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"Full Aid" Insurance for the Traffic Victim— A Voluntary Compensation Plan

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On March 3, 1953, an Assembly Interim Committee on Finance and Insurance of the California Legislature transmitted to the Speaker a Semi-final Report on Automobile Compensation Insurance.¹ In a foreword the committee pointed out that "for the past quarter century and at almost every session of the California Legislature there have been introduced, in some form or another, measures providing relief in the form of compensation for motorists injured or having suffered property damage, due to collision with an uninsured driver or owner," but that these proposals have so far met "with but perfunctory treatment at the hands of the Legislature."² By including a great mass of materials primarily, if not exclusively, dealing with personal injuries inflicted by motorists upon members of the public, the committee has shown its awareness of the entire scope of the problem.

Since the publication of this report state agencies and the insurance industry, as well as members of the bar and the public, have continued to discuss this problem whose gravity continues to grow from year to year and day to day. For, automobile accidents, notwithstanding any measures for the improvement of road safety,³ are bound to increase in number with our ever growing population and motorization.⁴ Extension of existing lia-

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¹ CALIFORNIA LEGISLATURE, ASSEMBLY INTERIM COMMITTEE ON FINANCE AND INSURANCE, AUTOMOBILE COMPENSATION INSURANCE, SEMIFINAL REPORT § 3 (H.R. 194) (1953) (hereafter referred to as CALIFORNIA REPORT).

² *Id.* at 4.

³ See James and Dickinson, *Accident Proneness and Accident Law*, 63 HARV. L. REV. 769 (1950); McNiece and Thornton, *Automobile Accident Prevention and Compensation*, 27 N.Y.U. L.Q. REV. 585, 591 (1952); Netherton, *Highway Safety under Differing Types of Liability Legislation*, 15 OHIO ST. L.J. 110 (1954); Schmidt, *Arbetsgivarens skadeståndsansvar vid olycksfall i arbete*, [1953] FÖRSÄKRINGSJUR. FÖRENINGENS PUBL. NO. 10, 189, 231.

⁴ The San Francisco Chronicle of Dec. 10, 1951, p. 17 reported the one millionth man killed on an American road. According to the BOOK OF STREET AND HIGHWAY ACCIDENTS OF THE TRAVELERS INSURANCE COMPANY (1955), two million people were injured in automobile accidents in this country in 1954 alone.

bilities and coverages, compulsory liability insurance, "unsatisfied-judgment funds," and automobile compensation plans are in the foreground of these discussions. But concern for the future of private insurance, fear of the "welfare state," and doubt as to the adequacy of the remedies proposed have so far prevented wholesale reform.

The primary reason for the deadlock lies, I submit, in the fact that all these remedies would, wholly or in part, continue to use tort liability for distributing accidental loss. In my "*Negligence without Fault*"⁵ and in several articles since,⁶ I have tried to show that this use has been responsible for much of the waste and failure now besetting our entire law governing hazardous "enterprise."

In further developing this thesis as applicable to automobile law, I have, in the present study, attempted to outline a new scheme in which tort liability and tort liability insurance would in part be replaced by accident insurance securing "full aid" to the traffic victim in continuing reliance upon private insurance and voluntary acceptance by the public. This study is thus neither a plea for state help nor, for that matter, a protest against "statism." It is neither an attack against vested interests nor, for that matter, a defense of the status quo. Nor does it purport to offer a complete scheme for immediate adoption. It is rather an attempt to inject into a stalemate of stereotyped proposals and rejections a new approach which, if found feasible in the light of facts and figures yet to be gathered and

⁵ EHRENZWEIG, *NEGLIGENCE WITHOUT FAULT* (1951). For discussions of terminology and thesis presented in that study, see e.g., Malone, *This Brave New World—A Review of Negligence without Fault*, 25 SO. CAL. L. REV. 14 (1951); James, *Social Insurance and Tort Liability: The Problem of Alternative Remedies*, 27 N.Y.U.L.Q. REV. 537, 540 (1952); Leflar, *Negligence in Name Only*, 27 N.Y.U.L.Q. REV. 564, 568 (1952); Feezer, *A Circle Tour through Negligence*, 27 N.Y.U.L.Q. REV. 647, 652 (1952); Green, *The Individual's Protection under Negligence Law: Risk Sharing*, 47 N.W.U.L. REV. 751, 773 (1953); Prosser, *Palsgraf Revisited*, 52 MICH. L. REV. 1 (1953); Ferson, *Res Ipsa Loquitur in Aviation*, 1 MCGILL L.J. 209 (1953); Feldman, *Liability of Furniture Manufacturers for Harm Done by Their Products*, FURN. MAN. ASS'N SO. CAL., Monograph No. 1, p. 3; Baker, *The Eclipse of Fault Liability?*, 40 VA. L. REV. 273 (1954). For reviews see Vold, 39 CALIF. L. REV. 609 (1951); Updegraff, 37 IOWA L. BULL. 328 (1952); Dame, 38 VA. L. REV. 427 (1952); Lockhart, 36 MINN. L. REV. 1001 (1952). A Japanese evaluation was published by Professor Wagatsuma under the same title. For discussions abroad see also Lawson, 1 INT. & COMP. L.Q. 112 (1952); Hellner, 39 SVENSK JUR. 583 (1954); Kruse, [1955] UGESKR. FOR RETSVAESEN 68.

⁶ Cf. Ehrenzweig, *A Psychoanalysis of Negligence*, 47 N.W.U.L. REV. 855 (1953); *What I have Learned in Scandinavia*, 64 GJALLARHORN 195 (1954). See also EHRENZWEIG, *DIE SCHULDHAFTUNG IM SCHADENERSATZRECHT* (Vienna: 1936); *ZUR ERNEUERUNG DES SCHADENERSATZRECHTES* (Vienna: 1937); *PRODUCTS LIABILITY FOR BREACH OF WARRANTY AND NEGLIGENCE*, STATE OF NEW YORK LAW REVISION COMMISSION REPORTS, Leg. Doc. No. 65(J) (1943); *Soldiers' Liability for Wrongs Committed on Duty*, 30 CORNELL L.Q. 179 (1944); *Assurance Oblige—A Comparative Study*, 14 LAW & CONTEMP. PROB. 445 (1950); *Versicherung als Haftungsgrund*, 72 JURISTISCHE BLÄTTER 253 (1950); *El Seguro Obliga*, 3 BOL. INST. DER. COMP. MEX. 3 (1950). For application in the law of conflict of laws, see Ehrenzweig, *The Place of*

studied, would give private insurance a chance to promote social progress without state interference.⁷

Briefly, this is my suggestion which is based on the study of related schemes now in operation:

Any owner or operator of an automobile who carries "full aid" accident insurance in statutory minimum amounts for all injuries inflicted by the operation of his vehicle should by legislative action be relieved from his common-law liability for ordinary (in contrast to criminal) negligence.

Until such legislation can be enacted, liability insurers themselves should seek an interim solution by adding a "full aid" clause to their policies. Under this clause any person injured by the insured car would be entitled to a fixed amount in consideration of a waiver of any other claim.

I shall try to explain and to implement this suggestion after a brief description of the crisis it is designed to meet; the deadlock similar endeavors have encountered; what I believe to be the cause of both this crisis and this deadlock; and certain related schemes designed for their solution.

A

THE CRISIS

"Plaintiffs' attorneys" clamor for higher awards to injured clients, the motoring public bewail increasing premiums and inadequate protection, while all-too-few insurers propose reform.⁸ Meanwhile the automobile, in the brief period of its existence, has created a serious crisis in our admin-

Acting in Intentional Multistate Torts: Law and Reason versus the Restatement, 36 MINN. L. REV. 1 (1951); DER TATORT IM AMERIKANISCHEN KOLLISIONSRECHT DER AUSSERVERTRAGLICHEN SCHADENERSATZANSPRÜCHE, Festschrift für Ernst Rabel 655 (1954).

