critical examination of the existing legal landscape to determine what features ought to be present in an accident loss allocation scheme with a more ambitious and better integrated set of goals than those that are possible to achieve under the current system of tort law theories that are used to deal with drinking-driver traffic accidents.

Part 2 presents a fairly lengthy explanation of the economics of drinking-driver accident costs, beginning with the first principles of economic analysis of liability rules, proceeding through an application of those principles to the various options that were examined in part 1, and concluding with a justification for the move beyond the existing tort law options to a new administrative compensation system. In part 3, I identify the major issues surrounding the development of such a system. Among the topics I look at are the assignment of accident costs to particular actors and activities, the determination of appro-

priate levels of compensation for injury, the creation of an efficient administrative structure for processing claims for compensation, and the constraints on public policy reform that are posed by the need for obtaining legislative action in order to implement a reform proposal. I offer specific suggestions for each of those topics as part of my proposal for an Alcohol-Related Accident Victim Compensation Fund. Under the terms of this proposal, the most seriously injured victims of drinking-driver traffic accidents would have a major share of their otherwise uncompensated accident losses paid from a compensation fund that would be financed by a new tax imposed on the alcohol industry. Finally, in part 4, I address the policy rationales behind the proposal's provisions that are necessary to gain the support of legislators and the public. In chapter 15, I provide model legislation that could serve as a prototype for legislatures interested in creating such a fund and demonstrate how the compensation fund would operate.

I use both real and hypothetical cases in this book to illustrate my points about the inadequacy of the legal remedies that are currently available for victims of drinking-driver traffic accidents. The facts of the real cases are derived from the official reports of the judicial opinions cited in the notes and from the cited articles in legal periodicals. The hypothetical cases are purely my invention and have absolutely no reference to actual individuals or events.

Acknowledgments

The outstanding research assistance provided during the summer of 1988 by John L. Ehrler, William and Mary law school class of 1990, made the prospect of expanding this work into a book much less forbidding than it otherwise would have been. The research that was performed by Mark Mullins, of the class of 1987, was valuable at the earliest stages of the project. Throughout the work on this book, the assistance of James Heller and the law library staff of William and Mary was superb. I am particularly appreciative of the efforts of Brenda Frank and Joan Pearlstein, who seemed to have material in my hands almost as soon as I thought about asking for it.

I am also grateful for the comments and insights of my present and former colleagues Trotter Hardy, Jerome Hoffman, Charles Koch, Elmer Schaefer, Elaine Shoben, Rodney Smolla, Michael Wells, and Martin Zelder, who read portions of the book in earlier drafts or commented on various ideas as they were being developed later on in the project. My interest in the subject was both sparked and sustained by the experience of teaching the first-year course in torts to four classes at the University of Alabama and seven classes at William and Mary. The contribution of those students to the development of my thinking about tort law is immense, particularly those at Alabama who were so generous, supportive, and encouraging in my first years of teaching.

Professor Jeffrey O'Connell read the entire manuscript and was extremely generous in providing encouragement and suggestions for improving the book. While not all of those suggestions were followed, the substance of the proposal that appears in this book nevertheless reflects the care with which a busy and prolific scholar was willing to read and comment on a lengthy manuscript. All of us who teach and write in the field of accident loss compensation are of course indebted to the work of Professor O'Connell, but I am particularly grateful for the support that he provided to me in the completion of this project.

The enthusiasm with which this book was received and the care

with which it has been treated by the University of Illinois Press have been a source of great comfort. My special gratitude goes to Beth Bower, whose herculean efforts in editing the manuscript were enormously helpful in making this a much more readable book.

A number of people took considerable time and effort to provide me with information that was helpful in the latter stages of this project. James T. Wakefield, George Plunkett, and Lisa Lewis of the Virginia Department of Alcoholic Beverage Control provided useful information about the assessment and collection mechanisms for state excise taxes on alcohol. Philip C. Katz, of the Beer Institute, was generous in supplying copies of studies that had been submitted by that organization to the Surgeon General's Workshop on Drunk Driving. The public information departments of the Surgeon General's office, the National Highway Traffic Safety Administration, and the Centers for Disease Control routinely responded promptly and helpfully to requests for documents.

