THE IMPACT OF LIABILITY INSURANCE UPON THE CONCEPTUAL BASIS OF LOSS ALLOCATION*

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During the past fifteen years or so increasing dissatisfaction has been expressed, particularly in academic circles, with the system of compensating the victims of negligently caused motor-vehicle accidents (who, of course, form only a proportion of all victims of motor-vehicle accidents) through the employment of the traditional device of fault-based tort liability coupled with liability insurance, either voluntary or compulsory.[1] The suggested alternative has been, in general, some form of compensation plan, based on the insurance principle but rejecting fault liability. Some four years ago, in a series of lectures delivered at the Yale Law School, first published as a law review article[2] but later as a small monograph,[3] Professors Walter J. Blum and Harry Kalven, Jr. made a plea for a careful re-examination of the basic assumptions underlying such plans. They suggested, among other things, that there was still a good deal to be said, from the public law point of view as well as from the private law point of view, for retaining the traditional rules of liability in tort as the basis for shifting the losses caused by automobile accidents, even if the losses themselves, or, more exactly, the risks of having such losses shifted on to one, are distributed by means of liability insurance. The contention of this essay is that if the assumptions underlying the fault-liability principle are looked at side-by-side with the assumptions underlying the accompanying liability insurance schemes, the apparent rationality of the fault-liability principle will be considerably weakened. Following upon this, certain other of the points made by Blum and Kalven will be examined with a view to assessing their force.

It seems desirable to begin by making more precise three associated ideas which at times appear to be used interchangeably These are

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* This is a revised version of a brief paper which was delivered to a seminar of torts teachers convened at the Australian National University on 19 and 20 August 1967. The writer's task was to discuss the effect of accident insurance on the conceptual basis of risk allocation, and to examine in this connexion the recent monograph of Blum and Kalven, *Public Law Perspectives On a Private Law Problem* (1965).

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1 It would be tedious to attempt to list even a fraction of what has been written on the topic. A 'comprehensive but not exhaustive' bibliography covering twenty four pages appears in Keeton and O'Connell, *Basic Protection for the Traffic Victim*, (1965) at 543-566.

2 In (1964) 31 *U. Chi. L. Rev.* 640.

3 *Op. cit. supra.*

the three ideas, referred to by implication in the preceding paragraph, of loss-shifting, loss-distribution, and risk-distribution.[4] 'Loss-shifting' is a function of private law—characteristically of the law of tort. It is individualized—that is to say, the loss is shifted wholly or partly from one person to another person, or, less frequently perhaps, to a defined group of persons—and it depends upon an evaluation of the loss-causing event, after it has occurred, in accordance with predetermined standards, or criteria for loss-shifting. Two criteria are most commonly employed: the criterion of fault in the person to whom the loss is shifted, and the criterion of 'the risk voluntarily created' by the person to whom the loss is shifted.[5] In the common law of tort the first is exemplified by the action of negligence, which at present founds liability for damage caused by motor-vehicle accidents; the second is exemplified by *Rylands* v. *Fletcher.*[6] 'Loss-distribution,' when it is a function of law and not merely of public charity, is a matter of public law; it is 'socialized.' In Savatier's words,[7] it is not a matter of liability *(responsabilité)* but of solidarity. It, too, takes place after the event. Examples are Government-sponsored social-security schemes and Government-sponsored compensation schemes, such as the United Kingdom and New Zealand schemes for the compensation of victims of crimes of violence. It may of course be said that this, too, is 'loss-shifting'; but the losses are shifted from the individual to the community at large, so it seems useful to provide a separate term to describe this.

'Risk-distribution,' unlike the other two activities described, takes place before the event. After the event it may result in loss-shifting or loss-distribution.[8] It again is basically a matter of private law, a function of the private-law contract of insurance. The solidarity which may be said to characterize it is voluntary in its inception. Individuals, few or many in number, enter into contracts with one another, or (characteristically nowadays) with a large organization, in order to create a fund which will be sufficient to distribute among them all any losses incurred in a given period and thus recoup to each loss-suffering individual the whole or an agreed part of his loss. The amount which each is to contribute to the fund is calculated on an actuarial assessment of the risk of such losses in the given period. The losses themselves are therefore seen as statistically highly probable, we might almost say statistically 'inevitable'; for all the

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4 'Loss-distribution,' of course, entails 'loss-shifting'—though to a more or less undefined group instead of to a specific person or persons. A 'loss' is simply the result of a 'risk' which has eventuated. There are occasions when interchangeability is intelligible and permissible.

5 See Savatier, 'Comment repenser la conception francaise actuelle de la responsabilité civile,' (1966) *Recueil Dalloz (Chronique)* 149.

6 (1868) L.R. 3 H.L. 330.

7 *Supra* n. 5 at 152.