⁷ Oral presentations of this plan [Eighth Robert S. Marx Seminar, Cincinnati College of Law, 1949; Comparative Law Conference, Cambridge, England, 1952; Insurance Institute, Hamburg, Germany, 1952; Fourth International Congress of Comparative Law, Paris, 1954; Austrian Insurance Society, Vienna, 1954] have been critically discussed by Mr. J. R. Maloney, Insurance Commissioner of California, National Underwriter, April 16, 1953; Fabrizio, *The Law and Automobiles*, 36 DELPHIAN QUARTERLY 18 (1953); Swatek, *Auto Insurance Plan*, Cincinnati Enquirer, Nov. 16, 1952, p. 6; Marx, *Let's Compensate—Not Litigate*, 3 FEDERATION OF INS. COUNSEL QUART. 62, 76 (1953); Green, *The Individual's Protection under Negligence Law: Risk Sharing*, 47 N.W.U.L. REV. 751, 773 (1953); Ussing, *Nord. lovgivning om erstatning for skade voldt ved brug af motorkøretøjer*, [1953] NORDISK FORS.TIDSKRIFT 219; Boettinger, *Überwindung der Haftpflichtversicherung*, 3 VERSICHERUNGSRECHT 306 (1952); VERSICHERUNGSDIENST, Nos. 27, 28 (1952); Leimdörfer, *Neue Wege im Kraftfahrrecht*, 29 MITTEILUNGEN No. 11, p. 2 (1954); Thornton and McNiece, *Torts* [1953] ANNUAL SURVEY OF AMERICAN LAW 719 (1954). For a review of FULL AID INSURANCE, see [1954] INS. L.J. 814. For outstanding foreign works following similar approaches, see ESSER, GRUNDLAGEN UND ENTWICKLUNG DER GEFÄHRDUNGSHAFTUNG (1941); STRAHL, FÖRBEREDANDE UTREDNING ANGÄENDE LAGSTIFTNING PÅ SKADESTÅNDRÄTTENS OMRÅDE (1951); SIEG, AUSSTRAHLUNGEN DER HAFTPFLICHTVERSICHERUNG (1952).

⁸ For a notable exception, see the proposed Alternative Compensation Insurance Endorsement of the Farni Bureau Mutual Automobile Insurance Company at Columbus, Ohio, *infra* note 239.

istration of justice which endangers the very fabric of our democracy—the people's confidence in the law.

When a person is injured in an accident and seeks compensation, he must allege the motorist's "negligence"—though, usually, if there is any fault, it is one chargeable to a society which "negligently" tolerates dangerous locomotion. This incongruity between law and life must result in much litigation—and litigation in these cases means a pernicious gamble which (with its inevitable by-products of delay and perjury) often proves calamitous to the injured. If he wins he may yet fail to recover even his stake, unless the loser has shifted his loss to a solvent "accomplice" of his "wrong"—an insurer of his liability.

1. *Negligence*

Although the victim must prove the injurer's "negligence," in at least one-fourth of all reported automobile accidents—and many more are never reported—no such proof can even be attempted.⁹ And in those cases where proof *is* attempted, negligence, proved or asserted, may consist of nothing but a technically faulty reaction, often committed in the split-second of the "agony of collision."

Courts and juries have long met the challenge and, in their findings of fault and fact, in their instructions and verdicts, have come to recognize "negligence without fault"¹⁰ as a sufficient basis for awarding compensation to the injured. At least three-fourths of all negligence cases are decided for the injured;¹¹ a pedestrian will almost always prevail. Such law making is characteristic of the soundness and the vigor of the common law. But by thus expanding the concept of *legal* fault, the present law has distorted the concept of true "*moral*" fault, while it has continued to deny relief to what is probably a majority of those injured by automobiles.

If the injurer was "innocent," the injured has to bear his own loss. It is true that such judicial doctrines as that of *respondeat superior*¹² or that

⁹ Cf. INSURANCE INDUSTRY COMMITTEE ON MOTOR VEHICLE ACCIDENTS, REPORT RELATING TO THE STATE OF NEW YORK 16 (1951); MARX, *Compulsory Compensation Insurance*, 25 COL. L. REV. 164, 175 (1925).

¹⁰ *Supra* note 5. See Niccolini, *Liability without Negligence*, [1954] INS. L.J. 527 reaching similar conclusions. As to the possible revival of a concept of true moral fault, caused by the progressing segregation of the liability for "negligence without fault" as a new kind of liability, see Friedmann, *Social Insurance and the Principles of Tort Liability*, 63 HARV. L. REV. 241 (1949); Griffith, *"Fault" Triumphant*, 28 N.Y.U.L.Q. REV. 1069, 1095 (1953). For additional references, also to civil law literature, see Ehrenzweig, *A Psychoanalysis of Negligence*, 47 N.W. U. L. REV. 855, 864 (1953); LUNDSTEDT, UNWISSENSCHAFTLICHKEIT DER RECHTSWISSENSCHAFT II, 252 (1932); Moeller, 63 JURISTISCHE WOCHENSCHRIFT 1076 (1934); Hilse, [1902] DEUTSCHER JURISTENTAG 50, 55; Schmidt, *Om culpabegreppet*, [1954] SVENK JURISTIDN. 467, 469.

¹¹ See Hartshorne, *Jury Verdicts: A Study of Their Characteristics and Trends*, 35 A.B.A.J. 113, 115 (1949); Thornton and McNiece, *Torts*, 29 N.Y.U.L.Q. REV. 692, 695 (1954).

¹² See e.g., *Jones v. Kinney*, 113 F.Supp. 923 (W.D. Mo. 1953), where the husband's em-

of the "family car"¹³ have made the injurer's employer or the head of the household responsible, and have thus tended to shift the burden of accidental loss to an "entrepreneur." But even this enterprise liability is predicated upon fault and thus falls short of achieving its purpose. Moreover, even where some fault, moral or technical, is proved, the claim of the injured will fail where it is met by such immunities as those of government agencies,¹⁴ charitable institutions, or close relatives. It is true that in some states a business charity may no longer be certain of its protection, as a "trust fund," against the consequences of the servant's negligence.¹⁵ But this is not the majority rule, and more often than not, a pedestrian negligently injured by the driver of an ambulance is still likely to be denied compensation. It is true, too, that some courts, following common sense rather than obsolete law, have permitted children or wives injured in cars driven by their fathers or husbands, to recover upon the latter's liability policy; but the majority rule continues to evince its solicitude for "domestic peace" by protecting the insurer.¹⁶ Finally, notwithstanding trends to the contrary on the part of courts and juries,¹⁷ even a person injured by a drunken driver lacking immunity, may, in the absence of remedial legislation,¹⁸ have forfeited his compensation by his own contributory "negligence" however

ployer was held suable by the wife notwithstanding the rule of interspousal immunity; James, *Vicarious Liability*, 28 TUL. L. REV. 161, 164 (1954).

¹³ PROSSER, TORTS 500 (1941).

¹⁴ See EHRENZWEIG, NEGLIGENCE WITHOUT FAULT, 24ff., 75ff. (1951); Note, 32 NEB. L. REV. 640 (1953); English, *Automobile Insurance for Municipalities*, [1950] INS. L.J. 807; and in general Symposium, *Governmental Tort Liability*, 29 N.Y.U.L.Q. REV. 1321 (1954). Miller, *Personal Injury Litigation in School Cases*, 20 LAW & CONTEMP. PROB. 60 (1955).

¹⁵ See, e.g., *Malloy v. Fong*, 37 Cal.2d 356, 232 P.2d 241 (1951); *Noel v. Menninger Foundation*, 175 Kan. 751, 267 P.2d 934 (1954); *Pierce v. Yakima Valley Memorial Hospital Ass'n*, 43 Wash.2d 162, 260 P.2d 765 (1953); and in general Green, *The Individual's Protection under Negligence Law: Risk Sharing*, 47 N.W.U. L. REV. 751, 760 (1953); Note, 31 N. DAK. L. REV. 75 (1955).

¹⁶ See James, *Accident Liability Reconsidered: The Impact of Liability Insurance*, 57 YALE L.J. 548, 553 (1948); Ford, *Interspousal Liability for Automobile Accidents in Conflict of Laws*, 15 U. OF PITTS. L. REV. 397 (1954); Note, 19 A.L.R.2d 423 (1951). Compare e.g., *Harralson v. Thomas*, 269 S.W.2d 276 (Ky. 1954); *Baker v. Baker*, 263 S.W.2d 29 (Mo. 1953) and *Strong v. Strong*, 267 P.2d 240 (Nev. 1954), *rehearing denied*, 269 P.2d 265. Thornton and McNiece, *Torts and Family Law*, 29 N.Y.U. L.Q. REV. 1671, 1678, (1954).

¹⁷ Leflar, *The Declining Defense of Contributory Negligence*, 1 ARK. L. REV. 1 (1946).

