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# A Schema of Alternatives to the Present Auto Accident System

Harry Kalven Jr.

# A SCHEMA OF ALTERNATIVES TO THE PRESENT AUTO ACCIDENT TORT SYSTEM*

*Harry Kalven, Jr.***

I WOULD like to acknowledge at the outset that not only the bar and the public but members of the law teaching profession also are deeply indebted to Professors Keeton and O'Connell for the splendid stimulus their plan has provided to a rethinking of the contemporary tort system. My purpose here is not to debate the merits of their proposal specifically but rather to engage in the more academic exercise providing a framework of possible alternatives to the present system, and to see where the Keeton-O'Connell plan itself fits into such a schema. My mission is not so much to suggest a reform as it is to draw a map.

There is one other prefatory observation. Current controversy over the personal injury system in the area of auto accidents is at present mixing a series of popular issues about auto insurance with what had been the traditional problems of tort law in the auto compensation area. Thus, we hear much popular discussion of such issues as the cancellation of liability insurance policies, the insolvency of liability insurance companies, and the differential in rates between different classes of insureds. These are all, to be sure, proper issues for public discussion, and possibly quite urgent ones. They are, however, not issues which concern the Keeton-O'Connell proposal directly, and I will, therefore, put them to one side for the purpose of the present discussion.

Speaking very broadly and theoretically, there are four possible

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* This paper is based on remarks made at a panel discussion of auto compensation plans held under the auspices of The Connecticut Bar Association and The University of Connecticut Law School on February 5, 1968, at Hartford. Although I have edited the remarks somewhat, I have elected to leave them in the perhaps unduly informal style of the oral presentation.

The analysis is based largely on the prior essay by Professor Blum and myself, PUBLIC LAW PERSPECTIVES ON A PRIVATE LAW PROBLEM (Little, Brown and Company, 1966). There has been a formidable amount of writing on the problem in recent years. It will suffice for our purposes here to note our colloquy with Professor Calabresi: Calabresi, *Fault, Accidents and the Wonderful World of Blum and Kalven*, 75 YALE L.J. 216 (1965); Blum and Kalven, *The Empty Cabinet of Dr. Calabresi*, 34 U. CHI. L. REV. 239 (1967); and to note two very recent symposia devoted to the general topic: 53 VA. L. REV. (May 1967); 3 TRIAL (Oct./Nov. 1967).

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courses of action the legal system can take with respect to the current challenges to its handling of auto accident compensation:

1) We could retain the common law tort system essentially as it is, making only internal changes in it;
2) We could abolish the common law tort system altogether and simply let auto accident victims take care of their own losses as they might take care of the risk of cancer or the risk of being hit by lightning;
3) We might go to a broad system of social insurance, some kind of extension of Social Security under which a large variety of human misfortunes, including being the victim of an auto accident, would be covered;
4) We could move to an ad hoc solution of the auto compensation problem, treating it as a distinctive and special problem in its own right attempting to solve it without any commitment to other social problems adjacent to it.

As I see it, while there may be various combinations of these, these are the only possibilities. And as I see it, none of these alternatives is wholly satisfactory. There are difficulties with the common law as it now stands in the auto accident area; it seems shocking to abolish the tort system altogether without putting anything else in its place; there are formidable difficulties with further extension of Social Security; and, finally, there are formidable difficulties in devising a persuasive ad hoc solution. Hence, even this very cursory overview of the problem suggests two points. First, the distinctive strategy of the Keeton-O'Connell proposal is to attempt to devise an ad hoc solution specifically for the auto problem. Second, viewing the problem from the perspective of this large framework, there appears to be no easy, no ideal solution to it. I should like now to proceed in a more leisurely and a more detailed fashion to examine these four alternatives. It may be helpful to attempt for the moment to look at the common law tort system itself being a kind of compensation plan. If we so view it, how should we describe it?