8 See 4, *supra.*

calculations are based on a prediction that, in Morris' words, 'the future will be much like the past.'[9]

The particular method of risk-distribution relevant to the topic now under discussion is accident insurance. This may be subdivided into two types, 'direct' and 'indirect.' 'Direct' accident insurance is insurance against primary, or 'unshifted,' losses. Personal accident insurance is an example. Many of us carry this when we travel, especially by air.[10] 'Indirect' accident insurance is typified by what is commonly known as 'liability' insurance. It is insurance against secondary or 'shifted' losses. It is taken out by persons who fear that their activities may expose them to the risk of being made defendants in a tort action, either because of 'enterprise' or vicarious liability or because of fault liability. Their concern is to protect their assets against depletion by the imposition on them of a liability which, in the phrase quoted above, is statistically 'inevitable.'

It is submitted that if one looks at the problem of distributing losses caused by motor-vehicle accidents from this point of view one may see it in a somewhat different light. From the individualistic point of view of 'loss-shifting' the conduct of the defendant will in many cases appear as 'faulty' or 'blameworthy,' for he has departed from the standard of conduct of the 'average reasonable man,' the '*bonus paterfamilias*' of Roman law. In the particular circumstances which have given rise to the litigation, he should have acted differently. But from the 'socialized' point of view of 'risk-distribution,' his conduct may be seen as no more than the happening of the very risk insured against. He has behaved—or rather, misbehaved—in the very way in which the statistically average man is expected to misbehave. From this point of view it is hard to characterize his conduct as 'blameworthy'; while it may be 'faulty' in the sense of 'defective,' it is not 'faulty' in the sense of 'culpable.' It is merely unfortunate.[11] True it is that by behaving as he has he has caused a loss to be

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9 'Enterprise Liability and the Actuarial Process—The Insignificance of Foresight,' (1961) 70 *Harv. L. Rev.* 554. One wonders, incidentally, whether this is the reason why insurance policies commonly exclude damage due to Act of God—that divine intervention upsets statistical probability. Cf. the *dictum* of Lord Mildew in *Turbot* v. *Mayor of Swindon* (unrep.) quoted *arguendo* by Mr. David in *Dahlia Ltd.* v. *Yvonne,* Herbert, *Uncommon Law* (1948) 314 at 316: that Act of God was 'something which no reasonable man could have expected.'

10 If all or most individuals were prudent enough to carry it, two results would probably follow: premiums (which at present are high) would become lower, and the rule that an accident policy held by a plaintiff would not be taken into account in assessing damages for personal injury (*Bradburn* v. *Great Western Rly. Co. Ltd.* (1874) L. R. 10 Ex. 1) would be abrogated—unless, indeed, insurance companies became subrogated to the rights of their assured. For a vision of what this would mean, in the slightly different context of subrogation of a social-security accident compensation scheme to the rights of negligently-injured victims, see Blum and Kalven, *op. cit. supra* at 84.

11 It would seem that this is the way insurance companies tend to regard the matter—the motorist is constantly being reminded that the reduction of premium which rewards the accident-free is a 'no-claim' bonus and not a 'no-blame' bonus.

shifted to himself, but because the behaviour is behaviour of which there was a known risk, he is able to distribute the loss if he has insured against the risk.

Over forty years ago Seavey said:

> Liability for conduct follows, usually belatedly, popular conceptions of justice. In primitive law it was "just" that vengeance should be visited upon the cause of the harm; in the age of economic expansion and individualism, it was "just" that the burden of loss should be shifted only where the cause of the harm was a knave or a fool.[12]

In the light of what has been said above, we may reasonably ask whether it is any longer 'just' to employ the criterion of fault-liability as a factor in the process which ultimately leads to loss distribution. First, we may ask, is it 'just' to the actor—the defendant? Long ago Sir A. P. Herbert described the Reasonable Man as an 'excellent but odious character' and characterized his excellences as 'worthy and repellent.'[13] 'Odious,' 'repellent' no doubt because, to use other words of Seavey's:

> (s)ince even careful men are human, they are sometimes "careless." They sometimes "unreasonably" permit their attention to wander from the task at hand. But the standard man is always up to standard. He is the careful man being careful. To that extent he is dehumanized.[14]

Is it, then, 'just' to shift loss on to any man because he lacks these repellent and odious qualities, because he is human and not 'dehumanized'; especially if he is allowed to distribute the risk of that loss precisely on the basis that he is human? We might, with reverence, question Holy Writ itself in this connexion; if it is true that 'it must needs be that offences come' (the basic assumption of liability insurance) is it then just to go on to say 'but woe to that man by whom the offence cometh' (the basic assumption of fault liability)?[15]

The matter might be looked at from a slightly different point of view. The notion of 'fault' or 'blameworthiness' connotes among other things that the shifting of loss to the person at fault causes him to suffer the penalty of his conduct; it is 'just' that he should suffer this. But the person who takes out liability insurance is allowed thereby to distribute among others the consequences of his own fault, and thus escape the penalty. One might have thought that such an insurance contract would have been against public policy. Gardner has said: '(i)t can hardly be thought that the law would enforce A's promise to indemnify B against liability for a contemplated assault