¹⁸ Several states, following a civil-law doctrine of dividing the loss, have adopted what is called "comparative negligence" statutes. See GREGORY, LEGISLATIVE LOSS DISTRIBUTION IN NEGLIGENCE ACTIONS (1936); PROSSER, *Comparative Negligence*, 41 CALIF. L. REV. 1 (1953); N.Y.C.B.A., REPORT ON THE COMPARATIVE NEGLIGENCE RULE 5, 7, 9 (1953); SNOW, *Comparative Negligence*, [1953] INS. L.J. 235; POUND, *Comparative Negligence*, 13 N.A.C.C.A. L.J. 195 (1954); CALIF. SEN. INT. JUD. COMM., 2d PROG. REP. [1953] 51 *et seq.* Even this conservative reform has been attacked as threatening "the death knell to the fine art of trial practice, and to those fine standards of private enterprise practice." *Report of Committee on Aviation Law*, 20 INS. COUNS. J. 260, 266 (1953). More serious arguments against this reform could, however,

trifling or technical;¹⁹ a "guest statute" may deprive an injured passenger of all recovery;²⁰ and in a hit-and-run accident where the injurer is not apprehended, the law will be of no avail to anyone.²¹

Insistence on basing liability on some negligence however fictitious in law or fact—in other words, the use of a "fault" rationale for "nonfault liability"—has seriously affected the law in many ways. It has also resulted in rules of evidence tending to confuse the jury as to the law's true aim. Juries may, on the one hand, be exposed to plays on their vindictive emo-

be derived from its operation which has resulted in new specious theories, such as that favoring assumption of risk as a new ground for the exclusion of liability. But *cf.* Calif. Legis. 1955 Session, A.B. 1845, 2169; S.B. 1063.

¹⁹ On this "cruellest and most indefensible doctrine of the common law" [Green, *The Individual's Protection under Negligence Law: Risk Sharing*, 47 N.W.U. L. REV. 751, 757 (1953)] see, e.g., Philbrick, *Loss Apportionment in Negligence Cases*, 99 U. OF PA. L. REV. 572, 766 (1951); Malone, *The Formative Era of Contributory Negligence*, 41 ILL. L. REV. 151 (1946); James, *Contributory Negligence*, 62 YALE L.J. 691 (1953); Comment, [1954] WIS. L. REV. 95; WILLIAMS, *JOINT TORTS AND CONTRIBUTORY NEGLIGENCE* (London: 1951); KOTZÉ, *DIE AANSPREEKLIJKHEID VAN MEDEADERS EN AFSONDERLIKE DADERS* (Leyden: 1953). For a judicial escape from "imputed" contributory negligence, see Traynor, J., in *Flores v. Brown*, 39 Cal.2d 622, 248 P.2d 922 (1952). In general see James, *Imputed Contributory Negligence*, 14 LA. L. REV. 340 (1954).

²⁰ These statutes require some kind of "aggravated" negligence on the part of the driver. See, in general, MALCOLM, *AUTOMOBILE GUEST LAW* (1937). Two reasons are generally given for this rule—danger of collusion between guest and driver against the latter's liability insurer, and disinclination to treat in such cases as basis of liability "ordinary mishaps of modern traffic" [PROSSER, *TORTS* 634 (1941)]; both reasons imply an admission of "negligence without fault" as the true basis of automobile liability. The need for a clearer formulation of the issue appears from attempts at defeating the statutory purpose by increasing the jury's discretion [Florida Stat., 1949, c. 320.59], or by extending defenses against the charge of aggravated negligence [Note, 25 ROCKY MT. L. REV. 68 (1952)]. In California extensive interpretation of "gross negligence" has caused the elimination of this concept from similar legislation. See Cal. Stats., 1949, c. 653. See, in general, *Report of the Automobile Insurance Law Committee*, 20 INS. COUNS. J. 255 (1953). See also Gradwohl, *Comparative Negligence of an Automobile Guest*, 33 NEB. L. REV. 54 (1953). For a comparative survey of similar foreign laws, see Stark, *Das sogenannte Handeln auf eigene Gefahr*, 50 SCHWEIZERISCHE JURISTEN-ZEITUNG 21, 23 (1954).

²¹ "Hit-and-run statutes" try to reduce this gap by requiring every driver involved in an accident to stop and give name and address. See, e.g., CAL. VEH. CODE §§ 480, 482. British insurers may make "ex gratia payments" in hit-and-run cases. See SHAWCROSS, *THE LAW OF MOTOR INSURANCE* 377 (2d ed., London: 1949). And France has made a national guaranty fund available in such cases. See Esmein, *Liability in French Law for Damages Caused by Motor Vehicle Accidents*, 2 AM. J. COMP. L., 156 (1953); Esmein, *Le Rôle et le Caractère Juridique du Fonds de Garantie des Accidents d'Automobile*, [1954] RECUEIL DALLOZ . . . Hebdomaire, Chroniques 871; Tunc, *Establishment of "Fonds de Garantie" to Compensate Victims of Motor Vehicle Accidents*, 2 AM. J. COMP. L. 232 (1953); COMMISSION DE RÉFORME DU CODE CIVIL, ASSURANCE OBLIGATOIRE POUR LES DOMMAGES CAUSÉS AUX TIERS PAR LES VÉHICULES AUTOMOBILES, TRAVAUX 348 (1947-1948); Picard, *Le Fonds de Garantie pour les Victimes d'Accidents d'Automobiles*, 23 REVUE GÉNÉRALE DES ASSURANCES TERRESTRES 105 (1952). Unsatisfied-Judgment Acts offer a similar solution in this country. See Note, 50 MICH. L. REV. 1385 (1952) and *infra* note 63. Similar problems arise with regard to foreign vehicles. Here, too, British companies will voluntarily cover the loss, while, e.g., in Switzerland the government has insured such accidents with private insurers. See, in general, Bolgár, 2 AM. J. COMP. L. 515 (1953).

tions,²² which should, if anywhere, be tolerated only in proceedings serving a wrongdoer's punishment. And juries will, on the other hand, be deprived of information highly pertinent in actions serving the distribution of inevitable loss. Thus, they may not be told (by counsel for the defendant) that the plaintiff's damages will be exempt from income taxation,²³ nor (by counsel for the plaintiff) that the defendant is wealthy²⁴ or insured.²⁵ The obsolescence of this last rule of "hide and seek," which ignores both the function and the common use of liability insurance, has led to the curious result that a jury which—to protect the defendant—must not be told that he is insured, may be permitted erroneously to assume that he is—to the defendant's detriment.²⁶

2. Delay, Perjury, Gamble

To avail himself of a liability rule even so pathetically inadequate, the automobile victim may have to face many years of misery—physical, mental, and financial. This delay further impairs the effectiveness of the

²² Reader's Digest, Sept. 1952, reprinted in CALIFORNIA REPORT 23. Cf. MURPHY, OBSERVATIONS ON THE FUTURE OF INSURANCE, AWARDS AND COMPENSATION 5 (1952).

²³ Hall v. Chicago & N.W. Ry. Co., 349 Ill.App. 175, 110 N.E.2d 654 (1953); noted 21 U. OF CHI. L. REV. 156 (1953). But cf. Dempsey v. Thompson, 363 Mo. 339, 251 S.W.2d 42 (1952); noted 32 TEX. L. REV. 108 (1953). See also Pfister v. Cleveland, 113 N.E.2d 366 (Ohio App. 1953), *appeal dismissed*, 159 Ohio St. 580, 112 N.E.2d 657 (1953).

²⁴ Consideration of the comparable wealths of the parties in a case involving two innocent parties has erroneously been attributed to communist ideology. See MURPHY, OBSERVATIONS ON THE FUTURE OF INSURANCE, AWARDS AND COMPENSATION 13 (1952). The "principle of the smallest harm" has been a feature of capitalist laws all over the world for almost 200 years and has only recently become obsolete in view of the spread of insurance. See Ehrenzweig, *Assurance Oblige—A Comparative Study*, 15 LAW & CONTEMP. PROB. 445 (1950); Note, 53 MICH. L. REV. 303 (1954).

²⁵ See Squires v. Riffe, 211 Cal. 370, 295 Pac. 517 (1931); Walker, *Indemnity Insurance in Damage Actions*, 21 SO. CALIF. L. REV. 227 (1948); Sutton, *Insurance is Prejudicial*, 16 TEX. B.J. 63 (1953); Comments, 29 TEX. L. REV. 949 (1951), 43 ILL. L. REV. 650 (1948), 15 U. OF CHI. L. REV. 986 (1948). But cf. Odegard v. Connolly, 211 Minn. 342, 1 N.E.2d 137 (1941). On "Discovery of Insurance" under the federal rules, see Note, 5 STAN. L. REV. 322 (1953). See also Morse, 25 MISS. L.J. 147 (1954); and, in general, Broeder, *The Functions of the Jury: Facts or Fictions*, 21 U. OF CHI. L. REV. 386 (1954); Green, *Blindfolding the Jury*, 33 TEX. L. REV. 157 (1954).