First, we would note it is not a system designed especially for the auto problem, but simply an application of the general principles the tort system uses for handling various types of accident. We are immediately reminded, therefore, that any challenge to the contemporary auto compensation system in all likelihood will involve a challenge to

the whole common law system handling inadvertently caused physical harm. The second point is that the common law involves a one-to-one shifting of losses. The victim, if he is going to shift a loss at common law, must have someone, some one particular person, to shift it to. The third point is simply the totally familiar one, that the shifting of losses in the system is keyed to the twin rationales of shifting only when there is fault on the part of the actor and only when there is an absence of fault on the part of the victim. This is, of course, the basic and elementary principle of the system, and I pause simply to underscore that by definition the common law did not intend to compensate all victims; whether for good or for ill, as a matter of principle, it did not compensate all victims of auto accidents. I stress this obvious point simply because in so many discussions it is announced with an air of discovery that the current system does not achieve full compensation for everyone. That it does not do so is not a sign that it is not working, but rather an indication that it is working according to principle, albeit a principle we might wish to debate.

The fourth characteristic goes to damages. We need note simply that under the common law system, damages are tailored to the individual case and include two celebrated features: the rule that damages are to be awarded for pain and suffering, and the rule that payments from collateral sources, such as insurance, are by and large irrelevant in measuring damages. I note these two rules, because they are features of the common law which are currently under special attack in the Keeton-O'Connell plan.

To continue with the profile of the common law system, the jury emerges as the great arbiter of values. It is the arbiter of the incidence of liability and it is the arbiter of the amount of damages. Further, the common law is a system serviced by a specialized bar which is paid, often handsomely, under contingent fee contracts. Again, it is a basic characteristic of this system that it regards insurance as permissible but irrelevant, and this is true whether we are talking about first party insurance or third party insurance.

Finally, in actual operation the vast majority of claims are settled outside the system, that is, settled without resort to formal adjudication; perhaps roughly 98 per cent of the business of the system is disposed of informally, without trial. If we view the common law as a system, then we might be tempted to say it was highly successful since it was able to dispose of so much of its business without resort to the

courts. This, then, in broad strokes is the common law tort system viewed for the moment as an auto compensation scheme. The question concerns the ways in which that system might be changed.

As we begin to consider possible changes, there is a point of history of which to remind you. We are in a sense in an awkward posture at the very beginning, because we have had a divided inheritance for at least fifty years. As you all know, industrial accidents, industrial torts, were taken out of the common law system about fifty years ago by the advent of workmen's compensation. The upshot is that for a long time now we have divided the accident field into two halves, handling the one by the common law system and handling the other by a radically different system. It is worth reminding you that in 1914 the distinguished Harvard law professor, Jeremiah Smith, puzzled over this arrangement in his article, "Sequel to Workmen's Compensation Acts."[1] Smith argued in effect that the common law and workmen's compensation could not continue to live peacefully side-by-side, that they involved radically inconsistent principles for shifting losses where harms were inadvertently caused. If one goes back to Smith's article, one cannot but be impressed with what a superb analyst Smith was—and what a poor prophet. We have, of course, lived fifty years since he wrote, with the two systems side-by-side.

There is just a brief post-script to add to this. One might have thought that modern proponents of compensation plans would have sought to take advantage of this schizophrenic arrangement and would have argued that the common law system was fatally compromised by the adoption of workmen's compensation. Yet one of the things Keeton and O'Connell do not do is to argue for their plan on the grounds that they are simply extending the principles of workmen's compensation to the auto accident. I exercise here the law teacher's prerogative of raising the puzzle without solving it.

With the common law as a basic alternative, what changes might be made which would not involve radical change of principle? One rule which could obviously be changed and which in fact has been changed in many common law jurisdictions, is the rule which makes coverage dependent on the fault of the victim. For years there have been proposals of comparative negligence and in some seven or eight American states we now have the new rule by statute. And in Illinois during the

1. 27 HARV. L. REV. 235, 344 (1914).

past year an Appellate Court has, as a common law change, moved from contributory negligence to comparative negligence.[2]

The essence of comparative negligence is to discount the plaintiff's recovery by the amount he was negligent. Thus, the victim's negligence remains relevant, but it is no longer decisive. It is perhaps worth noting that under the Keeton-O'Connell plan, the fault of the victim would not only be no longer decisive, but it would no longer be relevant for any purpose. We may wonder whether the fault of the victim can so easily be made irrelevant, at least where he has not contributed to the insurance fund against which he is now making a claim.[3]