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12 'Negligence—Subjective or Objective?', (1927) 41 *Harv. L. R.* 1, at 28.
13 *Fardell* v. *Potts, Uncommon Law,* (1948) 1, at 4 and 6 respectively.
14 *Op. cit. supra* n. 12 at 11.
15 *The Gospel According to St. Matthew,* Chap. 18, v. 7.

and battery.'[16] Equally, it can hardly be thought that the law would enforce a promise to indemnify a man against the consequences of an assault and battery which he might commit some time in the future, even if no present victim is contemplated nor has he any more than an apprehension that assault and battery is the kind of tort to which he is temperamentally disposed. Why then should the law allow him to insure against the consequences of the careless acts to which he fears (or statistics suggest) he is prone? Unfortunately, the point has never been squarely faced;[17] and this must be because it is thought that it is 'just' to allow a man to distribute his secondary or 'shifted' losses in this way.[18] Indeed, so 'just' is it that in many common law jurisdictions, as well as in many others, it is compulsory for a motorist to carry such insurance. In this way many of the losses arising from the use of motor-vehicles on the road are distributed among all motorists; but at the same time the process of distribution through compulsory insurance against what have been called secondary losses produces some anomalies, which will be discussed later.[19]

As already indicated, Professors Blum and Kalven, in the lectures referred to above, have suggested that there might still be a good deal to be said for fault liability, though they do so, in their own words, not by 'developing an adequate brief on its behalf' but merely by trying 'to counteract the fashionable tendency to dismiss it out of hand as being an untenable principle.'[20] They do this by schema-

16 'Insurance Against Tort Liability,' (1950) 15 *Law and Contemp. Problems* 455, at 458.

17 Gardner, *id.* at 462-463, discloses that early liability insurance policies, at any rate in the United States, did not specify the insurance company's obligation as being to 'pay' the tort obligations of the insured, but were carefully limited to agreements to reimburse the insured for money actually collected from him by legal process or voluntarily paid out by him. Nevertheless, they were attacked (a) because they purported to relieve the insured of the consequences of his own wrongdoing and (b) because the clause by which the insurance company agreed to defend the insured against lawsuits amounted to maintenance, (a charge at one time sustained by the Supreme Court of Missouri) and about 1910 it was thought necessary to validate such insurance contracts by State statutes. Kimball, *Insurance and Public Policy* (1960) discloses at 36 that in 1929 the Attorney-General of Wisconsin ruled that, in a malpractice policy, insurance against liability for intentional torts or crimes was illegal because it was against public policy; only negligence might be insured against; but, he goes on to say, the same doctrine would probably not be applied to automobile insurance, though the rationalization of the difference would give trouble. He thinks the real reason would be the crucial importance of automobile insurance as compared with the peripheral malpractice coverage. In England the point has arisen in two cases at first instance, *Tinline* v. *White Cross Insurance Co.* [1921] 3 K. B. 327 and *James* v. *British General Insurance* [1927] 2 K. B. 311, in each of which it was held that a motorist could recover under his policy expense incurred through negligent driving, even in circumstances involving the commission of a crime; both cases were distinguished in *Haseldine* v. *Hosken* [1933] 1 K. B. 822, (a case involving a policy against professional negligence) and both Scrutton and Greer L.JJ. reserved their opinion as to the correctness of the earlier cases.

18 'Just' perhaps because it is expedient that a fund should be created to ensure that injured victims receive their awards of damages in full, even though this entails lifting the burden off the wrongdoer.

19 *Infra,* page 61.

20 *Op. cit. supra* at 8.

tizing the objections to fault as a criterion for liability as being threefold:

> (1) We can never get enough facts about a particular accident to know whether fault was present or not; (2) even if we had a full history of the event we would be unable to rationally apply the fault criterion because it is unintelligible; and (3) even if we knew the history of the event and understood what fault meant, we would be deciding cases on the basis of an unsound and arbitrary criterion.[21]

They then throw doubt on the force of each of these points as an argument for dispensing with fault.

