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Public Law Perspectives on a Private Law Problem: Auto Compensation Plans by Walter J. Blum and Harry Kalven, Jr.

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There are automobiles. There are automobile drivers. There are automobile accidents. More often than not, there are victims of automobile accidents. Sometimes the drivers cause the accidents; sometimes not. Sometimes the victims themselves cause the accident; sometimes not. Apparently, it will be ever thus.

Under our present common law system of tort jurisprudence, those victims who do not cause the accidents have the right to recover the costs of their accidents from those drivers who do cause the accidents. But the process of recovery is both time-consuming and uncertain. Moreover, those victims who themselves cause or help to cause the accidents, those who are victims of non-negligent drivers, and those who cannot prove their right to recover must bear their own costs.

Out of concern for both the victims who face time-consuming and uncertain tort litigation and the victims who cannot even hope to recover the costs of their accidents under the present system, several law professors and a few practitioners have long advocated the abandonment of the common law system and its replacement with some compensation plan designed to end the delay and provide compensation for all victims.

It is to this issue that the authors of Public Law Perspectives on a Private Law Problem have addressed themselves. Their attention is directed to the resolution of a policy issue; although they profess their book to be aimed most pointedly toward law students, it offers much to all of us who are either automobile owners, automobile drivers, prospective victims of automobile accidents, tort lawyers, or just plain taxpayers.

Professors Blum and Kalven point out that proponents of automobile compensation plans approach the issue as if it were simply a question of "what is the most expeditious arrangement for 'shifting the losses' of automobile accidents from the victims who would otherwise bear them?" They say, however, that the more difficult question, as it is traditionally put at common law, is, "what losses should be shifted from the victims to others?" Obviously, then, there is a radical difference in the points of view of proponents and opponents of the plans, whatever may be the details of the plans. These authors quite ac-
curately conclude that the latter question should be answered before the former is even asked, and that one cannot fairly argue for the adoption of any automobile compensation plan without first satisfactorily disposing of the issue posed at common law. It is here, of course, that one is first conscious of "public law perspectives" on a "private law problem."

It is at this point also that one should consider, as is done in this excellent little book, to whom the losses should be shifted, if at all. As the authors say, allocating the costs of automobile compensation plans raises a fundamental issue of fairness.

Proponents of automobile compensation plans argue that the adoption of some plan or other would not increase the aggregate costs of automobile accidents, but would only result in more expeditious distribution among all victims of the funds presently available. Not so, counter Blum and Kalven. Vastly increasing the number of compensable claims and increasing the claims-consciousness of automobile accident victims could not be accomplished without correspondingly increasing costs to be shifted. The additional money to meet this increased need must come from somewhere. Administrative savings are not likely to provide it.

The authors suggest that there are four sources from which the additional money might be had. First, the added costs could be borne by motorists in increased insurance premiums. Second, it might be provided by the victims presently compensated under the common law system through reduction of their recoverable damages. Third, it could be shared by all victims as a class through accident insurance which they themselves would be required to carry. Fourth, it might be borne by society as a whole through expansion of the social security system. And, it goes without saying, some combination of these sources could be utilized.

If by the very adoption of an automobile compensation plan we were to abandon the present common law system's concern with the concept of fault, what justification could there be for the imposition of the added costs on either motorists or victims? While Professors Blum and Kalven do not discuss the moral and ethical implications of discarding the fault concept, they do mention in passing that the concept of fault is closely tied to views of personal responsibility and hence to values that have deep cultural and religious roots.

It becomes apparent, then, that substitution of a compensation plan for tort liability as we now know it would most likely be done through expansion of the social security system. And again we see a private law problem in public law perspective. So, says this book, those
who propose various types of automobile compensation plans should be forthright and candid in presenting them not as mere extensions of the present system or adaptations to it, but rather as another expansion of the welfare state.

An inescapable question is posed. As stated by Mr. Justice Marshall M. Porter of the Supreme Court of Alberta it is this: "Why should free and responsible men, in exchange for the promise to be paid something in all events, give up their right to recover what they deserve?"

This essay, drawn from material the authors used in delivering the 1964 Harry Shulman Lectures at Yale Law School, is a short but powerful argument by Professors Blum and Kalven that there is no persuasive moral, social, or economic justification for replacing the common law tort system and its fault concept with welfare type legislation.

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