²⁶ See King v. Starr, 43 Wash.2d 115, 260 P.2d 351 (1953). Consequently, the insurer in most states may not be joined as a party defendant. Concerning the Wisconsin law to the contrary, see Note, [1953] WIS. L. REV. 688. See also LA. REV. STATS. § 22:654 (1950); MASS. GEN. LAWS, c. 175, § 112 (1932); R. I. GEN. LAWS, c. 155, § 1 (1938); ARKANSAS LEGISLATIVE COUNCIL, PROPOSAL NO. 6, STAFF REPORT (1952); Note, 39 ILL. L. REV. 81 (1944); *infra* note 90. Whether or not these rules are even based on a correct understanding of jury psychology is an open question. See Hartshorne, *Jury Verdicts: A Study of Their Characteristics and Trends*, 33 A.B.A.J. 113 (1949); James, *Functions of Judge and Jury in Negligence Cases*, 58 YALE L.J. 667 (1949); Baer, *The Relative Roles of Legal Rules and Non-Legal Factors in Accident Litigation*, 31 N.C.L. REV. 46 (1952). For a bibliography see 4 N.Y.C.B.A. RECORD 139 (1949). Significant for the theoretical and practical confusion underlying our liability law, is the dilemma facing those insurers who attempt to recover in subrogation while trying to conceal their

law by making victims "easy marks for small immediate settlements."²⁷ Since 90 per cent of the litigants "bogged down in the law's delay are suing for personal injuries,"²⁸ it is these suits which, by clogging the courts, have seriously impaired their general operations. The effect of this type of litigation is the more pernicious as it is largely dominated by perjury and innocent misrepresentation of parties and witnesses who, after years have gone by, are compelled to reconstruct an event which had eluded their observation even when it happened.²⁹

Yet the ambiguity of the concept of negligence as a basis of liability, the inadequacy of related rules, the delay attending the trial, and the impossibility of ascertaining the facts are only some of the reasons making the outcome of an automobile accident case unpredictable. It is common knowledge that a multitude of irrational and incidental factors make the difference in the verdict between a pittance and a windfall. Common knowledge also is the ungainly fight currently raging around the "adequate award." Neither the plaintiffs' attorneys' well-managed "crusade" for ever bigger awards,³⁰ nor the insurers' well-publicized threats of ever bigger

position as that of the real party in interest. See, e.g., INLAND MARINE CLAIMS ASSOCIATION BULLETIN No. 29, concerning the subterfuge of the "loan receipt," and N. Y. CIV. PRAC. ACT, § 210.

²⁷ Life, Nov. 10, 1952. See, in general, *Congestion of the Docket: A Symposium*, 28 CONN. B.J. 369ff. (1954); Peck, *Report on Justice*, 25 N.Y. ST. B. BULL. 107 (1953); Comment, *Calendar Congestion in New York*, 54 COL. L. REV. 110 (1954); Webster, *Hotchpotch or Integration?*, 9 N.Y.C.B.A. RECORD 52 (1954); Corstvet, *The Uncompensated Accident and its Consequences*, 3 LAW & CONTEMP. PROB. 466 (1936). Remedial endeavors such as the Medical Expert Testimony Project in New York City can at best secure minor relief. See Note, 63 YALE L.J. 1023 (1954).

²⁸ Life, Nov. 10, 1952.

²⁹ "[I]n 95% of the cases it is impossible to say who was at fault." Marx, *Let's Compensate—Not Litigate*, 3 FEDERATION OF INS. COUNSEL QUART. 62, 66 (1953). On what has come to be a "trial by record" in the appellate court, see Green, *The Individual's Protection under Negligence Law: Risk Sharing*, 47 N.W.U. L. REV. 751, 763 (1953). That juries will ordinarily misunderstand or disregard the judge's instructions is generally assumed. See, e.g., FRANK, COURTS ON TRIAL 116 (1949); Hoffman and Brodley, *Jurors on Trial*, 17 MO. L. REV. 235 (1952). For a law requiring special jury verdicts, see Meredith, *Interpretation of Verdicts in Civil Jury Cases*, 1 MCGILL L.J. 99 (1953).

³⁰ See, e.g., Belli, *The Adequate Award*, 39 CALIF. L. REV. 1 (1951); THE USE OF DEMONSTRATIVE EVIDENCE IN ACHIEVING THE MORE ADEQUATE AWARD (1951); THE MORE ADEQUATE AWARD (1952). But see Morris, *Battling the More Than Adequate Award*, 21 INS. COUNS. J. 8 (1954); Hinshaw, *Use and Abuse of Demonstrative Evidence: The Art of Jury Persuasion*, 40 A.B.A.J. 479 (1954); Rollins, *The More Adequate Award*, 55 BEST'S INS. NEWS (Fire & Cas. ed.) 29 (1954). The National Association of Claimants' Compensation Attorneys has dedicated the NACCA Law Journal to the "rights of injured persons." Improvement of the present practice is primarily expected from "the providing of sufficient court rooms and judges." Miller, *The Congestion in Our Courts—Through the Eyes of the Attorney for the Plaintiff*, 28 CONN. B.J. 393, 397 (1954). Concerning Canadian practice, see Carter, *Assessment of Damages for Personal Injuries or Death*, 32 CAN. B. REV. 713 (1954); for Australia, see Note, 28 AUSTR. L.J. 365 (1954).

premiums,³¹ nor even well-intentioned attempts at promoting limitation of jury awards³² attack the problem itself, that is, 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. Moreover, "if our basis of compensating injury is shifted implicitly from fault to insurability, there must be a reconsideration of the kinds of interest which are compensated and the degree of compensation for the interests that are compensable."³³ Only a law designed to punish can be justified in purporting to "quantify the immeasurable."³⁴

A disquieting by-product of this state of the law is the fact that it permits, and indeed compels, the lawyer to participate in the gamble for the "adequate award," by both limiting him to, and insisting on, so-called *contingent fees*, which nearly everywhere else in the world are considered unethical, if not criminal. The obvious solution to the problem of securing counsel to the impecunious plaintiff would be to allow counsel fees to the prevailing party. This is general practice abroad. The argument most frequently advanced against this practice is that judges and juries are often wrong, that it is bad enough to see somebody held liable who in justice should have prevailed; and that in such a case to make him pay his opponent's attorney in addition would add injustice to injustice and make honest litigants unwilling to risk the gamble of a law suit. As I have tried to show elsewhere,³⁵ however, the American system of contingent fees is based on historical accident rather than such reasoning, which implies the cynical and most certainly incorrect belief that judges and juries are more often wrong than right. The fact that this system has nevertheless been preserved

³¹ See Sedgwick, *Automobile Insurance Litigation Today*, [1952] INS. L.J. 816; MURPHY, OBSERVATIONS ON THE FUTURE OF INSURANCE, AWARDS AND COMPENSATION (1952). Leave to sue the American Associated Insurance Companies concerning "a corrupt attempt to influence jurors" in a widely circulated advertisement was granted by the Attorney General of California, [1953] INS. L.J. 765. But cf. *Hoffman v. Perucci*, 117 F.Supp. 38 (E.D. Pa. 1953).

³² See, e.g., resolution of Grand Jury of Placer County (California) of March 23, 1953. And see H.R. No. 83, California Assembly 1953, citing an "alarming increase in insurance rates in this State" due to "large and increasing awards"; 1955 Session, A.B. 2160.

³³ Jaffe, *Damages for Personal Injury: The Impact of Insurance*, 18 LAW & CONTEMP. PROB. 219, 235 (1953).

³⁴ *Ibid.* But see Kilroe, *Necessity for Preservation of the Judicial Process in the Interest of Persons Injured in Automobile Accidents*, 25 N.Y. ST. B. BULL. 315 (1953).

³⁵ Ehrenzweig, *Shall Counsel Fees be Allowed?*, 26 CALIF. ST. B.J. 107 (1951), in part verbally adopted by Potter and Cooper, *Attorney's Fees*, 14 TEX. B.J. 579, 604 (1951). For a comprehensive bibliography see 7 N.Y.C.B.A. RECORD 463 (1952). Limitation of the permissible percentage, recommended by a committee of the Association of the Bar of the City of New York, would be at best a symptomatic treatment of the disease. On the reexamination of the entire problem by the British Committee on Supreme Court Practice and Procedure, see C. E. Clark, *The Evershed Report and English Procedural Reform*, 29 N.Y.U. L.Q. REV. 1046, 1056 (1954); Goodhart, *Current Judicial Reform in England*, 27 N.Y.U. L.Q. REV. 395, 406 (1952); Gower, *The Cost of Litigation*, 17 MOD. L. REV. 1 (1954).

to this day, can, I believe, be explained only on the ground that it has proved an indispensable corrective, however undesirable, of the risk involved in the gamble of a negligence suit.³⁶

3. *The Judgment-proof Defendant*

Let us assume the gamble has been won, fault has been proved in three years of fear, anger, and grief, and the compensation has been assessed. Yet, the victim and his counsel are anything but certain of recovery. If the defendant does not carry liability insurance, they have but one chance in four³⁷ to obtain their compensation.