The submission of this essay is that, important as these points are, and powerful as is Blum and Kalven's plea for a re-consideration of them, they do not touch the basic point which has been developed above: that fault of a defendant is no longer a satisfactory criterion for selecting the losses to be distributed because it connotes a personal blameworthiness, a culpability, which the underlying assumptions of the distribution system suggest to be no longer present in the majority of cases. No doubt, as they say, '(t)he whole concept of fault, even in our torts system, is . . . closely tied to views on personal responsibility—and hence to values that have deep cultural and religious roots . . . ';[22] but under the impact of liability insurance the tie must today be much less close than they suggest. The very distinction between the standards of civil negligence and criminal negligence, in the context of road accidents and the offence of negligent driving causing death,[23] seems to point to a shift in views concerning personal responsibility. It seems, however, that in this part of their monograph Professors Blum and Kalven are still looking at things rather too much from the private law perspective, from the point of view of the individual case; this, it is submitted, appears from a passage on page 12 of the monograph which is in striking contrast to the theme which the preceding pages have attempted to develop. Dealing with the argument that fault is an unsound criterion, because the law exaggerates the contribution of the actor's fault to an accident, they say that either in tort or in crime it is hard to see what else the law could do but single out the conduct of the individual actor, for 'the law is charging the actor for a flaw in conduct that the mass of mankind . . . could have avoided.' The present argument is that the law—the tort law, at any rate—is charging the individual for a flaw in conduct which perhaps that dehumanized individual, the careful man being careful all the time, might have avoided, but to which the mass of mankind is prone.

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21 *Id.* at 9.
22 *Id.* at 8.
23 See *Callaghan* v. *Reg.* (1952) 87 C. L. R. 115.

More important as an argument against the fault principle is the argument the authors introduce, additionally to the threefold objections mentioned above, that all drivers are in the same boat morally, since all drivers are at some time or other clearly negligent, but that only some negligent acts lead to accidents; so that pure chance, the chance of other circumstances combining with the negligence, is in effect the cause of most accidents. Because of this, all drivers ought to pay for the damages inflicted by drivers as a class (presumably the authors mean all damages caused in situations in which negligence was an element) since it is unjustifiable to place the burden solely on those whom chance did not favour. (In passing, it should be noted that this result is achieved by compulsory liability-insurance schemes: but the authors do not note this). The authors attempt to refute the argument by pointing out that it is 'very likely' an overestimate that all drivers are alike in being occasionally negligent—a palpable guess which is 'very likely' to be wrong[24]—and reinforcing this by suggesting that there is probably a difference in the degrees of risk taken by different people engaging in the same essentially risky behaviour. But they then go on to draw attention in a footnote[25] to the 'accident-proneness' hypothesis outlined by James and Dickinson,[26] apparently without accepting that accident-proneness is a characteristic or propensity which enters into the 'total make-up' of some people and not of others, and can hardly be regarded as something for which the sufferers can be blamed, even if the external manifestation of the accident-proneness is a greater readiness to take risks or (what is more likely) a lesser capacity to perceive the risks inherent in a situation or a course of conduct. James and Dickinson assert, at the conclusion of their paper that 't(he) findings of the industrial psychologists who have studied accident proneness . . . point up the emptiness of the arguments, both from morals and from expediency, which are currently used to support the fault principle of liability.'[27] With this the writer enthusiastically agrees.

If then the impact of liability insurance and its associated ideas on our present thinking concerning schemes of loss allocation is to cast doubts on the utility and justice of the fault principle as a criterion for choosing the losses to be allocated, do the ideas underlying liability insurance point to any better path than the present? Two alternatives may be canvassed; first, that since an underlying concept of liability insurance is to distribute the risks of a particular operation, the losses to be distributed should be selected by the risk principle rather than the fault principle, and second, that now that liability

24 There is pretty certainly a great deal of 'undetected' negligence—conduct which objectively creates a risk of accident but which never results in an accident. One suspects more and more that the conduct of many motorists at intersections is of this kind.

25 *Op. cit. supra* n. 29, at 14.

26 'Accident Proneness and Accident Law,' (1950) 63 *Harv. L. Rev.* 769.

27 *Id.* at 794.

insurance, which is insurance against secondary or 'shifted' losses, is increasingly becoming compulsory, utility and 'justice' demand that it be converted into a scheme for insurance against primary or 'unshifted' losses. Both these suggestions engage the attention of Blum and Kalven in the next section of their argument. Of the first they disapprove; the argument runs, shortly, that the American version of the 'risk principle' is the Restatement doctrine of liability for ultra-hazardous activities, and that this cannot without distortion be applied to motoring. 'Ultra-hazardous activity' is defined by the Restatement as an activity which '(a) necessarily involves the risk of serious harm . . . which cannot be eliminated by the exercise of the utmost care, and (b) is not a matter of common usage.'[28] A note to the section containing this definition[29] points out that the operation of automobiles is matter of common usage, and moreover that the risk involved in the careful operation of a carefully maintained automobile is slight.

