

BOOK REVIEW

AUTOMOBILE ACCIDENT COSTS AND PAYMENTS. BY ALFRED F. CONARD, JAMES N. MORGAN, ROBERT W. PRATT, JR., CHARLES E. VOLTZ & ROBERT L. BOMBAUGH. Ann Arbor: The University of Michigan Press, 1964. Pp. xxviii, 506. \$12.50; BASIC PROTECTION FOR THE TRAFFIC VICTIM. BY ROBERT E. KEETON & JEFFREY O'CONNELL. Boston: Little, Brown & Co., 1965. Pp. xv, 624. \$13.50; PUBLIC LAW PERSPECTIVES ON A PRIVATE LAW PROBLEM. BY WALTER J. BLUM & HARRY KALVEN, JR. Boston: Little, Brown & Co., 1965. Pp. vii, 88. \$1.45.

E. Wayne Thode †

I have been asked to review these three books as a unit. Obviously such a request carries with it license to forego a great deal of the detailed descriptive matter and analysis that often is found in the review of a single book. My efforts are directed primarily at discovering how these books support, complement or challenge each other.

This trilogy furnishes ample reading material for many a long, frustrating night. My frustration lies in the fact that the clear, incisive light of morning never came. The difficulty is not in the books—each fulfills an important role in the over-all inquiry—but is in the complexity of the subject matter, the felt need for compromise and the inability of anyone to ascertain concretely the cost and effect of alternative proposals. Statistics for 1964 establish the magnitude of the problem: 48,000 dead, 1.6 million injured and untold millions directly affected by the destruction left in the wake of the automobile, the figures continuing to climb.

The basic issue is easily stated: Should the tort liability system of compensation of traffic victims be changed? If the answer is "Yes," then the logical follow-up is: What kind of system should replace the present one? The basic issue has two facets that are separable, but not independent in that a major change in one will affect the other. The first pertains to the legal basis for allocation of costs between the victim and other interested parties, and the second deals with the method of compensating those traffic victims who will have some portion of their losses shifted to another party.

The most effective plan for obtaining the full benefit of these three books is to begin with *Automobile Accident Costs and Payments*.

† Professor of Law, University of Texas. B.S. 1943, University of Illinois. LL.B. 1950, University of Texas. S.J.D. 1964, Harvard University.

This study, another in the long and valuable series of research projects carried on under the direction of the University of Michigan Law School, sets the stage. Professor Conard and his colleagues briefly describe the various existing systems of reparation for injury, illness and death. In addition to discussions of our legally imposed liability systems (tort and workmen's compensation), there are descriptions of the systems of private loss insurance, sick leave and nonoccupational disability insurance, social insurance and noninsured public programs. The magnitude of intake and reparations paid in 1960 through each of these programs is reported. A striking figure in this mass of statistics is the one showing that less than one-half of the premiums paid for tort liability insurance actually ends up in the pockets of claimants. None of the other reparation systems begins to approach this high cost of administration.

The authors set forth certain factors to be used as criteria in evaluating the social value of a reparations system. These criteria are then applied to the automobile injury reparation system with the conclusion that as a system for compensating injured traffic victims the tort liability system works very poorly. The authors did recognize that as a spur to encourage the purchase of liability insurance, and as an attempt to obtain justice in each individual case, the present system may be acceptable; but these inquiries were not pursued in depth.

The heart and primary value of this book lies in 285 pages of charts, figures, descriptions and analyses of a survey of all injuries caused by automobiles in Michigan in 1958. The operation of the tort liability system in dealing with these traffic victims is carefully detailed. A survey in depth was made of an appropriate sample of the serious injury cases. The amount of time, thought and effort that went into this project can only be appreciated by a careful examination of this report. There is a wealth of statistics documenting what has been known for a long time—that *as a method of compensation*, the present tort liability system, which in almost every case involves the injured party and an insurance company, is a very expensive failure.

This remarkable book concludes with short, but informative sketches of the automobile injury reparations systems in England, Sweden, France and West Germany. In each instance, the report is written by an expert in the field from the named country.

The issue that is not answered in the Michigan study is presented as the focus of Professors Blum and Kalven's *Public Law Perspectives on a Private Law Problem*. Their stated interest is in coming to grips with the issue of the proper legal basis for the allocation of the costs of automobile accidents. They assert, justifiably, that the burden of proof is on the proponents of a change from our present fault system. The title of their book indicates an attempt to bring into the problem a new insight, a public law perspective. However, I would have to

cast my lot with Dean Leon Green who in his usual perceptive way entitled an article (which is quite in point on the matters under discussion), *Tort Law Public Law in Disguise*.¹ Nevertheless, a further penetration of the disguise is of value.