According to a computation by the New York Insurance Department in 1950, in New York alone the ascertained uninsured bodily injury loss was well over \$10,000,000.³⁸ The national picture is even more serious in view of a considerably lower percentage of insured vehicles. According to a recent study, that percentage may not be substantially higher than it was in 1931,³⁹ the year used as a basis in the so-called Columbia Report⁴⁰—a revolutionary analysis of the law and facts of automobile liability, which will be discussed below. According to a recent count, 33,000,000 motor vehicles (out of a total of 48,000,000 registered vehicles in the nation) carry liability insurance—leaving 15,000,000 uninsured!⁴¹ Related to the New York data, above, this percentage would mean many hundreds of millions of dollars of uncollectible personal-injury claims every year.

We may safely assume that the amounts of damages paid out by liability insurers under the prevailing fault rule represent at most one-half of those amounts which could be claimed by victims of automobile accidents under a rule of liability without fault. On this assumption, personal injury

³⁶ Ehrenzweig, *supra* note 35. See also Marx, *Let's Compensate—Not Litigate*, 3 FEDERATION OF INS. COUNSEL QUART. 62, 66 (1953); Jaffe, *Damages for Personal Injury: The Impact of Insurance*, 18 LAW & CONTEMP. PROB. 219, 235 (1953). A committee of the American Bar Association recently criticized the present state of the law and recommended further study. See A.B.A. SECTION OF INTERNATIONAL AND COMPARATIVE LAW, REPORT OF THE COMMITTEE ON COMPARATIVE JURISPRUDENCE 125ff. Proceedings (1953).

³⁷ See COLUMBIA UNIVERSITY COUNCIL FOR RESEARCH IN THE SOCIAL SCIENCES, REPORT BY THE COMMITTEE TO STUDY COMPENSATION FOR AUTOMOBILE ACCIDENTS 86 (1932), hereafter referred to as COLUMBIA REPORT.

³⁸ NEW YORK (STATE), THE PROBLEM OF THE UNINSURED MOTORIST 11, 12 (1951).

³⁹ James and Law, *Compensation for Auto Accident Victims: A Story of Too Little and Too Late*, 26 CONN. B.J. 70 (1952). See also McNiece and Thornton, *Automobile Accident Prevention and Compensation*, 27 N.Y.U. L.Q. REV. 585, 587 (1952); Grad, *Recent Developments in Automobile Accident Compensation*, 50 COL. L. REV. 300 (1950). But see Lemmon, *Insurance and the Automobile—Where Are We Headed?*, [1954] INS. L.J. 369, 376.

⁴⁰ *Supra* note 37. See Smith, Dowling and Lilly, *Compensation for Automobile Accidents, A Symposium*, 32 COL. L. REV. 785 (1932).

⁴¹ Marryott, *Automobile Accidents and Financial Responsibility*, 287 ANNALS OF THE AMERICAN ACADEMY OF POLITICAL SCIENCE 83, 85 (1953).

losses which remain uncompensated because of the absence of insurance or "fault" probably exceed one billion dollars annually.⁴²

Many legislatures in this country and abroad⁴³ have recently published legal and factual studies undertaken with a view to reform. Lack of funds and personnel, extensive borrowing from partisan presentations and materials previously available, and above all, lack of facts and figures have, however, prevented these studies from going beyond the restatement of existing schemes and of well-known and well-worn arguments. It is high time that what the Columbia Report attempted more than 20 years ago be repeated on as broad a scale as possible. Only when we know the probable cost and effect of the various schemes now discussed on a purely theoretical level will our legislatures be able to break the current deadlock.

B

THE DEADLOCK

1. *Compulsory Liability Insurance*

As early as 1925 Massachusetts undertook to remedy what even then seemed to have become an intolerable situation, by introducing a system of compulsory insurance. Though widely used abroad⁴⁴ it was untried in

⁴² See WISCONSIN LEGISLATIVE COUNCIL, COMMITTEE ON MOTOR VEHICLE ACCIDENTS, 1953 REPORT (hereafter referred to as WISCONSIN REPORT) II, 4, according to which the annual total dollar loss due to automobile accidents in Wisconsin alone is now close to \$1,000,000,000. Doyle, *A Public Relations Problem*, [1954] INS. L.J. 23, estimates the loss of wages alone at \$1,200,000,000, and medical and hospital expenses at \$100,000,000. See also Note, 167 WEEKLY UNDERWRITER 1234, 1245 (1952).

⁴³ Besides the CALIFORNIA REPORT (see note 1 *supra*) and the WISCONSIN REPORT (see note 42 *supra*), see ALBERTA LEGISLATURE, SPECIAL COMMITTEE, ALL PHASES OF AUTOMOBILE INSURANCE (1949); MISSOURI STATE CHAMBER OF COMMERCE, *Motor Vehicle Financial Responsibility*, [1952] INS. L.J. 722; NEW JERSEY LEGISLATURE, JOINT COMMITTEE ON IMPROVEMENTS OF THE MOTOR VEHICLE RESPONSIBILITY LAW, REPORT (1952); NEW YORK LEGISLATURE, JOINT LEGISLATIVE COMMITTEE ON UNSATISFIED JUDGMENTS FUND AND COMPULSORY INSURANCE, REPORT, MCKINNEY'S SESSION LAWS NEWS OF NEW YORK, No. 4, p. A-133; NEW YORK STATE INSURANCE DEPARTMENT, THE PROBLEM OF THE UNINSURED MOTORIST (1951); NORTH DAKOTA LEGISLATURE, REPORT ON AUTOMOBILE LIABILITY INSURANCE (1950). See also Knowlton, *Insure the Driver Plan* [New Hampshire], 3 FEDERATION OF INS. COUNSEL QUART. 77 (1953); Baillie, *Manitoba Safety Responsibility Legislation*, 3 FEDERATION OF INS. COUNSEL QUART. 17 (1953); *Congestion of the Docket: A Symposium* [Connecticut], 28 CONN. B.J. 369 (1954). For foreign countries see particularly Professor Strahl's Report to the Swedish Government, FÖRBEREDANDE UTREDNING ANGÅENDE LAGSTIFTNING PÅ SKADESTÅNDRÄTTENS OMRÅDE (1950) and the publications on this topic of the International Institute for the Unification of Private Law in Rome.

⁴⁴ Compulsory liability-insurance schemes exist in most countries. See Deák, *Liability and Compensation for Automobile Accidents*, 21 MINN. L. REV. 123 (1937); Deák, *Automobile Accidents: A Comparative Study of the Law of Liability in Europe*, 79 U. OF PA. L. REV. 271 (1931); Bolgár, *Motor Vehicle Accident Compensation: Types and Trends*, 2 AM. J. COMP. L. 515, 516 (1953); SUZMAN, THE LAW OF COMPULSORY MOTOR VEHICLE INSURANCE IN SOUTH AFRICA (1954). In Europe, only France (see *supra* note 21), Greece, Italy and Spain apparently remain without such insurance and without current proposals for its introduction. The

this country.⁴⁵ The value of this experiment, despite its long duration, is, as will be shown presently, questionable. But what an outstanding leader of the insurance industry said 17 years ago is pertinent today:

A short-sighted policy of blind opposition to compulsory insurance, in lieu of a whole-hearted effort to contribute toward a solution of one of our most serious social problems, has brought private insurance face to face with a grave danger.⁴⁶

The prediction that compulsory insurance must necessarily lead to state insurance has proved false both in this country and abroad. Most arguments purporting to "explode" what recently has been termed an "old-fashioned idea"⁴⁷ have so often been exposed⁴⁸ as mere "shotgun criticisms"⁴⁹ that they discredit other valid objections. Thus the ever-reiterated disparagement of the Massachusetts plan as "incomplete" (because of its exclusion of out-of-state drivers and accidents, accidents on private property, guest occupants, insurance dodgers, and property damage) must sound strange if coming from those advocating other schemes considerably

Benelux countries are now engaged in preparing a uniform law to the same effect. For the 1951 draft, see INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW, REPORT ON THE ACTIVITY OF THE INSTITUTE 31 (1951). A compulsory insurance law of Aug. 24, 1934 for the federal district of Mexico was repealed in the year of its enactment for "unknown reasons." Gutiérrez, *La Responsabilidad por Daños Causados por Automóviles*, [1944] REV. ESC. NAC. JURISPR. 363, 393. As to similar problems in air law, see *infra* notes 145ff. On compulsory liability insurance of hunters and accountants in Germany, see ALBERT EHRENZWEIG SR., DEUTSCHES (ÖSTERREICHISCHES) VERSICHERUNGSVERTRAGSRECHT 360 (Vienna: 1952).