One's quarrel here is less with Blum and Kalven's argument than with the Restatement itself. In the first place, the Restatement (more exactly this section of it) is now thirty years old; and it is submitted that in the last thirty years we have become more and more aware that automobiles are notorious risk-creators, even when driven by persons doing their utmost to be careful. In the second place, the passage in the Restatement indicates that the developed doctrine of ultra-hazardous activity (which, be it noted, is a specifically American doctrine in this form) has come a long way from its origin in *Rylands* v. *Fletcher*.[30] 'Common usage' appears as a gloss on the 'natural user' qualification imposed by Lord Cairns[31] on Blackburn J.'s original generalization.[32] Its genesis appears to have been the need to distinguish *Smith* v. *Kenrick*,[33] in which water percolated into a lower mine because the upper mine-owner worked out his seams of coal, leaving no barrier between his mine and that of his neighbour, from *Baird* v. *Williamson*,[34] in which the mine owner pumped water out of his mine and it passed into the mine of the plaintiff, so that the latter case might apply. But the gloss is quite inconsistent, it is submitted, with the origin of Blackburn J.'s famous generalization. The first case of absolute liability which he shepherded into the fold was that of cattle-trespass. Nothing could be more a matter of common usage than the grazing of cattle. No one could call it an ultra-hazardous activity. But cattle are prone to stray; moreover, when they stray

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28 *Restatement, Torts* (1938) s. 520.
29 *Id.*, n. (*e*).
30 (1866) L. R. 1 Ex. 265 (*sub. nom. Fletcher* v. *Rylands*); (1868) L. R. 3 H. L. 330.
31 (1868) L. R. 3 H. L. 330, 338.
32 (1866) L. R. 1 Ex. 265, 279.
33 (1849) 7 C. B. 515.
34 (1863) 15 C. B. (N.S.) 376.

they are liable to eat the herbage in the place to which they stray,[35] thus benefiting their owner, and creating an additional reason why he should pay the price of their straying. So with the motorist; he benefits from his activity, but he creates a risk of injury. Why then should he not pay for the injury of which he has created the risk?

It must be conceded, however, that the shift from fault liability to risk liability, whether confined to motor-vehicle accidents or applied over the whole field of tort,[36] could not be brought about by judicial processes, but would need legislation.[37] If so sweeping an alteration to the basis of loss-distribution were to be contemplated, it would be desirable to 'go the whole hog' and ask whether in the light of the prevalence of compulsory liability insurance, at any rate in the automobile field, it continues to make sense to distribute losses through two operations, requiring losses to be shifted before they could be distributed. For current schemes present some unsatisfactory features; though most of these would be mitigated by adoption of an alternative loss-shifting criterion. At the moment, for example, a driver insures himself against the loss he will suffer as a result of his negligence, if he injures another; but is not covered under the scheme for the loss he will suffer if by his negligence he injures himself (or, in some jurisdictions, his wife).[38] Drivers who may be said to have contributed to the accident by their own negligence are given only reduced access to the insurance fund in respect of their own injuries, although they shift to the fund the whole of the losses they would otherwise suffer as a result of the award in respect of the injuries of other parties. And drivers (and others) who are injured without fault on the part of anyone are denied all access to the fund—although their injuries result from the activity of motoring, and *ex hypothesi* therefore from the happening of some event which was a risk of that activity. The adoption of the risk principle instead of the fault principle for loss shifting would not affect the situation in which the driver was injured in a single-driver accident, whether he were negligent or not;[39] though his passengers would recover irrespective of negligence. But even this anomaly would be removed by the adoption of a compulsory scheme of insurance against primary or 'unshifted' losses resulting from the operation of a motor-car on a highway.

It will be seen that the argument is moving inevitably towards the suggestion that the impact of liability insurance—especially compulsory liability insurance—upon concepts of loss-distribution, in the

35 Early writs of trespass frequently contain specific reference to this.

36 A part of which, of course, it already occupies.

37 This point is made, a little obliquely, by Blum and Kalven, *op. cit. supra* at 30.

38 *E.g.*, in England (the Law Reform (Husband and Wife) Act, 1962), New Zealand (s. 4 of the Matrimonial Property Act, 1963) New South Wales (s. 16B, the Married Persons (Property and Torts) Act, 1901-1964), South Australia (s. 118, the Motor Vehicles Act, 1959) and Western Australia (s. 6A, the Motor Vehicle Third Party Insurance) Act, 1943-1967); it is understood that Victoria will follow suit this year.

motor-vehicle accident field at any rate, must push people's thoughts in the direction of accepting a compensation plan for all victims of such accidents as the only rational way of dealing with the inconsistencies of the present way. This is not a new idea, as the opening phrase of this essay made clear, and the writer's voice makes only a late and tentative addition to the chorus of advocates of this. But Professors Blum and Kalven are not convinced by the pressure of so many earlier arguments, and once they have made the point that 'fault is still a sufficiently feasible criterion of liability so that the current system cannot be said to fall of its own weight,'[40] a proposition which the foregoing pages have attempted to challenge, they turn to examine the arguments for, and more especially against, the use of legislative power to introduce a compensation plan. In effect, these arguments all bear on the simple question, how is the extra cost to be financed? For it is axiomatic that if victims of accidents who have previously had no access to a risk-distributing insurance fund are given that access the drain on the fund will be greater and the cost of the fund will go up.

