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In recent years, Albert Ehrenzweig has played the important role of gadfly in stimulating thinking about tort law. His Negligence Without Fault argued with insight and gusto the case for enterprise liability. An article a few years ago proposed "insurability" as the key test of liability.1 Another article suggestively explored the application of psychoanalysis to tort law.2 Looking for new worlds to stimulate, he has now turned his attention to the auto accident compensation problem and in the book here considered proposes a new automobile compensation plan. Like his earlier efforts, it is at once stimulating and irritating, imaginative and incomplete; and on the net balance, a useful contribution.

The new book is scarcely as long as a modest collection of sonnets, and one is tempted to say that Professor Ehrenzweig has now carried to its absolute limit the current trend in law of writing the "small book."3 It was his clear intention, however, to write a brief for a specific proposal, rather than to attempt a full treatment of the auto compensation problem. The overriding objective, as he says, is "to inject into a stalemate of stereotyped proposals and rejections a new approach."

The proposed plan has, it seems, been the product of a conscious political strategy which seeks to skirt all the standard objections to compensation plans and yet to provide all the standard reforms. The result is statesmanlike and ingenious indeed. Following the author's precedent, the book might well have been entitled "Compulsory Insurance Without Compulsion" or "Social Insurance Without Statism" or "The Medical Payments Revolution Without Pain." We are promised a compensation plan which will provide some recovery for all victims of auto accidents; will provide it quickly and with a minimum of litigation; will leave the driver free to insure or not; will leave existing tort law unchanged; will leave the insurance industry free from any additional state control; will revive the admonitory and moral functions of tort damages against the truly negligent driver; and will cost less than current operations. If Professor Ehrenzweig is correct, then, he has produced the irresistible answer to the problem.

The plan, although complex in detail, can be reduced to three basic steps. First, it proposes "full aid" insurance under which the insurance company would pay, under a fixed schedule, damages for the injuries of all victims of the insured auto. This is of course a large extension of the current first-aid clauses, and the play on words is intended—we are to go from "first aid" to "full aid." The introduction of full-aid insurance is to be accompanied by legislation relieving properly insured drivers from all tort liability. No one, however, is required to carry such insur-

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3 For other examples see Ehrenzweig, Negligence Without Fault (1951); Levi, An Introduction to Legal Reasoning (1948); Blum and Kalven, The Uneasy Case for Progressive Taxation (1953); cf. Elliot, Four Quartets (1943); White, Here Is New York (1949).
ance as a matter of law. The second major step creates an "uncompensated injury" fund for aiding any auto accident victim who is not the beneficiary of a full-aid policy. The fund is to be financed partly out of taxes and partly out of payments collected from "criminally negligent" drivers. The third step calls for a variety of "recoveries over" from criminally negligent drivers, to be used, as noted above, to finance in part the uncompensated injury fund. One notable feature of this part of the scheme is the provision for recovery over by the fund even from criminally negligent victims of auto accidents. And it might be noted that Professor Ehrenzweig, in passing, very effectively criticizes the inconsistencies of liability insurance.

Will the plan work as advertised? It will provide recovery for all auto accident victims, since every victim will necessarily be the beneficiary either of the auto's full-aid insurance or liability insurance or of the uncompensated injury fund. No changes in substantive tort law are involved, and the simplification of issues should greatly reduce litigation and speed up the process of paying the victim. From the point of view of the driver, the plan is as voluntary as is the law today; no one is required to carry full-aid insurance in order to drive. Nor are the insurance companies brought further under state control, since insurance is not compulsory and the fund is to be administered by the companies. And as deterrents the various recovery-over devices proposed will certainly not be less effective than today's negligence sanctions. Finally, if the plan works, it will substantially reduce the cost to the state of litigation and the cost to the individual of processing his claim, particularly in counsel fees. Although Professor Ehrenzweig freely admits that "the facts and figures [are] yet to be gathered and studied," it can be argued with force that the cost of premiums under his plan will be less than the cost of liability insurance today. In fact, as will be shown in a moment, they must be less if the plan is to work.