Again, it has long been clear that under the common law there were two kinds of gaps in coverage. There was a liability gap which resulted from the loss shifting principles of the system, and what might be called a solvency gap which resulted simply from the fact that the defendant lacked sufficient funds to pay the judgment against him—in brief the problem of the uninsured motorist. It has been a characteristic of all compensation plans to close the solvency gap. There is, however, no reason why the common law scheme should not also close it; this is not a real issue between the common law and other alternatives. In the past decades, a great deal of attention has been paid to closing the solvency gap and there have been three or four major moves along these lines, such as financial responsibility laws, compulsory liability insurance laws, uninsured motorists' funds, and perhaps the most interesting of all, the uninsured motorist clause in the ordinary liability policy today which covers the insured against the hazard of being injured by a negligent, uninsured motorist.

We have then the two changes, comparative negligence and compulsory liability insurance, which are congenial to the common law system. If they were made together, they would dramatically narrow the gap between the common law and any compensation plan. I can only underscore for you the fascinating question thereby raised of whether this twin change in the common law would strengthen the case for retaining the common law system—or would fatally impair it.

There is one final possibility of a change that might be made within the existing common law framework. It has been characteristic of most plans in some fashion to use state intervention to effect the changes

2. Maki v. Frelki, 229 N.E.2d 284 (Ill. App. 1967).

3. *Compare* Franklin, *Replacing the Negligence Lottery: Compensation and Selective Reimbursement*, 53 VA. L. REV. 774 (1967).

that are required. But every once in a while someone goes back to the possibility that without the intervention of the state and simply by creative use of the insurance contract, one could, so to speak, "contract into" a system of strict liability.[4] A few years ago, Professor Ehrenzweig came up with a scheme called first-aid insurance in which the voluntary use of contract was a principal feature. And one of the major insurance companies once posed a family insurance plan along this line. The existing provisions in liability policies, such as the medical payment clause and the omnibus clause, have shown that people can, under some circumstances, be persuaded voluntarily to insure beyond liability. If they could be persuaded to do this somewhat more generously, the problem to which auto compensation plans are addressed would disappear. Perhaps someday someone will be ingenious enough to work out a successful scheme of this sort. The difficulty, however, appears to be basic and elemental. It is difficult to persuade people simply as a matter of good will and charity to buy insurance for their victims if they do not have to. I suspect we will wait a long time for the American public to make such a gift of insurance coverage to auto accident victims. The upshot—and it is an important one—is that if the victim is to be covered in all cases, it will require some type of state intervention, some type of compulsion by the state to bring it about.

So much for the large possibility of keeping the common law system essentially as it is, subject to internal modifications. We turn now to the other three major alternatives and consider for the moment the most radical of them, namely, that we resolve the auto compensation problem by abolishing the tort system altogether. This is, of course, a difficult proposal to make seriously in public, but it may be a useful academic exercise to consider it for a moment and to consider the sources of our hesitation to embrace it. In one sense it meets head-on many of the criticisms of the present system. It would solve, in one fell swoop, the problems of delay, fraud, and expense; it would eliminate the cost of liability insurance. It would avoid quibbles about the reality of fault in driving. If people are troubled by the risk of becoming victims of auto accidents, they could, of course, insure themselves against it as they do against the risk of their house burning or their getting sick. Why is it the law's business to bother with shifting this particular loss? The ready answer that leaps to one's mind is notably old-fashioned. There is simply something unfair in leaving all

4. *See* especially, James, *Accident Liability Reconsidered: The Impact of Liability Insurance*, 57 YALE L.J. 549 (1948).

of these losses to lie where they fall. The original point of the common law system comes back with force. When someone has caused a loss to you not due to your but to his fault, that loss should be shifted to him. You should not have to pay premiums to insure yourself against the fault of other people.

