

and Canada have virtually done away with the jury in personal injury suits, in no small part because of a lively disapproval of the Hollywood type of trial; and as the impact of Mr. Belli's book spreads across the country, with its full revelation of the calculated method by which the thing is done, I would expect to hear a great deal more of the proposal to abolish it in the United States.

There is much that is excellent in this book, and properly used it can be a thing of value. But it will not be properly used; and it leaves me very unhappy.

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EHRENZWEIG, ALBERT A. *"Full Aid" Insurance for the Traffic Victim*. Berkeley, Calif., University of California Press, 1954. 72 pp. \$2.00 (paper bound).

Everyone knows that the automobile accident problem is one of the most important concerns of modern tort law. And most people see major flaws in the way tort law is meeting that problem. For thirty years or more, only one type of comprehensive solution has been offered—a compulsory compensation scheme roughly analogous to workmen's compensation<sup>1</sup>—though there have been some half-way measures.<sup>2</sup> The comprehensive solution has found no takers in this country, and the half-way measures have brought less than half-way relief. The accident toll goes on apace, and the compensation of victims may well be as inadequate as it was in the early thirties.<sup>3</sup>

Professor Ehrenzweig offers a solution along a new and different path—one suggested by a step already taken by automobile liability insurance companies. He would expand the type of "loss" (or accident) insurance represented by the medical payments clause often found in existing liability policies, so as to make it carry the main burden of compensating accident victims. This is a promising approach and one that deserves earnest and sympathetic study by law makers and insurers.<sup>4</sup>

Two competing doctrines have long stood side by side in tort law: liability based on fault and strict liability. These correspond to "two bases of popular feeling about wrongs, first that the wrongdoer should be made to pay because he has done wrong and, second, that an innocent person damaged should be made whole because he has been damaged."<sup>5</sup> Embedded in the former is probably a deep-seated urge for vengeance, though it is generally clothed in the raiment of healthy deterrence of future wrong.<sup>6</sup> The two bases of feeling noted may often pull in the same direction, but also they are often enough in conflict.

From a functional point of view, the motor accident problem calls for two

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<sup>1</sup> The classic case for such a solution was presented by REPORT BY COMMITTEE TO STUDY COMPENSATION FOR AUTOMOBILE ACCIDENTS (Columbia University Council for Research in the Social Sciences, 1932) often referred to as the COLUMBIA REPORT.

<sup>2</sup> Notably compulsory automobile liability insurance in Massachusetts and financial or safety or security responsibility laws in other states.

<sup>3</sup> See James and Law, *Compensation for Auto Accident Victims: A Story Too Little and Too Late*, 26 CONN. B. J. 70 (1952) (indicating in the area studied persistence of essentially the same conditions as disclosed in the COLUMBIA REPORT).

<sup>4</sup> See James, *Accident Liability Reconsidered: The Impact of Liability Insurance*, 57 YALE L.J. 549, 565-6 (1948).

<sup>5</sup> Radin, *A Speculative Inquiry into the Nature of Torts*, 21 TEX. L. REV. 697, 706 (1943).

<sup>6</sup> Cf. Ehrenzweig, *A Psychoanalysis of Negligence*, 47 NW. U. L. REV. 855, 864-5 (1953).

things: (1) accident prevention, and (2) the minimization of losses that do occur, through equitable and efficient administration. These objectives often go hand in hand, but they may sometimes be in conflict.

As the accident problem has grown in magnitude, there has been increasing demand upon tort law to serve the objective of loss administration. The emergence of liability insurance has furnished a method to distribute and minimize losses, and the liberalization of tort rules has helped plaintiffs get compensation. But the result is far from ideal; its efficiency in promoting loss administration is constantly being thwarted by the cross-pursuit of the fault principle because of "the law's inability to transform a set of quasi-criminal tort rules admonishing a 'wrong-doer' into a tool for distributing losses inevitably caused by the hazards of our mechanized age."<sup>7</sup> This, Ehrenzweig finds, yields a system marked by "delay, perjury, and gamble."<sup>8</sup> He might have added that even the successful litigant finds thrust upon him a burden of providence and wise investment which he is often ill fitted to bear.

Ehrenzweig would solve the riddle by divorcing the compensatory from the admonitory function. Since tort is so much identified with fault and liability insurance is so interwoven with tort liability, he would not have the main burden of compensation carried by either of these, but rather by a form of accident insurance which would provide benefits for victims without regard to fault on anyone's part. The benefits would be roughly comparable to those found under the more generous workmen's compensation plans.<sup>9</sup> They would generally be made by way of continuing payments rather than in a lump sum. Experience has shown that accident victims as a class do not in fact carry accident insurance to any great extent; and those who need such protection the most are least apt to provide it for themselves. Ehrenzweig's proposal would not try to make them do so—a futile task—but would have automobile owners provide it. This is the "full aid" insurance of the title.

Full aid insurance is not to be compulsory. The inducement to buy it would be furnished by legislation which would relieve those covered by it from liability for ordinary (in contrast to criminal) negligence.<sup>10</sup> Drivers not covered would remain subject to existing tort liabilities against which they would be free to take out liability insurance. Ultimately, it is hoped, full aid insurance would supplant liability insurance and cover the field.

Pending adoption of the requisite legislation, Ehrenzweig invites the insurance industry to devise and write full aid provisions with benefits available to claimants who would be willing to waive their tort claims.<sup>11</sup>

Up to this point, the suggestions have very much indeed to commend them. To the extent used, full aid insurance would minimize accident losses far more equitably and efficiently, from a social point of view, than the delay and caprice of the present system, which affords nearly fabulous recoveries to the fortunate few<sup>12</sup> and to their attorneys, but which spells "too little and too late" for the many.