Three possibilities are explored: (1) making a fund of the existing size go further, by reducing the amount of damages or compensation each victim may receive from the fund; (2) making the existing fund cheaper to administer, so that a greater percentage of the fund is available to meet the claims on it; (3) increasing contributions to the fund, so that either each motorist pays more for his 'insurance' or contributions are levied upon others. Against each of these Blum and Kalven see weighty arguments. It would move too far from the original theme of this essay to examine in detail all that the authors say in their next fifty-odd pages; but two things in particular remain to be said.

The first, at the risk of appearing to digress a little, is to give some account of the recent Western Australian experience in setting up a new Tribunal to take away from the Supreme Court its jurisdiction to hear claims arising out of motor-vehicle accidents.[41] This may be instructive as an example of the way the existence of liability insurance, especially compulsory liability insurance, (premiums in respect of which are paid at the same time as, and on the same account as, registration fees and a Government tax or surcharge) may affect not so much the underlying concepts but the procedures of, and rules concerning, loss-distribution.

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39 Blum and Kalven point out (*op. cit. supra* at 41.) that the problem as to what provision to make for accidents of this kind provided a puzzle for the draftsmen of the prototype Columbia Plan, drafted in 1932 (Columbia University Council for Research in the Social Sciences, *Report by the Committee to Study Compensation for Automobile Accidents*).

40 Blum and Kalven, *op. cit. supra* at 30.

41 The Third Party Claims Tribunal, set up by s. 10 of the Motor Vehicle (Third Party Insurance) Act Amendment Act, 1966.

On 24 November 1965 the Motor Vehicle (Third Party Insurance) Act Amendment Bill was introduced into the Western Australian Legislative Assembly and received its first reading; immediately thereafter the second reading was moved by the Minister for Agriculture, the Hon. C. D. Nalder.[42] Among the provisions of the Bill were some which proposed a radical change in the procedures for determining what losses should be shifted, and an equally radical change in the mode of quantifying those losses. Actions for damages for personal injury arising from the use of a motor vehicle were to be withdrawn from the purview of the Supreme Court and placed within the exclusive jurisdiction of a new tribunal, to be called the Third Party Claims Tribunal. This was to comprise three men; a Judge of the Supreme Court (or a person qualified to be a Judge of the Supreme Court) as chairman, and two members who were to be persons with experience in assessing damages for personal injury claims.[43] The decision of the majority (except on questions of law, on which the final decision was to be that of the chairman) was to be the decision of the Tribunal, and it was not to be open to review in any Court; the Tribunal could, however, on its own motion or at the request of a party, state a case for the decision of the Full Court. The Tribunal was to be given power to award periodical payments in lieu of or in addition to lump sum awards of damages, for, the Minister said: '(i)t is confidently felt some claimants have been awarded large sums of money on medical prognosis which has not been borne out.'[44] The object of the new scheme was apparently to make some attempt to reduce the cost of loss-distribution, for, the Minister said:

> At present third party claims are costing the motoring public of this State about £2,500,000 a year, a figure which is steadily rising. While it is not intended that the unfortunate victims of motor accidents should not receive proper and adequate compensation, it is felt not only in this State but elsewhere that perhaps a more modern approach to this problem, which is becoming one of economics as far as the motorist is concerned, might be attempted.[45]

So, he explained, it was hoped by means of the use of a single Tribunal to obtain consistency in awards of damages, which in turn would encourage settlement of claims rather than litigation; and

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42 (1965) 172 *Western Australian Parliamentary Debates,* at 2451.

43 It was generally thought that this curious provision was intended to secure the appointment to the Tribunal of two non-legal members with experience in accident insurance. The provision is described as 'curious' because such people do not in fact have direct experience in assessing damages in respect of personal injury claims; their experience is experience in predicting what damages Courts are likely to assess. One catches an echo of one objection to the 'prediction' theory of law; that judges deciding cases are not predicting what they will in fact decide, but doing something else. Had the original provision been left intact one wonders how such persons would have found the change of occupation.

44 (1965) 172 *Western Australian Parliamentary Debates* at 2854.