Let me leave you then with the academic exercise of speculating on the "reform" of abolishing the tort remedy and go on to the third major alternative, the use of a broad social insurance scheme. The point is that if one begins in another corner thinking about human misfortunes and the use of social insurance to offset them, he may be moved to a large scale plan for the handling of human misfortunes generally. Such a plan, if adopted, would solve the problem of the auto accident victim, not because he is in a special category or presents a special problem, but simply because he offers an example of human misfortune and falls in a category of misfortunes much larger than the automobile accident. The English experience in this respect is quite instructive; when the Labor Government came in at the end of World War II, the English came within inches of abolishing the tort law inadvertently. They had begun a broad program of social insurance covering medical and unemployment losses and a wide category of misfortunes. And only at the last moment did they discover the overlap between this scheme and the business of the law of torts. The challenge was this: since the insurance scheme would now provide compensation in all cases for the kinds of losses the law of torts was covering in only a selective group of cases, was any function left for the law of torts? The question was a good one, and the English answered it in typical fashion. They muddled through, avoiding an answer in principle, under a formula that deducted half the social insurance payments for five years from the tort remedy.

For all of us who are moved by welfare concerns when we look at the victims of auto accidents, the social insurance alternative has some attractive advantages. It gives a coherent group of beneficiaries defined not by the accident of being hit by an automobile, but by the fact that they suffered a misfortune. It does recognize a commonality in misfortune of the man hit by an auto and the man hit by cancer. Again, it provides a rational and coherent way of paying for the insurance fund by charging it broadly to the population as a whole, in effect, as a cost of living. Further, it provides through taxation an unbeatably economical and efficient method of collecting premiums, and, finally—and this is worth noting in view of the complexity of the Keeton-O'Connell proposal—it provides an intelligible issue of policy to put to the public.

There are also, however, as I am sure you anticipate, some impressive disadvantages, at least two of which deserve mention. First, we are eliminating an important source of private power in the society and concentrating great additional power in the state itself. And this is not a change to be made lightly. Second, there is the point that Professor Calabresi has urged recently, a point borrowed from the economist. If you take the cost of auto accidents and put them under a social security scheme, you externalize these costs, that is you free the accident-causing activity from any concern with the cost of that activity; you remove all economic discipline from the field of accidents or, to put this in Professor Calabresi's idiom, you eliminate the possibilities of general deterrence.

As we come down the roster of alternatives then, there arises a sense of being hemmed in by tough choices. The simplicity of social insurance looks attractive for a moment but then looks rich in major perplexities; the common law looks like a clumsy, elaborate, curious way of handling the contemporary problem of the auto. Abolishing the common law instantly looks unjust. One cannot, therefore, help but wonder whether the fourth alternative which would improve the coverage of the common law without involving the complexities of social insurance might not be the best strategy. And it is here, of course, that auto plans are to be placed: they represent efforts to exploit the idea of social insurance for the narrow world of the auto accident alone.

As we turn then to the specific auto compensation plan, it may be helpful to stress that the key difference between any such plan and the common law tort system is that under the plan *all* victims will recover something. It is the intention and objective of the plan that all victims recover; as we have already noted, it is a distinctive characteristic of the common law system viewed as a compensation scheme, that as a matter of principle it is not intended that all victims recover. This is the critical difference and any other differences between the common law and compensation plans follow from this. The point of the plan then is that all victims recover and as a result it is possible to simplify the insurable event. It seems to me that the dream of being able to simplify the insurable event is the real source of the attractiveness of compensation plans. It is hard to resist the impression, as one looks at the institution of insurance, that there must be some more practical way of utilizing it than we now employ. Whatever one may say about negligence as a criteria of liability, it certainly makes an odd and unduly subtle and complicated insurable event. The question, of course, is

whether the insurable event can be simplified without other difficulties arising as a consequence.

The problem is this. The objective and the achievement of the compensation plan is to increase coverage beyond what the common law now offers. The increased coverage requires additional funds to pay the additional victims. As Professor Blum and I have repeatedly argued, the crucial policy question proposed by compensation plans is simply where is the money to come from for the additional coverage which is the hallmark of the plan. If it were not for this issue, everyone would be in favor of compensation plans. Absent the issue of cost, the question is reduced to whether it is preferable to have all victims recover rather than have only some recover. If, as the argument seems to assume, we are paying out of a limitless fund, the conclusion is inescapable that it is better to have all victims recover.