⁴⁵ For long-standing exceptions in limited fields such as the insurance of professional carriers or minors, see, e.g., CAL. VEH. CODE §§ 350, 418.3; N.Y. VEHICLE AND TRAFFIC LAW §§ 11-a, 20-a; 49 U.S.C.A. § 315 (Federal Motor Carrier Act 1935).

⁴⁶ Sawyer, *Frontiers of Liability Insurance*, 39 BEST'S INSURANCE NEWS (Fire & Cas. ed.) 439 (1938).

⁴⁷ ASSOCIATION OF CASUALTY AUTOMOBILE INSURERS, COMPULSORY LIABILITY INSURANCE—AN OLD-FASHIONED IDEA EXPLODED (undated). See also, e.g., Murphy, *Compulsory Automobile Insurance*, 13 CAS. & SUR. J. (1952); Rosenzweig, *Why Agents and Brokers Oppose Compulsory Automobile Insurance*, [1953] INS. ADVOCATE (Feb.); Moser, *The Financially Irresponsible Motorist*, 25 N.Y. ST. B. BULL. 326 (1953); Moser, *The Uninsured Motorist*, 55 BEST'S INSURANCE NEWS (Fire & Cas. ed.) 18 (1954).

⁴⁸ See, e.g., Bohlinger, *Which Road for the Uninsured Motorist?*, [1951] INS. L.J. 433; Bohlinger, *Compulsory Automobile Insurance—Open or Covert?*, 25 N.Y. ST. B. BULL. 336 (1953); Grad, *Recent Developments in Automobile Accident Compensation*, 50 COL. L. REV. 300 (1950); Marx, *Let's Compensate—Not Litigate*, 3 FEDERATION OF INS. COUNSEL QUART. 62 (1953); NEW YORK (STATE), THE PROBLEM OF THE UNINSURED MOTORIST (1951); Note, Two Different Looks at Compulsory Auto Insurance, *Business Week*, Feb. 16, 1952, reprinted in CALIFORNIA REPORT 12. See also testimony of the former Commissioner of Insurance of Massachusetts, Charles F. J. Harrington, reprinted in CALIFORNIA REPORT 54; explanation of purposes of workings of the Massachusetts plan by Commissioner W. E. Monk, reprinted in CALIFORNIA REPORT 68; Notes, 77 N.J. L.J. 5 (1954), 76 N.J. L.J. 341 (1953), 130 N.Y. L.J. 702 (1953).

⁴⁹ Kenney, Great Danger in These Shotgun Criticisms of Compulsory Automobile Insurance, *United States Investor*, Nov. 10, 1951, summarized in CALIFORNIA REPORT 15.

less inclusive. Similarly, criticism of the Massachusetts plan as lacking protection for the victim of innocent drivers is hardly convincing if coming from spokesmen of an industry which has consistently opposed any discussion of a broader liability.⁵⁰

Even more serious objections carry little weight unless fairly presented. True, the fact that Massachusetts won the National Safety Council's traffic contest for the northeast region in 1950 probably has nothing to do with the compulsory character of its insurance scheme. But this fact should at least preclude opponents of the Massachusetts plan from claiming that compulsory liability insurance tends to promote carelessness.⁵¹ In this connection, a tabulation of 1,285 replies from nine cities in Massachusetts deserves some attention even though this sampling was not based on strictly scientific procedure. The tabulation includes 1,201 replies from writers who state they would prefer to live in a state with a good compulsory automobile insurance law.⁵² Apparently, even if compulsion should tend to increase premiums, this would be taken in stride if it would help "to keep the \$40 junkies off the highways."⁵³

Other criticisms must be considered in relation to alternative solutions and possible modifications. For example, it may well be that compulsory insurance would increase the danger of insolvency of insurers;⁵⁴ but this could be avoided by proper rate calculations as under any other insurance plan. The problems created by undesirable risks are just as serious under the "Safety Responsibility Laws" recommended by the insurance industry.⁵⁵ In fact it was under such laws that these problems resulted in the imposition of "assigned risk plans" which have been held constitutional by the Supreme Court.⁵⁶ To reduce the coverage of undesirable risks stricter

⁵⁰ Murphy, *Compulsory Automobile Insurance*, 13 CAS. & SUR. J. (1952).

⁵¹ See *supra* note 3; text at notes 103ff., 193ff.

⁵² CALIFORNIA REPORT 33, 37. See also ALBERTA LEGISLATURE, SPECIAL COMMITTEE REPORT, ALL PHASES OF AUTOMOBILE INSURANCE 35, 63 (1949) in which the consulted nonpartisan groups (Association of Municipal Districts, Taxpayers' Association) expressed themselves in favor of compulsory insurance. The Pedestrians' Association in London (according to information for which I am indebted to its counsel, R. S. W. Pollard) probably shares this opinion and would add strict liability.

⁵³ CALIFORNIA REPORT 28, 39. In fact, rates tend to be the same under voluntary and compulsory insurance schemes. See NEW YORK (STATE), THE PROBLEM OF THE UNINSURED MOTORIST 63 (1951).

⁵⁴ See N.Y.C.B.A., REPORT ON PROBLEMS CREATED BY FINANCIALLY IRRESPONSIBLE MOTORISTS 9 (1952).

⁵⁵ See, e.g., *supra* note 47.

⁵⁶ California State Automobile Ass'n Inter-Insurance Bureau v. Maloney, 341 U.S. 105 (1951). See also N.Y. Ins. Law, § 63; and in general, R. C. Wagner, *Assigned Risk Plan*, 14 CAS. & SUR. J. (1953); NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS, 374 Proceedings (1946); Russell, "Good Faith" and Motor Vehicle Assigned Risk Plans, [1952] INS. L.J. 397; Richardson, 54 BEST'S INS. NEWS (Fire & Cas. ed.), Nos. 12, 65, 73 (1954); Massar, *The Assigned Risk Plan for Allocation of Certain Insurance Risks*, 15 OHIO ST. B.J. 172 (1954); NAT'L COUNC. COMPENS. INS. 1953 REPORT 48 (1954).

licensing and testing requirements should be and are being considered under *any* program.

According to other critics increased state regulation of private insurance, accompanied by political implications,⁵⁷ and an impairment of free competition are likely concomitants of compulsory insurance. This is probably true. More significantly, however, opposition to compulsory liability insurance could be supported by another argument which, though rarely made, is conclusive from the standpoint of legal analysis and runs as follows:

Compulsory liability insurance, as a means of loss distribution, suffers from two prenatal defects which in the long run must prove fatal. In the first place, *any* liability insurance, be it compulsory or voluntary, has always presented a policy problem since it offers protection to the insured against the consequences of his own wrong. Indeed, this type of insurance was originally considered invalid on this moral ground⁵⁸ and became acceptable only because it was soon recognized that in most cases the liability insured against was based upon morally blameless, though technically faulty, reactions or even upon entirely unavoidable consequences of modern traffic conditions; or, in other words, because "negligence" liability in automobile cases proved to be a liability for "negligence without fault."⁵⁹ Automobile liability insurance thus purports to protect against liability for the very "fault" whose absence in most cases has made such insurance permissible. This inconsistency could but create unsurmountable difficulties in law and practice.⁶⁰

Secondly, to compel insurance against such liability without fault can be justified only in the victim's interest. This consideration, not without a further distortion of the concept of liability insurance, has induced legislatures and courts to allow the victim a direct action against the insurer.⁶¹

⁵⁷ See WISCONSIN REPORT II at 53. It should be remembered, however, that the Massachusetts Commissioner's influence on rate making is not a necessary corollary of compulsory insurance and may, on the other hand, occur under voluntary schemes. See statement from general counsel for Massachusetts Associated Industries (1952), reprinted in CALIFORNIA REPORT 29. For California law (lacking the usual filing requirement) see CAL. INS. CODE, §§ 1852(a), 1857.

⁵⁸ See J. C. Breeden v. Frankfort Marine, Accident & Plate Glass Ins. Co., 220 Mo. 327, 119 S.W. 576 (1909); McNeely, *The Genealogy of Liability Insurance*, 7 U. OF PITTS. L. REV. 169 (1941); McNeely, *Illegality as a Factor in Liability Insurance*, 41 COL. L. REV. 26 (1941). See also Fagiani v. General Accident, Fire and Life Ins. Corp., 105 Cal.App. 275, 287 Pac. 377 (1930), relying on Messersmith v. American Fidelity Co., 232 N.Y. 161, 133 N.E. 432 (1921).

⁵⁹ *Supra* note 5. Concerning the parallel history of liability insurance in Germany see Böhm, 4 VERSICHERUNGSRECHT 169 (1953). Liability insurance grew up as an indistinguishable part of early accident insurance schemes. For historical analysis see SIEG, AUSSTRAHLUNGEN DER HAFTPFLICHTVERSICHERUNG 42ff. (1952).

