
The auto insuring public appears to be increasingly dissatisfied with high insurance rates, tight underwriting restrictions, and the present system of claims payments. In a study of severe accidents and court cases in Michigan, 54 per cent of the seriously injured thought their tort settlements were inadequate; 53 per cent thought their cases should have been handled differently to get more money; and 47 per cent blamed the liability insurance company for treating them unfairly.¹ Professors Blum and Kalven have catalogued some of the reasons for this public agitation and the mounting pressures for a modification of the system of reparation for automobile accidents: (a) the ubiquity of insurance has sharpened perception of the inefficiencies, costs, and inequities of the present system for determining liability, measuring damages, and adjusting claims in and out of courts; (b) an increased sensitivity to welfare has drawn attention to an alleged failure of the system to provide victims with prompt payment of their medical and emergency expenses; (c) the renewed volume of large scale empirical research in this field has supported scepticism of the system with new data; and (d) urban court congestion, frequently blamed on auto accident cases, has caused seasoned trial judges to argue that an auto compensation plan under an administrative agency would be the best solution to court delay.²

Courts, legislatures, and administrative agencies have often responded to this dissatisfaction by substituting strict liability for common law liability based on fault. Although at first liability insurance was officially seen only as a device for guaranteeing the solvency of parties to whom a loss might be shifted by the common law fault principle, today in the eyes of the victim the source of recovery for damages has shifted from the negligent driver to his insurance company. And in fact, liability insurance funds are being used to indemnify an increasing proportion of all injured parties. In addition, financial responsibility and compulsory insurance laws, assigned risk plans, medical payment and uninsured motorist coverages, unsatisfied judgment plans, and restrictions on the right to cancel policies are all contributing to this trend away from the fault principle.


² Pp. 6-7.
Blum and Kalven challenge the proposition underlying the trend away from common law liability—that the concept of fault has become an anachronistic and unworkable criterion for liability in auto accident cases. They thus provide a spirited defense of the tort liability system of handling auto accidents; moreover, their theoretical framework for analyzing new proposals for auto compensation plans requires the public to face up to the proper full costs of alternative plans. Beset by the rising frequency of accidents, persistent underwriting losses, and resistance of state regulatory officials to rate increases, insurers will welcome this cogent defense of the familiar and tested principle of fault.

To an insurance executive, the distinction between the fault principle and a compensation plan may have a firm theoretical base, but he knows that it has become seriously blurred in the minds of the general public, the regulatory agencies, legislative committees, and even the courts. In my opinion Blum and Kalven have failed to recognize that the existence of a large reservoir of insurance funds to indemnify injured parties has a corrosive effect upon the insureds' behavior. This effect is illustrated by the fact noted by Blum and Kalven, that if a loss is to be shifted under compensation plans, it is viewed as being shifted from the individual victim to the compensation fund instead of to the person at fault, while the latter's duty to contribute to the fund "is thought of as having only the faintest resemblance to common law liability for negligent conduct." There is a growing consensus that losses due to automobile accidents should be borne by insurance institutions rather than by the individual and that an intensive study of compensation plans by insurance companies is needed. What actions do insurance leaders take in the face of these developments? Do they attempt to salvage what remains of the negligence principle, using the full force of the Blum-Kalven arguments? Do they use the yardsticks developed by the authors to measure the attributes of the Keeton-O'Connell, Conard, Ehrenzweig and other proposals yet to appear? They probably do both, particularly in those respects in which they make positive contributions to the general public and to the insurance business as a whole.

It should be noted, however, that insurance executives are facing several additional issues in auto insurance not noted in depth by Blum and Kalven. If the public believes that insurance institutions should

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4 Pp. 54-65.
5 P. 32.
bear the cost of losses due to auto accidents, insurance executives must then shape these institutions so that they secure maximum public acceptance for their indemnification programs consistent with financially sound operations. Such a criterion raises certain questions not covered by the Blum-Kalven models.\textsuperscript{7}