Does he then persuade us? Not fully, I think; and for reasons of two kinds. First, there are a series of problems on which the discussion is simply too sketchy. Thus, the claim that substantive tort law is left unchanged is a bit disingenuous in view of the proposed legislation abolishing the tort remedy whenever the automobile is covered by full-aid insurance. Is this proposal, in the end, more inviting to a legislature than a direct attack on tort law?

Again, the recovery-over procedures seem too gadgety. The proposal that the fund be permitted to recover the so-called "tort fines" once from the liability insurer and again from the insured wrongdoer appears to be nonsense. We are given little understanding of the meaning for this purpose of "criminal negligence"; nor does the discussion deal adequately with the matter of whether insurance against liability for criminal negligence would be available. More seriously, Professor Ehrenzweig has not

4 It is clear that he would prefer changing the law generally to make invalid insurance against extreme forms of negligence, but this change is not insisted upon as a step in his proposal (p. 33). The result is a genuine difficulty for him. Drivers will be reluctant to exchange their liability insurance, which indemnifies them for all forms of negligence, for his full-aid insurance, which would leave them still liable if "criminally negligent." And if they do not shift from liability to full-aid insurance his plan will not work.
joined issue here with the most sympathetic of his readers, Fleming James, who has ably argued that it is wasteful and useless to shift a loss again once it has been placed in broad insurance channels.\(^5\) And one is left with serious doubts that these punitive sanctions would be enforced with any vigor.

There is virtually no indication of how disputes are to be handled. No special administrative machinery comparable to the workmen's compensation system is contemplated; it seems to be assumed that literally no disputes would develop. This assumption would be more acceptable if it were indicated why so much administrative and court litigation is still found in workmen's compensation.\(^6\)

Further, the key legislative step seems to present some constitutional difficulty. It is by no means clear that the workmen's compensation cases fully dispose of the issue. Two equally injured victims, who theoretically would be treated the same under the law today, may be treated quite differently under the plan if one is the victim of a driver carrying full-aid insurance and the other is the victim of a driver carrying liability insurance. Nor, given the level of awards today, is it clear that the common-law cause of action can be so readily altered. The accident victim's claim today is much more substantial than that of his employee counterpart a generation ago. In any event, some discussion of constitutionality would have been appropriate.

However, these are relatively minor matters. Difficulties of second order are the lack of clarity in the basic rationale and the failure to discuss the most interesting issue the plan raises. It is an inevitable weakness of Professor Ehrenzweig's desire to present a specific proposal, and to do it quickly, that it does not permit him to deal more adequately with the basic issues common to all proposals to discard the current negligence system. Had he proceeded to his proposal after a more general discussion of the over-all problem, the reader would have been better able to assess whether all three steps in it are equally important and indispensable. And, in any event, it seems to me something of a shortcoming that the costs for the new coverage are apportioned in a rather hodge-podge fashion to three quite different groups: the negligent drivers, all drivers and the community generally.

Although I am sympathetic to Professor Ehrenzweig's desire to provide some recovery over against those really at fault, his scheme for doing so seems to me overcomplex and not likely to play a significant role. I would, therefore, regard the plan as depending primarily on two sources: the premiums now paid in liability insurance by drivers who choose to insure and the moneys taken from tax sources to finance the fund. The fund is therefore simply a proposal for limited social insurance and is subject to the familiar query—why should the community pay for the misfortunes of a certain group of auto accident victims and


\(^6\) The lessening of litigation will not be unqualified. If the recovery-over procedures work as the author intends, they will produce considerable litigation. Further, the plan may substantially affect settlement practices under liability insurance and cause the victim to prefer litigation, since he can recover from the fund if he loses.
not for other equally urgent misfortunes? It is subject to the further practical difficulty that it requires that the state underwrite so much of the scheme. The burden on the fund will be one thing when the voluntary carrying of insurance is common, as it now is, and another if the practice should substantially decline.