⁶⁰ See text at note 80 *infra*.

⁶¹ See text at note 89ff. *infra*.

But once the priority of the victim's interest over that of his injurer is conceded, it makes little difference to the victim whether his injurer was uninsured, though "negligent," or whether he was "innocent."⁶² Yet, only in the first case would compulsory liability insurance furnish protection, even if it were to be combined with unsatisfied-judgment funds or an assigned-case plan.

2. *Unsatisfied-Judgment Fund and Assigned-Case Plan*

The unsatisfied-judgment fund has gained the national limelight because of recent legislation in New Jersey. That state has indeed brought to new perfection a device well known and much practiced abroad⁶³ and used to some extent in at least one state of the Union.⁶⁴ A committee of the Association of the Bar of the City of New York has recommended a similar statute for enactment in New York⁶⁵ and it is likely that such legislation will make further headway. Unsatisfied Judgment Coverage Endorsements on automobile insurance policies reach the same result.⁶⁶ But since their operation is necessarily limited to policy holders, it is regrettably misleading if "much broader" coverage is claimed for these endorsements "when compared to coverage extended by the unsatisfied judgment state funds in New Jersey and one or two other states."⁶⁷ Under the New Jersey scheme a special board, managed by the insurers themselves, will (with certain exceptions) pay any personal injury judgment in excess of \$200 which *any* victim (who owns a New Jersey motor vehicle or resides in New Jersey or

⁶² See Marx, *Let's Compensate—Not Litigate*, 3 FEDERATION OF INS. COUNSEL QUART. 67, 75 (1953).

⁶³ Such funds exist in Alberta, British Columbia, Manitoba, Nova Scotia, Ontario and Prince Edward Island. Cf. Bolgár, 2 AM. J. COMP. L. 515, 521 (1953). Similar legislation was recently enacted in France, see note 21 *supra*. See also the British M.I.B. (Motor Insurers' Bureau) Agreement with the Minister of Transport, June 17, 1946; and the government insurance under Art. 55 of the Swiss Motor Law of March 15, 1932. On early precursors of such funds see, e.g., JANNOTT, *DER SOZIALE GEDANKE IN DER HAFTPF LICHTVERSICHERUNG* (1941); ROEDER, *DIE STELLUNG DES GESCHÄDIGTEN IN DER KRAFTFAHRZEUGHAFTPF LICHTVERSICHERUNG NACH DEM ALTEN UND DEM NEUEN RECHT* (1941).

⁶⁴ N.J. Laws, 1952, c.174; CALIFORNIA REPORT 21, 98ff. See also Bergesen, *The North Dakota Unsatisfied Judgment Plan*, 3 FEDERATION OF INS. COUNSEL QUART. 35 (1953); Piper, *Canadian Unsatisfied Judgment Funds*, *id.* at 25; Gaffney, *The Motorist, His Victims and the State*, *id.* at 42.

⁶⁵ N.Y.C.B.A., REPORT ON PROBLEMS CREATED BY FINANCIALLY IRRESPONSIBLE MOTORISTS 12, 13; Donovan, *Our Association's Program*, 25 N.Y. ST. B. BULL. 302 (1953). But cf. *Report of the California Insurance Industry*, CALIFORNIA REPORT 159, 161, declaring its opposition because "the establishment of such a fund creates a threat, no matter how operated, of placing the state into the insurance business."

⁶⁶ For companies writing this insurance, see *Symposium, Unsatisfied Judgment Insurance*, 55 BEST'S INS. NEWS (Fire & Cas. ed.) 21 (1954). The benefits may or may not be determined in fixed schedules (*id.* at 111) and may or may not include default judgments (*id.* at 110, 111, 113).

⁶⁷ *Id.* at 21. But cf. *id.* at 114.

any state or country granting reciprocity) has taken all possible steps to collect from the injurer. This payment will be made from an unsatisfied-claims-and-judgment fund within the usual liability-policy limits. Since this scheme excludes uninsured motorists from its benefits, it may furnish an incentive for the further spread of liability insurance and remove some of the hardship now caused by uninsured motorists. But it preserves the "negligence" gamble in subrogation suits; and it leaves unaffected the present discrimination against the victims of "innocent" motorists and those unwilling or unable to engage in the costly venture of a negligence suit. The same criticism would apply to the so-called assigned-case plan under which unsatisfied judgments would be assigned to individual insurers.⁶⁸

3. Absolute Liability

In this country as well as abroad,⁶⁹ it has often been suggested that these difficulties could be removed by the adoption of a principle of strict or absolute liability. And, indeed, there are many important indications that such a development may be under way.⁷⁰ But this cannot be the answer. Not so much for the reason, I believe, that the introduction of absolute liability "would ape socialistic notions of Europe which by their reactionary 'liberalism' have brought the world to the brink of disaster,"⁷¹

⁶⁸ NEW YORK LEGISLATURE, [1954] MCKINNEY'S . . . NEWS, No. 4, pp. A-133, A-138.

⁶⁹ See COLUMBIA REPORT 237. See also RESTATEMENT, TORTS §§ 519, 520 (1934) which, however, exclude the operation of automobiles as "a matter of common usage"; and Comment, 37 CALIF. L. REV. 269 (1949). See, e.g., Austrian Automobile Liability Law of Aug. 9, 1908, Reichsgesetzblatt [Official Gazette] No. 162, § 1, which was followed by the laws of Germany (1909), Greece (1911), Italy (1912), Sweden (1916), Denmark (1918), Netherlands (1925), Norway (1926), Switzerland (1932), Czechoslovakia (1935). Concerning the French and Scandinavian judge-made rules to the same effect, see Esmein, *Liability in French Law for Damages Caused by Motor Vehicle Accidents*, 2 AM. J. COMP. L. 156 (1953); Ussing, *The Scandinavian Law of Torts*, 1 AM. J. COMP. L. 359 (1952); and, in general, LAWSON, *NEGLIGENCE IN THE CIVIL LAW* (1950); Cohen, *Negligence Law in Europe*, [1953] INS. L.J. 75. See also MEX. CIV. CODE, Art. 1913, providing for a general enterprise liability for causation (see Gutiérrez, *La Responsabilidad por Daños Causados por Automóviles*, [1944] REV. ESC. NAC. JURISPR. 363, 390), and INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW, PRELIMINARY DRAFT OF A UNIFORM LAW ON CIVIL LIABILITY OF MOTORISTS, Unification of Law 175 (1948) and REPORT ON THE ACTIVITY OF THE INSTITUTE 31 (1953). On Soviet law see HAZARD, *LAW AND SOCIAL CHANGE IN U.S.S.R.* 224 (1953); on Japanese law, Ishimoto, *A Study on the Liability for Torts*, 1 OSAKA L. REV. 47 (1952); Wagatsuma, *Dr. Okamatsu's "Absolute Liability"—What is to Follow It?*, HŌGAKU KYŌKAI ZASSHI, with additional references.

⁷⁰ On *respondent superior* and the family-car doctrine, see *supra* notes 12, 13. See also, e.g., CAL. VEH. CODE § 352 (liability of minors) and the owners' liability statutes in many states. Florida seems to continue to treat the automobile as a dangerous instrumentality. See Note, 5 U. OF FLA. L. REV. 412 (1952).

⁷¹ ORR, *Is Aviation Ultra-Hazardous?*, 21 INS. COUNS. J., 48, 56 (1954). The author reports that he has "directed more litigation involving aviation liability than any other man certainly in this hemisphere." See also ORR, 21 J. AIR L. & COMM. 399 (1954).

or that this liability would be another step toward the creation of the "service state,"⁷² but because such liability can be only justified as another liability for fault. I have tried elsewhere to establish this seemingly paradoxical proposition by a "psychoanalysis of negligence,"⁷³ tracing absolute liability to primitive—and modern—man's irrational disbelief in faultless causation. If in the injured's mind the injurer were truly innocent, why should *he* bear the loss rather than the injured himself or any equally innocent third party? The only answer to this question would be to base the injurer's liability on the ground that he presumably is better able to distribute the loss than the injured. Under that rationale, however, insurability rather than causation should be the test;⁷⁴ and there is little reason for relating this insurability to liability insurance rather than to the insurance of the loss itself.

4. Financial-, "Safety-," and "Security"-Responsibility Laws

All arguments against compulsory liability insurance apply at least with equal force to certain now generally accepted laws which limit the duty to insure (or to give other security) to a selected group of motorists. In addition, these laws are subject to other criticism.