45 *Id.* at 2853-2854.

it was proposed to 'provide some means of easy access to injured persons desirous of having claims determined with a minimum of legal procedure, documents, *etc.*' for '(t)he present cumbersome legal procedure necessary to bring an action to hearing is considered not only outdated for this type of action but costly to litigants.'[46] The Bill was not proceeded with in 1965, for it was intended that in the interval which would elapse before the next session of Parliament it should be the subject of thorough study by all members of the community. The proposals generated opposition both from the legal profession and from the governing body of the Royal Automobile Club of Western Australia. The specific attacks were on the idea of taking jurisdiction in certain types of tort actions away from the ordinary courts; on the limitation of the right of appeal; and on the composition of the Tribunal. These objections were to a great extent founded on questions of principle;[47] but behind them was a suspicion that by its apparent intention to associate persons with insurance experience with the Chairman in the work of the Tribunal, and by isolating the Tribunal from the thinking of the regular courts, both those of Western Australia and the High Court, on questions of quantum of damages, the intention of the Government was, if not to reduce damages, at least to hold them at a 'reasonable' level, and so postpone as long as possible the politically unattractive measure of increasing 'third-party' premiums. In general, spokesmen for the Government hotly denied that this was the intention—though there were one or two speeches which suggested that at least the spokesman himself thought that this desirable position might be brought about;[48] and objections to the form of the Tribunal were partly met by the re-introduction of the Bill with a provision that of the two 'lay' members one was to be a person who had not for the seven years prior to his nomination been employed in connexion with motor-vehicle liability insurance. In the Committee stage in the Legislative Assembly the right of appeal on all questions was restored; the Legislative Council rejected the amendment, but a conference of managers agreed that the right of appeal should remain, save that it should be to the Full Court and not to a single Judge.[49]

It was widely thought that since it had been defeated on the question of the right of appeal on *quantum* of damages the Govern-

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46 *Id.* at 2854.

47 It was generally felt that the ordinary Courts should not lightly be deprived of jurisdiction, particularly when other actions involving identical principles of law—*e.g.* actions for damages for negligently-caused industrial accidents—were to remain with the Courts. For an extended criticism on grounds of principle see Braybrooke, 'The Motor Vehicle (Third Party Insurance) Act Amendment Act, 1966—A Nonprincipled Development in Western Australian Law,' (1967) 8 *U. of Western Aust. Law Rev.* 204.

48 Notably that of the Hon. E. C. House (1966) 175 *Western Australian Parliamentary Debates* at 2879; *cf* also that of Mr. C. C. B. Mitchell, *id.* at 2846.

49 The reasoning behind this may be conjectured; single Judges vary in their views as to *quantum* of damages, but there is more likelihood of a Full Court of three being consistent and therefore predictable.

ment might drop the proposal; but after a considerable interval appointments to the Tribunal were made, and the relevant provisions of the legislation were brought into force in December 1967. It is too early to attempt any forecast concerning the effect which the new scheme will have on awards of damages and general administrative costs; it began its jurisdiction with a rather thin list, as members of the legal profession issued as many writs as possible out of the Supreme Court before its jurisdiction in motor-vehicle accident cases disappeared, and not many judgments have been handed down. Certainly it has shown itself willing to use its power to award periodical payments rather than lump sum awards in appropriate cases;[50] but, apart from one case which narrowly missed being the perfect example of the apparent virtues of the new system, the plaintiff dying unexpectedly just before an award for periodic payments to compensate for loss of wages was handed down,[51] no evidence has yet come to light to indicate what effect this may have on the costs of the new scheme.

It should perhaps be noted that the new legislation did make two alterations to the previous rules as to liability and damages; injured spouse was permitted to sue negligent spouse, and so to have access to the insurance fund, and the limitation on the extent to which the Fund would meet damages awarded to an injured passenger in the vehicle of a negligent driver was removed.[52] It is not clear whether it was thought that any extra cost resulting from the spreading of the fund a little wider could be met from savings; but the Hon. the Minister for Agriculture, who introduced the 1966 Bill into the Legislative Assembly, appears to have been reconciled to the fact that premiums would rise as a result of this.[53]

This bears directly on the second of Blum and Kalven's points to be discussed. They conclude that if a compensation scheme is introduced there is no escape from the need to provide more money to operate it. Who, they ask, ought to pay it? They assume that those

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50 Its first award of this kind was made on 8 May 1968 in the case of *Lopez* v. *Cousins* (The West Australian, 9 May 1968, p. 2); Lopez, left an incomplete quadriplegic as a result of the accident, received a lump sum award of $38,594 plus $43 a week for loss of earning capacity (until age 65) and a quarterly payment of $50 for medical, hospital and medicine expenses. Before the accident his wages were $50 a week. The lump sum was made up of special damages $13,594 and general damages $25,000.

51 The case (*Schaper* v. *Foppoli*, The West Australian, August 6 1968, p. 2) was adjourned for a re-assessment of damages which might become due; query, to dependents? Had the death occurred after the making of the award the position of the dependents would have been rather less fortunate, it is submitted; the Act makes provision for the review of periodical payments, as well as for payment of a further lump sum award, on application by the claimant or any party to the proceedings, but did not contemplate the situation which so nearly arose, and which raises in a new form the problem of the 'lost years'—see Fleming, 'The Lost Years,' (1962) 50 *Cal. L.Rev.* 598.

52 From 1 July 1944 to 30 November 1962 this was £2,000, with a maximum of £20,000 in respect of any one accident. After 30 November 1962 the limits were raised to £6,000 and £60,000 respectively.