As work on this book was completed, the students of the William and Mary law school class of 1990 had just completed their legal education and were preparing to embark on careers that offer challenge and excitement. As my friend and former colleague at Alabama Charles Trost would say, they have a chance both to do good and to do well. The roll of that law school class at graduation was, however, two members short. In the summer before they were to begin their third year of law school, Laurie Patarini and Jonathan Hudson were involved in a collision with a drinking driver. Laurie was killed and Jon was seriously injured. The tragedy of this accident affected all of us at William and Mary who have been fortunate to be their teachers, fellow students, and friends. The memory of the loss that was suffered on that day will undoubtedly continue to inspire efforts to attack the needless waste caused by drinking and driving.

Work on this book was supported in part by summer research grants from the College of William and Mary Committee on Faculty Research and from the Law School Foundation of the Marshall-Wythe School of Law, College of William and Mary. A semester research leave from the college came at an opportune time, providing an interval from teaching and normal committee work for virtually undivided attention to the completion of the manuscript.

For the last eight years, I have been privileged to work in a professional environment that both encourages and supports scholarly efforts. For that I thank my colleagues at William and Mary, particularly those who participated in the faculty colloquium at which I was able to present some of the ideas in this book at a time when their con-

structive critique was extremely helpful. The quality of the working environment at William and Mary is especially attributable to the efforts of Timothy J. Sullivan, dean of the law school for the last six years, whose generosity, integrity, and decency have provided a model of principled and humane administration. Finally I would like to note that a university's commitment to serious scholarship and the highest quality education can benefit enormously from support by the individuals who hold the top administrative posts. Those of us who teach at the College of William and Mary are fortunate to have the benefit of the leadership of President Paul Verkuil and Provost Melvyn Schiavelli.

Even such a supportive professional environment as the one at William and Mary would have been substantially less than satisfactory had it not been for the love and, above all, the patience of the most special people in my life, my wife, Cindy, and my daughter, Lisa. By the time this book was nearing completion, they had become quite good at harmonizing their "Not as much as we do" reply to my recurrent whining about how much I wished the book was finished. A great deal more than just this book is dedicated to them.

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Perspectives on the Drinking-Driver Accident

A traffic accident involving a drinking driver can happen in less time than it takes to read about it. A serious accident of this sort happens in the United States on an average of every twenty minutes. Tens of thousands of people die each year in these accidents. Nearly half a million more suffer serious injuries.

These figures are just numbers to many of us, perhaps because we are confronted with so many other overwhelming numbers such as figures on drug use and poverty, defense spending, budget deficits, and savings and loan bailouts. Others of us know someone who has been involved in an accident of this sort, either a drinking driver or a victim. To bring home what all of this really means, it might be helpful to look behind the numbers and consider a hypothetical but typical accident.

The Bloom family—Alan, Molly, Billy, and Sally—were on their way home after spending a late summer day at the beach. Alan was driving and Molly was riding in the front passenger seat. The children, Billy and Sally, were seated in the back of the car. Billy was staring out the window at the scenery on the right side, thinking whatever five-year-olds think on their way home from the beach. Eighteen-month-old Sally was asleep in her car seat. Molly was wondering whether they ought to stop at a drug store and pick up something to put on Sally's sunburned shoulders in case they were going to be as sore as they looked. This had been Sally's first time at the beach, and she had been a lot quicker to burn than Molly had expected.

The speed limit was fifty-five on this stretch of the road, but Alan was only doing a little under fifty. He seldom drove at fifty-five here because the road was only two lanes wide and had a lot of blind curves. The only traffic he could see was a truck coming toward him that was just appearing around a curve up ahead. That truck was about a hundred yards away when suddenly a car pulled out from behind it and occupied all of Alan's lane. Before Alan could apply the brakes or turn the steering wheel, the two cars collided.