In order to present their position the authors state the arguments of the proponents of change, and then answer them. Once again we see demonstrated the wisdom of the observation that if you can state your opponent's case for him, then surely you can cope with his arguments. Blum and Kalven examine the asserted proposition that the fault system has already eroded into a poor compensation system for all traffic victims. Proponents of change argue that the area of dispute really shouldn't involve further discussion of *fault* as the criterion, but only the method of improving the compensation plan. Blum and Kalven demonstrate that the present system is still based essentially on fault, and that a major shift of policy is involved in changing it into a compensation plan.

Blum and Kalven's defense of the fault system is that *fault* has proved to be a workable concept, and:

It should be abundantly clear that the common law never has had information about the incidence of recovery which would follow from the application of its liability rules. What is more important, it has had no expectations about incidence of recovery, and could not have cared less. Its commitment to fault as a basis for shifting losses is independent of any estimates of how many losses will thus be shifted. No empirical study of gaps in loss shifting, insofar as they rest on the absence of liability, can be relevant. The striking point is that under the common law system it is intended that some victims will have to bear their own losses. (Pp. 14-15.)

Here is the crux of the matter. Should the legal system under which the traffic victims seek compensation today be concerned with the incidence of recovery? Should the philosophy of rugged individualism, tempered by the fault doctrine—a nineteenth century product of the Industrial Revolution—control the method of compensating the mass of humanity injured on our highways? Can we justify *fault* as the basis of compensation of traffic victims in today's environment? If the incidence of recovery *should be* a matter of concern, then Blum and Kalven rely too heavily on the common law "eye shutting" technique.

Possibly the authors had second thoughts about the efficacy of their defense of the fault system in this context, or more likely, as good lawyers they wanted to explore fully the opponent's case. They

¹ 38 TEXAS L. REV. 1, 257 (1959).

conclude with an examination of various compensation plans and find that in terms of important public policies none is satisfactory. They state the obvious. If all traffic victims are to be compensated and total costs are to remain somewhere near the present level, then aside from added funds made available by administrative savings, the money must be obtained by reducing the awards to those who would receive compensation under the present system. This money would most likely be obtained by eliminating awards for pain and suffering. Blum and Kalven oppose the elimination of such "dignitary" elements of damage, and further assert that on policy grounds the elimination of such damages cannot be justified. (Pp. 35-36.) They state that the presently compensated victims will receive nothing in exchange for giving up the pain and suffering portion of the damages. (Pp. 33-34, 72.) The answer to this is clear. A potential victim, not an actual victim, is being discussed. He gives up his potential for "full recovery" in some accidents under the present system for the assurance of some recovery in every automobile accident in which he is involved. Thus, their policy of the need for consideration is fulfilled.

These authors reach the conclusion that there is no basis in common sense, economic analysis or justice for placing the costs of all traffic accidents on all motorists, as contrasted with leaving much of the cost on some of the victims as we presently do. In addition, they foresee that a compensation system would destroy the deterrent effect of the present system, and that the private insurance industry might well be supplanted by a system of government-administered welfare benefits.

This book furnishes a needed perspective. We should not blindly assume that the fault system of compensation of traffic victims is a failure. We must examine the policies that are necessarily involved in adopting any other system. My difficulty with the book is that I am not convinced by the arguments advanced by the authors to support a continuation of the present system.

The final book of this trio is Professors Keeton and O'Connell's *Basic Protection for the Traffic Victim*. These authors first examine the fault system as it operates in practice, its impact on our courts and the effect of compulsory liability insurance requirements on the system. They find that the fault-liability insurance system has resulted in some over-compensation of minor claims, and almost invariably an under-compensation of major claims (if compensated at all). This, plus the hardships, waste, delay and uneven application of the fault principle lead them to the conclusion that the fault system is inadequate as a basis for compensation of traffic victims in today's world. From my viewpoint, they have carried the burden of demonstrating the inadequacy of the fault system as applied to traffic victims, thus meeting Blum and Kalven's burden of proof requirement.

Several proposed, or operational, compensation plans are reviewed, and their shortcomings and difficulties, from the perspective of these authors, are exposed. The Blum and Kalven thesis is discussed at some length, and disposed of in a manner that I find convincing. This book then adds a new dimension. It is not purely descriptive and statistical, as is the Michigan survey, nor is it merely argumentative, as is the Blum and Kalven work. Keeton and O'Connell combine their creative talents and present, not in generalities, but in specific language appropriate for legislative adoption, a plan of "Basic Protection for the Traffic Victim." It is thorough, explained in painstaking detail and disappointing.