Most interesting and important, however, is the proposed use of money which currently goes into liability insurance. Professor Ehrenzweig appears to expect that the shift from liability insurance to full-aid insurance would be gradual. Perhaps inertia, together with some initial uncertainty as to how the new insurance will work, may slow down the transition, but the key question is surely how much the new insurance will cost. Unless it costs less than liability insurance, no one except the occasional Good Samaritan will pay for it. If it does cost less, there is no reason why, after a few years, all current holders of liability insurance should not prefer it, since from the point of view of the driver full-aid insurance and liability insurance perform exactly the same function; that is, each relieves him of having to pay for the accidents he causes. Further, the principal factor in determining the cost of full-aid insurance is the level at which awards are to be set, and of course they may be set low enough to make full-aid insurance cheaper. Since nothing in the plan will tend either to increase or decrease the amount of voluntary insurance coverage, its primary result will be to take money currently paid in liability insurance and to distribute it in a new pattern affording wider coverage but lower awards. For the time being the plan therefore is likely to impose no new financial burdens on auto drivers.

Wider coverage will therefore not be paid for by the drivers; to the extent it is not paid for through the fund, losses will be allocated to the victims themselves. This then poses a familiar query in a new and interesting form. Are low but certain awards for everyone preferable to more adequate awards for less than everyone?

For me the book remains less persuasive than it might have been because of Professor Ehrenzweig's failure to discuss this question sufficiently. The nature of his answer, however, is suggested. The aim of the plan, he tells us, is to provide an award "based on the minimum needs of low-income groups. For it is these groups that offer the most urgent social problem.... As everyone is able to assess his own risk, he will,
if he considers his own worth in excess of the statutory minimum, be free and indeed encouraged by his agent, to take additional accident insurance.”

Here, as in so many social welfare projects poverty is the real problem. If the poor were not quite so poor, we could decently ask them to provide their own accident insurance.

Early in his book Professor Ehrenzweig estimates that personal injury losses exceeding a billion dollars go uncompensated each year in the present scheme of things. It would have been illuminating to have him estimate how much of this billion-dollar loss his plan will compensate. In the end I remain uncertain whether the shift to full-aid insurance or the uncompensated injury fund is the pivotal step in his proposal. If the key is the shift from liability to full-aid insurance, the total amount of uncompensated losses cannot be reduced materially. If the key to the increased coverage is the fund, the only magic of the plan will be in shifting the uncompensated personal injury loss to the taxpayer. There is undoubtedly much to be said for his side on these matters. My only complaint is that he failed to support his case by saying it.

Despite its extreme brevity, then, the book is genuinely stimulating. I am not sure that his proposal has the necessary political appeal, and it appears to suffer from complexity. But it should stimulate more venturesome discussion of the issues and this was its main purposes. Indeed, one cannot read it without thinking of other variations of the basic idea.

Harry Kalven, Jr.*

Problems of Law in Journalism. By William P. Swindler.


Dr. Swindler’s book is intended primarily for journalism classes. Like most of the teachers who will use it for a text, Dr. Swindler learned law from newspaper work and from law library work—not from law school training. For that reason lawyers and law students should find two special factors of interest in the book—the newsman’s slant and the non-law school organization.

The book combines textual discussions with selected, edited cases. Subject areas covered are freedom of the press, libel, right of privacy, contempt of court, copyright and property in the news, obscenity, antitrust laws, labor relations, public notice advertising, and the legal problems of radio journalism. Several of these areas are covered for the first time in a general text on press law.

Dr. Swindler has presented, for example, an up-to-date round-up of U. S. Supreme Court decisions in the Jehovah’s Witnesses cases and the similar “handbill” cases, cases of reasonable regulations and controls on the press as a business, and other recent cases involving press freedom.

11 P. 36. He hopes, of course, that counsel fees will be saved under his plan; hence, the discrepancy between the old and the new award will be reduced. He might also have more vigorously followed Professor Jaffe’s brave lead and argued the case against the allowance for pain and suffering. Jaffe, Damages for Personal Injury: The Impact of Insurance, 18 Law and Contemp. Prob. 219 (1953).

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