Alan was killed instantly in the collision. Molly and both of the children suffered serious physical injuries—broken bones, internal injuries, and concussions. Billy was in a coma for a couple of weeks, and the latest medical prognosis is that he will have a permanent learning disability as a result of the head injury that he suffered. The force of the impact twisted the Bloom car into an almost unrecognizable shape. The car was so mangled that Sally was trapped in her car seat for nearly half an hour before the rescue squad and the paramedics could work their way into what had been the back seat. During much of that time, she was awake and screaming in pain and terror. In addition to the lingering effects of the physical injuries she suffered in the accident, Sally continues to have frightening nightmares, and she often becomes terrified while riding in a car.

Alan had made out a will leaving everything to Molly, but it may not be enough for the family to keep its old standard of living. The last time Molly had worked full-time was just before Billy was born, and she had just started putting in a regular volunteer shift at the local public library three mornings a week while Sally went to her play group. Now Molly would have to think seriously about finding a well-paying job and see about arranging extended day care for the children.

Life hadn't been perfect for the Blooms before the accident. They had certainly had their share of worries and frustrations. But this . . .

What really made Molly furious was what she learned from reading the police report on the accident. The driver of the car that hit the Blooms, Tommy Smith, had been only slightly injured in the crash. A police officer at the scene had said she thought it was a miracle that Smith had survived the accident, let alone that he had come through it virtually unharmed. One of the emergency medical teams that responded to the accident took Smith to the trauma center at the nearest hospital so that he could be examined for more serious injuries. As Smith had been helped from his car, a police officer had noticed that beer had spilled onto Smith's clothes, that his breath smelled of beer, and that both empty and unopened cans of beer were in the front of the car. Because of this evidence, the state trooper in charge of the accident investigation had ordered a blood alcohol test to be done on Smith when he arrived at the hospital. The test showed that the level of his blood alcohol concentration was nearly two times the legal standard that constituted driving while intoxicated in that state.

The driver of the truck that Smith had been following had stopped after the collision. He told the state troopers that he had seen Smith's car coming up behind him and that it had been trying to pass him for a couple of miles, even though the road was winding and was marked with a double yellow line down the center for that entire distance. The car had repeatedly been crossing the center line and pulling back and had also been weaving off onto the right

shoulder of the highway. The truck driver said that there was nothing he could do when he saw the Bloom car approaching. He never would have thought that anyone would try to pass in a location like that.

John Barleycorn Must Pay has a dual purpose. Roughly the first half of the book presents a critical analysis of the legal remedies that are currently available to compensate the victims of drinking-driver traffic accidents. The remainder of the book develops in considerable detail a reform measure that will have two beneficial effects: it will provide more complete compensation for the more seriously injured victims of drinking drivers, and it will cause the alcoholic beverage industry to absorb—and presumably pass on to consumers—a greater share of the accident costs that are attributable to its products than is currently the case under existing law.

The story of the Bloom family is fictional, but the facts it portrays are not unusual. Alcohol consumption plays a role in a substantial number of traffic accidents that result in serious personal injury or damage to property.¹ Recent figures indicate, for example, that as many as one-third of the drivers who are involved in fatal traffic accidents are drinking drivers.² Of the more than 46,000 people who were killed in traffic accidents in 1987, 40 percent of them died in crashes in which at least one of the individuals involved was intoxicated.³ Whether one looks at the number of drinking drivers connected with fatal accidents or at the number of people who die in those accidents, it is clear that alcohol is involved in a significant proportion of the carnage that occurs on our highways.

A traffic accident in which someone is killed or seriously injured by an alcohol-impaired or intoxicated driver—a drinking driver⁴—touches many members of society in a number of different ways. The primary focus of this book is on what happens to the people who are injured in those accidents and to the survivors of those who die in them. Thus a major concern is how our legal system imposes liability for the losses suffered in drinking-driver traffic accidents and how it distributes the cost of those accidents. Drinking-driver accident costs are primarily distributed among the accident victims, the drinking drivers who cause the accidents, the third parties who are related in some way to the accidents, and members of society at large. The book ends with a specific proposal for a better way of allocating the costs of the most serious injuries suffered in these accidents. Along the way, some more general observations are made about the nature and the effectiveness of tort law in contemporary society—the body of law

that is primarily concerned with the recovery of damages for harm caused by wrongful conduct.