The disappointment arises in part from its compromises. The authors are presenting a suggested plan for adoption by state legislatures. They recognize a need for caution and compromise, but one wonders why the authors don't present the optimum plan. Legislative proponents of the best plan could compromise from that position. Why start with a compromise which will almost surely be further compromised, if adopted at all?

Under the Basic Protection Plan each motor vehicle is covered by a new form of compulsory insurance, and every injured person (excluding a claimant who intentionally inflicts injury on himself) receives up to 10,000 dollars reimbursement for economic out-of-pocket losses. A detailed analysis or description of the plan is beyond the scope of this review, but certain aspects will be mentioned. No tort liability recovery is available to the person not suffering more than 10,000 dollars in economic loss and 5,000 dollars in pain and suffering. To state it another way, if this plan is adopted each person covered would give up his potential pain and suffering and loss of earning capacity damage elements if they do not exceed a total of 15,000 dollars, for the certain recovery of up to 10,000 dollars in economic out-of-pocket loss.

However, the tort action based on fault is "preserved" for those whose damages exceed the 15,000 dollar level, subject to a right of subrogation by the carrier of the Basic Protection insurance. Property damage resulting from automobile accidents is left for determination under the present tort liability system, as is the first 100 dollars (or some other deductible amount) of the net economic loss from personal injury. Basic Protection benefits are normally to be paid as losses accrue, and the maximum recovery for work loss is 750 dollars per month. Added insurance protection is to be made available, for a price, to each person who desires to protect himself further. However, payments received from collateral sources are taken into account in determining the basic benefits.

The definition of "motor vehicle" includes a common carrier, and at least as to passengers, the Blum and Kalven policy argument

relating to the giving up of benefits without receiving a *quid pro quo* has considerable merit. Finally, recovery under the policy is available only for injury "arising out of the ownership, maintenance, or use of a motor vehicle as a vehicle." This means that *proximate cause* is still with us under the guise of "arising out of." Its retention is justifiable; with insurance coverage limited to injuries growing out of designated activities, the problems of factual connection and injuries within the insured risk are necessarily present.

To my mind the Basic Protection Plan raises the following issues which must be confronted:

- (1) Is a change in the method of compensation of traffic victims which leaves the most serious cases of injury to decision under the present fault system really worth the effort? The very cases that these authors pointed to as the most inadequately handled under the fault system are left to the vagaries of that system except for the 10,000 dollars of basic protection. Political considerations (a sop to claimants' attorneys?), a hoped for deterrent effect from the threat of large tort judgments and the efficacy of the fault system as the basis for allocating the impact of large losses are the reasons given. A large measure of my disappointment is focused on this point.
- (2) Is the proposed plan too complicated to be understood and administered effectively? It is complicated, but in this respect pales beside our present fault system. With study, and in light of the very detailed discussion of each section of the proposed plan, it can be mastered and administered fairly easily.
- (3) What will it cost? The lack of any real knowledge about cost is probably inherent in every new proposal, but is very troublesome when trying to compare plans. Can the insurance industry give more help than it has?
- (4) Are the tremendous administrative costs that are involved in obtaining and transferring the premium dollar to the traffic victim justified, or is this a place where savings may also be made? With the power of the state being exerted to force the purchase of insurance, and with legislation controlling the method of distribution, shouldn't the insurer's costs receive the same close scrutiny that the fault system has undergone?
- (5) Can we realistically expect that if change is forthcoming, the fifty jurisdictions will achieve any semblance of

uniformity? The authors discuss at length the problems of administration of the Basic Protection Plan caused by nonresident motorists not covered by such a plan in their home states. In fact, several sections of the Plan are devoted to the various facets of this problem. But the crucial question is never posed: *Isn't federal legislation the only realistic hope for a change in the fault system that will in fact provide Basic Protection for all traffic victims?*

This book is an excellent example of a scholarly, yet practical work that will have great impact on the lives of all of us in the years to come. The final product may not closely resemble the present package, but the groundwork has been completed and specific proposals have been made that furnish the basis for discussion, debate and action that will, almost inevitably, result in statutory change in the present method of compensating traffic victims. Yet, without the contribution of the other two works that make up this trio, the Keeton and O'Connell product would not be the outstanding work that I believe it to be.