One solution to the financing of the additional coverage, of course, has been to argue that it should be placed on motorists on the grounds that auto accidents are a cost of motoring and that the automobile should pay its way. This has been a long standing notion in our culture and indeed was the rationale offered for the workmen's compensation reform. It poses a good issue and one that is not altogether easy to analyze; it deserves to be argued out fully.

I would pause here for a moment to note another curious item from the history of auto compensation proposals. So far as I know, no one has ever proposed a plan in which the premise that auto accidents are costs of driving was taken with such seriousness that the plan simply gave common law damages to everyone that was injured. I would suggest that there has been a failure of nerve on the part of proponents of plans in this connection which is instructive.

What has been proposed, of course, is the less dramatic strategy of adjusting the level of awards downward. It is somewhat a surprise to discover the common law principles most seriously challenged by compensation plans may not be the liability principles but rather the principles of damages. The essential insight that has been used here is a very simple one: if you pay all the victims half as much, you can pay twice as many victims with the same amount of money. In the end this is the rationale that supported the constitutionality of workmen's compensation; it was viewed as a bargain between employees and employers in which the level of recovery was traded for the certainty of recovery.

The proposal that the common law scale of damages should be re-

adjusted also poses interesting and proper issues of policy and there are a variety of ways to do it; damages might be lowered by some arbitrary fraction or some specific components of damages might be eliminated. It is the distinctive characteristic of the Keeton-O'Connell plan that it utilizes the strategy of lowering awards, and that it does so by a complicated series of cuts which are not altogether easy to keep track of. The two most important reductions appear to be the elimination of part of the damages for pain and suffering, and in the large majority of the cases the reversal of the collateral source rule. As we have seen, these are both controversial features of the common law scheme of damages, and are certainly in their own right open to debate and challenge. The question is whether the arguments for making these changes become stronger if the changes are joined to a compensation plan. Under the Keeton-O'Connell plan, for example, the first $5000 for pain and suffering is eliminated. How would you view a proposal to keep the common law system as it is and simply eliminate the first $5000 for pain and suffering from it? Or, how would you view a proposal to leave the common law alone and eliminate the collateral source rule? There are respectable arguments for making each of these changes independently of a plan. The puzzle once again is why these changes should be more attractive joined to a plan.

There is one fundamental point to make about all this. The dilemma posed by the reluctance to place the full cost of accidents on drivers and the parallel reluctance to lower awards was solved with spectacular ingenuity some years ago by the Province of Saskatchewan. In many ways the Saskatchewan plan has offered the most interesting model yet put forward. In effect, it is a two-level system. At the lower level the damages for all accident victims are underwritten at a modest level of damages; at the second level, the common law tort action is kept alive over and beyond this basic recovery. The beauty of this scheme is that under it, no plaintiff can be worse off than he was under the common law. All victims will still receive whatever they would have gotten at common law and some victims will receive more.

It is, I think, an especially good question to put to Professors Keeton and O'Connell as to why they do not claim the Saskatchewan plan as their model since they too propose a two-level system and keep the tort system alive over and beyond their initial basic protection. Indeed, they not only do not claim the Saskatchewan plan as a precedent, they remain virtually silent about it. The reasons, I think, are not hard to find. Although their plan leaves the common law action alive, it is not

true that all victims will be as well off under it as they were under the common law. The most distinctive feature of the Keeton-O'Connell plan is the adaptation it makes of the two-level plan model. The best way of putting their plan in perspective is to lay it next to the Saskatchewan plan and to note the differences. One of the difficulties I have with the Keeton-O'Connell plan is simply that when such a comparison is made, I find it less intelligible and less attractive than the Saskatchewan model.

In brief outline these are, as I see it, the major alternatives in the compensation field. Each of them poses its own special brand of difficulty, and the important thing is that the policy issues thus engendered be located and discussed vigorously. In the end, I would simply note that in this context of basic alternatives, the common law has two advantages which still seem to me impressive. The first is that it has a coherent way of selecting the beneficiaries of state intervention on behalf of victims of misfortune, and the second is that it has a coherent way of selecting those who, under state compulsion, are to provide the funds.