There are, however, things about the proposal in its present form which trouble

<sup>7</sup> EHRENZWEIG, "FULL AID" INSURANCE FOR THE TRAFFIC VICTIM 6 (1954).

<sup>8</sup> *Id.* at 5.

<sup>9</sup> *Id.* at 35-8.

<sup>10</sup> *Id.* at 1, 30 *et seq.*

<sup>11</sup> *Id.* at 39.

<sup>12</sup> Much light could be shed on the social value of such recoveries by a study of how they are spent, or squandered.

me. In the first place, it seems to furnish too little in the way of sanction against the irresponsible automobile owner to make him pull his weight in the scheme. The fear of civil liability does not *now* induce the judgment-proof to pay premiums for liability insurance; and there is no reason to expect the same fear to induce them to pay for full aid coverage. Ehrenzweig would take limited care of the uninsured driver's victims by payments from an uncompensated-injury fund;<sup>13</sup> but even if this took complete care of the victims' needs I object to having other elements in society subsidize judgment-proof car owners for this material part of the cost of their operation. Aside from my personal feeling that such a subsidy is not deserved, I fear it would be planted where it would grow the best crop of irresponsibility that could be had for the seed. This objection could be largely met by making insurance in one form or another compulsory—a solution for which I see no satisfactory substitute.<sup>14</sup>

There is another aspect of Ehrenzweig's proposal which bothers me. This is his treatment of "criminal negligence." Here it seems to me he has not put his finger on the spot which will yield the most in the way of admonition, and perhaps has not stuck close enough to his admirable objective of divorcing the compensatory and admonitory functions. "One of the principal features of the proposed scheme is the denial of relief from liability in cases of criminal negligence."<sup>15</sup> For the "promotion of safety," criminally negligent drivers remain under full civil liability to their victims and/or to the Fund, which is to be given an action for a "tort fine" in such cases. Tort fines are also to be levied against criminally negligent accident victims.<sup>16</sup> It is not clear to me that all this will be much of a spur to safety. There is substantial reason for thinking that liability exerts its most effective pressure towards accident prevention when it is directed at larger units (industrial, transportation, insurance companies, etc.) rather than at individuals.<sup>17</sup> There well may be, in other words, very little correlation between the effective pressure points for accident prevention and the points at which individual fault is greatest, especially since the group of those originally at fault will probably have more than its share of the judgment-proof who will scarcely feel this kind of pressure, and who will, incidentally, furnish little aid to the Fund. If this is true, thought might profitably be given to recruiting part of the Fund from sources which would be more efficient in promoting safety.

To the extent that individual penalties are effective deterrents in the present field, the proposal of tort fines, to be sued for by a Fund which has incentive to pursue the claims, has some merit. It would probably represent considerable im-

<sup>13</sup> This Fund is to be recruited from (1) "tort fines" against the criminally negligent, including both the injurer and the injured (to the extent, of course, that such fines prove collectible) (pp. 30, 33); and (2) such contributions from tax sources as might be deemed to correspond to the taxpayer's saving (e.g. in outlay for the court system) from the new scheme "and to his fair share in the burden of automobile losses as a nonmotorized user of the road." (p. 30).

Recourse against the Fund would be conditioned on the injuring party's *insolvency* or *non-liability*. (p. 30).

<sup>14</sup> The insurance companies offer various forms of financial or safety responsibility laws as the panacea. These have often increased the amount of insurance held, but they still leave too wide a gap. See JAMES AND LAW, note 3 *supra*; NEW YORK INSURANCE DEPARTMENT, THE PROBLEM OF THE UNINSURED MOTORIST, [Report by Dep. Supt. George H. Kline and Sp. Asst. Carol O. Pearson to Supt. Alfred J. Bohlinger, (1951)].

<sup>15</sup> EHRENZWEIG, note 7 *supra* at 33.

<sup>16</sup> *Id.* at 34.

<sup>17</sup> See, e.g., James, note 4 *supra*; James and Dickinson, *Accident Proneness and Accident Law*, 63 HARV. L. REV. 769 (1950).

provement over the practice in our traffic and police courts today. Where tort fines or common law rights are to be pursued by individual claimants, however, there is danger of sacrificing the compensation objective. Ehrenzweig sees one difficulty here, and suggests a remedy which would cut down large common law recoveries to somewhere within hailing distance of full aid benefits.<sup>18</sup> I am even more worried about assuring victims of criminal negligence a speedy and sure access to the minimum benefits of the plan. These are not afforded by full aid insurance even where the injurer carries it. Presumably they are to come out of the Fund if the injurer himself is insolvent. But is it contemplated that the victim must first pursue his common law remedy to judgment and execution unsatisfied before he may have recourse to the Fund? And where there is a question whether negligence has been ordinary or criminal, who has the burden of getting that question settled, if a full aid insurance carrier denies liability? The author's insistence on the importance of tort fines leaves some doubt on these points. If tort fines are to be retained, perhaps the victim might be given full aid benefits at once, in all cases, from the insurance carrier where there is full aid insurance, or from the Fund where there is not. The Fund could then collect the tort fines, for its own benefit or that of the insurance carrier as the case may be.

These suggestions and criticisms do not (even if valid) detract from the great value of Ehrenzweig's proposal. Rather, I hope, they indicate something of the provocative nature of his proposals. In any event, the present work will take its place as one of the most serious constructive contributions to the solution of this critical problem.

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<sup>18</sup> EHRENZWEIG, note 7 *supra* at 33.

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