The first question relates to duplication and overlap of protection, rather than to the gaps in common law coverage which concern most advocates of compensation plans. Conard found in his Michigan study that 32 per cent of the serious injury cases suffering economic loss below $1,000 recovered at least 150 per cent of such losses. Of those persons suffering economic loss between $1,000 and $5,000, 17 per cent of them recovered at least 150 per cent.\textsuperscript{8} In general, recovery exceeding the economic loss is received from several sources and reflects the multiplicity of insurance coverages and institutions playing a part in such reparation. An auto accident victim or his family may receive reparation from workmen's compensation, health insurance, social insurance, life insurance, as well as auto liability insurance. Again, in the Michigan study, in an investigation into the sources of reparation for automobile injuries in 1958, it was found that 55 per cent of the total reparation received was from tort liability, 38 per cent from the injured person's own insurance, 2 per cent from social security, and 0.5 per cent from workmen's compensation.\textsuperscript{9} In view of the trends in growth of reparation systems, especially health insurance and social insurance, it can hardly be doubted that were a study to be made of 1965 auto accident victims, the pattern of payments would reflect such growth since 1958 and also the increased share of collateral insurance systems in the burden of compensating losses due to automobile accidents. For the insurance executive who is facing public resistance to needed increases in both automobile and health insurance, overlapping and duplicate payments to accident victims constitute a serious problem. Substantial improvements in the present reparation systems might be made if legislative or regulatory provisions were to specify the order in which various coverages would be called upon to indemnify losses up to 100 per cent.

The insurance executive is also concerned with a related issue—the efficiency of the insurance process. Ideally, he seeks to return the maximum number of dollars to the insured or other claimants consistent with sound administration and a reasonable return on capital. Different expense levels are involved in administering different cover-

\textsuperscript{7} Pp. 32-44.
\textsuperscript{8} CONARD ET AL., op. cit. supra note 1, at 179.
\textsuperscript{9} Id. at 63.
ages; obviously, claims arising under the tort liability system, involving a careful determination of fault and the costs incidental to the potential or actual litigation, will be more expensive to administer than health or other personal insurance claims. Such cost considerations should be taken into account in deciding the order in which the insurance coverages available should pay for losses up to 100 per cent.

These issues raise a more fundamental question of whether, in fact, it is possible to separate damages due to automobile accidents from damages otherwise caused. The economic welfare of the family depends upon its present assets and its future income potential. Both assets and income are subject to all the risks which the family faces in its life cycle, including auto accidents. In this context, the function of insurance is to provide protection against those hazards upon which actuarial probabilities can be determined and whose cost the insured can afford. As they apply to the average family, the principal insurable risks might be grouped in two broad classes: (a) loss in income, arising from untimely death, superannuation, and disability; and (b) reduction in net worth, arising from legal liability, property loss or damage, or insurable expenses incurred. At the present stage of insurance product development, these family insurance risks can be covered only by a multiplicity of individual policies, often expensive to administer and unsatisfactory to the insureds. However, rapid progress is being made toward a comprehensive family insurance program which will consolidate the entire insurance needs of the family on an account basis. But the full potential of all-risk insurance can come only when we have developed a completely integrated, all-loss insurance portfolio for the family. By using such a functional approach to insurance, we can identify more precisely the losses for which compensation is needed. The all-loss policies would also tend to eliminate duplicate coverages and to fill the gaps in existing protection. If such a full protection program were combined with the proposal for rank ordering of reparation payments for auto injuries noted above, the existing gap in uncompensated auto accident losses would be virtually closed.

Another possible innovation in insurance product development is also relevant, the family compensation coverage policy under which the insured, his passengers, and third party claimants are given the option of accepting payment under a schedule contained in the policy in lieu of resorting to their common law remedy. This reviewer has outlined such a policy in an article noted by Blum and Kalven.10 In

general, the difficulties of attempting to launch such a plan through voluntary contract are effectively described by Blum and Kalven. In the opinion of the reviewer, however, it deserves further study and trial, particularly if its benefit schedules were to be increased and it were to be given statutory support.

Concurrent with its improvement of the insurance product, the insurance business is beginning to overhaul its claims practices under the present system. Many major auto insurers are introducing programs for the advance or timely payment for losses as incurred and for rehabilitation of third party victims. We expect through such programs to provide a satisfactory answer to one of the major targets of compensation plans outlined by Blum and Kalven: improvement in the timing of payment to victims.

Blum and Kalven have set the standards for judging all future compensation proposals. In fact, I expect that their work will prevent the widespread adoption of any overall compensation plan. A pluralistic answer to the auto accident reparation problem appears to be emerging. It does seem clear, however, that the fault principle will recede in importance in the future since an opaque veil is being drawn between the at-fault driver and the victim. Future losses are more likely to be borne by insurance institutions than by the individual. For this reason, it becomes even more important to secure remedies for insurance institutions which will stimulate innovations and development in the public interest. In my opinion, Blum and Kalven have made a valuable contribution in helping to formulate responsible public and private policies vitally affecting the future of insurers and their policyholders.

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Contract Law in America: A Social and Economic Case Study.

This is a challenging book. The tone is set in the Preface, where Professor Friedman talks of "the devastating obsolescence of legal education." The law schools "fail to teach the legal system as a whole, let