Although drinking drivers sometimes cause death or serious injury to themselves, I have chosen to focus on the injuries they cause to others and the compensation problems that result. Studying how our society deals with the innocent victims of a widespread activity such as drinking and driving offers an insight into society's general practice regarding injury compensation and the potential for reform. In 1987 almost seven thousand of the people who were killed in alcohol-related traffic accidents were not themselves alcohol-impaired at the time.⁵ The number of nondrinking victims who are injured but not killed in these accidents is difficult even to estimate, but it is surely many times the number of fatalities. Understanding the nature of the legal and public policy problems surrounding the plight of the victims of the drinking driver and then devising a solution require a detailed consideration of what our legal system and what we as a society currently do to soften the impact of the most harmful consequences of drinking-driver traffic accidents.

Different Perspectives on a Social Problem

Both the legal consequences and the practical effects of a traffic accident in which a drinking driver causes death or serious injury to another person can be viewed from a number of different perspectives. The particular public policy concerns of tort lawyers and scholars will be better understood if their perspective is compared to some others.⁶

The Perspective of the Victims and of Society. Those who are most closely related to the victim of an alcohol-related traffic accident feel grief and outrage. Any serious accident is likely to produce loss and regret, but a drinking-driver accident provokes an additional element of personal and societal anger at the fact that unnecessary and unacceptable behavior has contributed to the injury and loss. The author of a recent newsmagazine article detects a similarity in the way the public's perception of both drunk driving and pollution has shifted. Both are "now seen as fundamentally disgraceful and bespeaking lack of character, as opposed to just mistakes."⁷

The concern and the outrage of those who are closest to the individual victims of drinking drivers have been an important impetus for institutional reform efforts. The last decade's growth in the size and influence of such groups as Mothers Against Drunk Driving (MADD) and Students Against Drunk Driving (SADD) may reflect

the emergence of a more sustained community feeling that current attitudes toward drinking and driving, a social practice that is still fairly ubiquitous, are inadequate. This growth also indicates an increasing level of public frustration with weak and ineffective official actions to control and punish drinking and driving. Citizens' interest groups have often played a significant role in raising the public's awareness of the seriousness of the problem and in lobbying for new legislation such as laws that lower the standards for defining drinking-and-driving offenses and laws imposing more stringent sanctions on offenders. Citizens' groups have also been active in regularly monitoring courtrooms to see whether and how existing laws are being applied.⁸

During the early days of trench warfare in World War I, the British War Office referred to casualties from shellfire in relatively quiet sectors of the front as "normal wastage."⁹ Today, when public attention is likely to skip around from topic to topic depending on what the most influential members of the news media decide is the crisis of the day, carefully focused and sustained efforts to keep the problems caused by drinking drivers near the forefront of public consciousness are needed if the victims of drinking-driver traffic accidents are not to be considered the "normal wastage" of our contemporary lifestyles, which so easily mix alcohol and automobiles.

The Drinking Driver's Perspective. Drinking drivers responsible for causing a traffic accident may well feel more remorse than their nondrinking counterparts because they must face the knowledge that their consumption of alcohol contributed to the accident. It is a common and natural reaction for people to inquire about whose fault was responsible for an accident, but this question is much easier to ask than it is to answer. Personal responsibility is a complex issue. It is not easy to reconstruct and evaluate actions that occurred in an instant of time or to identify and distinguish the multiple and overlapping causal precursors to an accident. The general difficulties of administering our automobile accident compensation system, which is based mainly on proving fault, have prompted a number of states to move to a no-fault system of automobile insurance.¹⁰

It is also human nature to try to blame others for the results of our own misbehavior. In the popular understanding, the term "accident" may subtly imply that an event was impossible to avoid or that we should not attach a great deal of blame to it. After an accident in which serious injuries have occurred, however, the natural inclination to deny that one was at fault may be much more difficult for