53 (1966) 175 *Western Australian Parliamentary Debates* 2234.

who advocate compensation plans contemplate placing the whole of the cost on to motorists; and they seek to find a justification for this. The argument of the earlier part of this paper suggests that the justification is that of enterprise liability—not, be it noted as a criterion for loss-shifting but as a reason for loss-distribution among motorists. It seems pretty clear (if the figures quoted by the Hon. Mr. Nalder as Western Australian statistics are typical of other jurisdictions) that this is already the justification for present compulsory liability insurance schemes; for, he asserted, approximately ninety six per cent of motor-vehicle owners in any one year are paying for the benefit of the other four per cent.[54] But Blum and Kalven reject this. In part their argument is economic—that the true function of enterprise liability is the proper allocation of costs, and that the economist cannot really tell us where the costs of automobile accidents properly belong.[55] In part, however, it appears to rest on the curious assertion that motor vehicle accidents are 'impregnably a cost of multiple activities'—activities which include walking,[56] road building, motor-car manufacture and no doubt others.[57] But this, with respect, is quite fallacious. *Vis-à-vis* walking, the driving of a motor-vehicle is much the less 'natural' activity. The thrust of *Rylands* v. *Fletcher* liability is that it is the 'unnatural' activity which should bear the cost of loss, as against the natural one; and it is the motor-vehicle which has made the life of the pedestrian so risky. The other activities referred to are all ancillary to the demand for motor-vehicles to drive. It is true that defects in motor-vehicles, defects in roads, even defective behaviour in pedestrians, bring each its share of accidents on the road; but the activity of motoring is the *sine qua non* of each. To load the whole costs of accidents on to the motorist may seem a little rough; one may with Blum and Kalven sigh for finer tools; but it would be no rougher that the present system of liability insurance, which loads the cost of being a faulty motorist on to the non-faulty.

The most puzzling single feature of Blum and Kalven's book is the fixed affection of the authors for fault liability as an integral part of the loss-distribution process. No doubt when 'loss-shifting' *simpliciter* is in question it is wrong and unfair to attempt to shift all losses on to other individuals, and fault liability offers the fairest way of choosing between the losses to be shifted and the losses which must lie where they fall.[58] But once shifted losses are distributed among all those who engage in the enterprise creating the risk of faulty conduct, the picture changes. One would think that in what Calabresi

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54 (1965) 172 *Western Australian Parliamentary Debates* 2852.
55 Blum and Kalven, *op. cit. supra* at 61.
56 Or, as Blum and Kalven (following earlier precedent, admittedly) call it, 'pedestrianism'; *id.* at 61.
57 Blum and Kalven add (*ibid.* n. 129) tire manufacturing (which is understandable) and shoe repairing (which is not).
58 Although even here a case can be made out, at least in some areas of human activity, for enterprise liability.

has called 'the wonderful world of Blum and Kalven'[59] liability insurance did not exist; but the monograph shows that the authors realize that it exists, recognise, moreover, that compulsory liability insurance is increasingly widespread, and accept that, among other effects it has, it is likely to 'dampen whatever stimulus to deterrence there may be in liability rules.'[60] Yet they do not accept that its existence erodes almost all of the justifications which can be advanced for the retention of fault liability. Calabresi characterizes their whole position in the monograph as 'essentially contrary to most current academic thought, and, nevertheless, on the whole wrong.' The writer would not attempt to follow Calabresi into the economic analysis which leads him to this conclusion, but would submit that the foregoing pages show that Blum and Kalven's approach to the conceptual basis of loss distribution in a field increasingly keyed to compulsory liability insurance leaves much to be desired.

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59 Calabresi, 'Fault, Accidents, and the Wonderful World of Blum and Kalven,' (1965) 75 *Yale L. J.* 216.

60 Blum and Kalven, *op. cit. supra* at 69. In a preceding passage the authors say that they 'concluded that tort sanctions probably had little impact on the quality of driving conduct; but . . . observed that if deterrence of accidents were taken as a serious goal for liability policy it appeared that the common law combination of negligence and contributory negligence was most likely to maximize whatever deterrent potential there might be.' Surely, however, few drivers approach the wheel with the attitude of mind 'I must be careful or I may be the defendant in a negligence action'? How can they know that they will hurt another without hurting themselves? It may be conceded that we know little about the mental attitude of drivers to risk-taking; but even in the days referred to by Mr. H. N. Guthrie in his second reading speech on the Motor Vehicle (Third Party Insurance) Act Amendment Bill, 1966 ((1966) 175 *Western Australian Parliamentary Debates* 2792), when passengers were not covered by insurance and drivers either refused to give lifts or plastered the car with notices saying that the passenger travelled at his own risk, no driver, surely, thought 'I might be careless' but rather 'I might be involved in an accident *and be unlucky enough to be an unsuccessful defendant.*'