Their history is well known. As financial-responsibility laws, they compelled insurance or security only from those who had failed to satisfy a judgment for the payment of damages for injuries caused by an automobile accident. Such laws were thus clearly inadequate because they failed to affect those offenders who, being judgment-proof, escaped a law suit and thus a judgment. Contrary to widely accepted views, the most modern versions of these laws, the so-called "safety-"⁷⁵ or "security-"⁷⁶ responsibility laws,⁷⁷ while removing this flaw, have introduced a new, even more serious

⁷² Pound, *Law in the Service State*, 36 A.B.A.J. 977, 981 (1950).

⁷³ Ehrenzweig, *A Psychoanalysis of Negligence*, 47 N.W.U.L. REV. 855 (1953).

⁷⁴ EHRENZWEIG, *NEGLIGENCE WITHOUT FAULT* (1951); *Assurance Oblige—A Comparative Study*, 15 LAW & CONTEMP. PROB. 445 (1950).

⁷⁵ This is a misleading misnomer, because the purpose of these laws has nothing to do with highway safety. See Marx, *Let's Compensate—Not Litigate*, 3 FEDERATION OF INS. COUNSEL QUART. 62 (1953).

⁷⁶ This is the term used in New Jersey. See *supra* note 64.

⁷⁷ See in general Vorys, *A Short Survey of Laws Designed to Exclude the Financially Irresponsible Driver from the Highway*, 15 OHIO ST. L.J. 191 (1954); Marryott, *Automobile Accidents and Financial Responsibility*, [1953] INS. L.J. 758; Grad, *Recent Developments in Automobile Accident Compensation*, 50 COL. L. REV. 300 (1950); *International Association of Insurance Counsel, Financial Responsibility Laws Committee, Report*, 19 INS. COUNS. J. 310 (1952); Feinsinger, *Operation of Financial Responsibility Laws*, 3 LAW & CONTEMP. PROB. 519 (1936); Notes, 66 HARV. L. REV. 1300 (1953), 27 N.Y.U.L.Q. REV. 817 (1952). For persuasive criticism see, e.g., Note, 21 CIN. L. REV. 277 (1952); Hallen, *The Motor-Vehicle Safety Responsibility Act*, 12 OHIO ST. L.J. 362 (1951); Baker, *Motor Vehicle Act*, 16 TEX. B.J. 693 (1953); and particularly NEW YORK (STATE), *THE PROBLEM OF THE UNINSURED MOTORIST* 30, 32 (1951). Concerning the 1954 amendments of the New York Safety Responsibility Act,

inconsistency. These laws subject to their compulsion anybody "involved" in an automobile accident, thereby abandoning the last semblance of reasonable discrimination under a fault rationale. According to these laws it is no longer the "safe driver" who is spared the expense of compulsory insurance, but only he who by sheer good fortune has escaped "involvement" in an accident. Such a rule can be justified only on the assumption that a maximum number of insured is desirable as such, even at the expense of completely distorting the fault rule by penalizing the innocent driver.

Nor is that all. Under all these laws the first bite may be free. Little comfort it is for the victim that the drunken driver who has maimed him for the rest of his life will either have to give up driving or take out insurance. And the second bite? Our rugged individualist who refuses to take insurance, relying on his skill, has negligently injured a pedestrian. If he is ready to settle the case—and he will find an all-too-willing ear once he has made known his lack of insurance—he may save his free bite for another, more serious accident. Indeed, as long as no action is brought against him, he need not worry about the "safety"-responsibility law of his state—and who will bring the first action against the uninsured motorist! Little is added by the so-called impounding acts of British Columbia, Manitoba (mandatory), and Alberta (discretionary), which provide for the impounding of any motor vehicle involved in an accident not carrying liability insurance.⁷⁸ All these measures at best attempt to provide symptomatic relief for the disease.⁷⁹ To find the cure we must probe more deeply.

C

THE VILLAIN OF THE PIECE: TORT LAW AND TORT INSURANCE

1. *Tort Liability*

Neither crisis nor deadlock can be blamed on plaintiffs' attorneys, casualty insurers, defense counsel, state supervision, or the courts. So sudden

see Veness, *New York Safety Responsibility Act*, 55 *BEST'S INS. NEWS* (Fire & Cas. ed.) 51, 98 (1954). Cf. the following bills in the 1955 Calif. Legislature: A.B. 561, 836, 1645, 1794, 1819, 2568-2571, 2732, 2818, 3373, 3603; S.B. 356, 622, 1550, 1713. For an attempt at remedial judicial legislation see *Farmers Ins. Exchange v. Ledesma*, 214 F.2d 495 (10th Cir. 1954).

⁷⁸ See, e.g., Baillie, *Manitoba Safety-Responsibility Legislation*, 3 *FEDERATION OF INS. COUNSEL QUART.* 17 (1953). This type of law seems to find increasing support among insurers. See *INSURANCE INDUSTRY COMMITTEE ON MOTOR VEHICLE ACCIDENTS, REPORT RELATING TO THE STATE OF NEW YORK* 10 (1951). For a European equivalent see, on Swiss law, Steinlin, *Verarrestierung ausländischer Motorfahrzeuge durch die einheimischen Geschädigten*, 49 *SCHWEIZERISCHE JURISTEN-ZEITUNG* 254 (1953); and Schreiber, *id.* at 307. See also Calif. Legis. 1955 Session, S.B. 1712.

⁷⁹ For a detailed criticism, see *NEW YORK (STATE), THE PROBLEM OF THE UNINSURED MOTORIST* 40 (1951). See also Marx, *Let's Compensate—Not Litigate*, 3 *FEDERATION OF INS. COUNSEL QUART.* 62, 69 (1953).

was the increase of mechanical hazards caused by the industrial revolution that there was no time for a rethinking of the law. Tort law was seized upon as a tool for the newly needed distribution of losses unavoidably caused by lawful enterprise; the same tort law which, as its name implies, relates to wrongs.

Elsewhere, I have tried to trace the long and complex process by which this tort liability was transformed into one for "negligence without fault."⁸⁰ I have suggested that much of the theoretical and practical confusion created by this transformation could perhaps be removed by a conscious distinction between new liabilities for loss typically caused by certain enterprises; and those still primarily serving a wrongdoer's censure and admonition for foreseeable and avoidable harm. But, even if we should thus be able both to preserve some of tort law's original admonitory functions and to secure to some extent its compensatory effect, the latter remains deficient in the adjustment of automobile losses. For, even though legal fictions and presumptions extend most liberally the negligence concept far beyond moral "neglect," the fact remains that victims of hazards tolerated and encouraged by a mechanized society will remain uncompensated in innumerable cases in which equitable loss distribution would clearly demand compensation. No "tort" law can protect the family whose provider was killed without his fault by a hit-and-run driver; by the operator of a car who by a tragic coincidence was unable to avoid a collision; by the careless motorist whose fault cannot be established because proof is unavailable or too expensive; or by the reckless driver who, while proved guilty, appears judgment-proof.⁸¹ Only in the last respect can liability insurance bring some relief, and here only at the cost of a theoretical and practical distortion of both the law of torts and the institution of insurance. For, this much seems obvious: So far as tort liability is a sanction for wrongdoing, insurance should not protect the wrongdoer against the consequences of his act. If the law nevertheless tolerates and encourages such insurance without limitation, it does so in order to protect the victim against his injurer's insolvency. Where, however, such protection is thus considered more important than the very purpose of tort liability, there is no reason for preserving this liability as a conduit for loss distribution through insurance. Being burdened with standards designed for the injurer's censure, such liability can never

⁸⁰ *Supra* note 5.

⁸¹ In at least one other respect the principle of fault causes insurmountable difficulties—even if surviving only in name. "Contributory negligence" must continue to exclude or, at least, to affect recovery (see *supra* notes 17-19) in application to the plaintiff. But if forfeiture of recovery is rationalized on a punitive ground, how can we justify penalties whose effectiveness must vary with the amount of the claim and the plaintiff's wealth? See Jaffe, *Damages for Personal Injury: The Impact of Insurance*, 18 LAW & CONTEMP. PROB. 219, 223 (1953).

properly be adjusted to the injured's needs, and tort law may well have reached the end of its usefulness in this field.⁸²

Assuming an effective use of criminal law for punishment and deterrence, supplemented by some kind of social insurance, tort law does at first glance indeed seem dispensable even where its admonitory function is best preserved, namely in the field of intentional torts. For it is hardly more reasonable to make the injurer's solvency and guilt a condition of the recovery for assault or intentional libel than to make solvency and guilt a condition of compensation for the harm caused in an automobile accident. But the administration of criminal justice, with its imperfections of personnel and organization, will within the foreseeable future scarcely be found suitable to replace private initiative in pursuing the law breaker.⁸³ Moreover, the victim of an intentional aggression, neither satisfied by mere compensation of his monetary losses by insurance, nor, for that matter, by seeing the aggressor punished by the state, will insist on his own role in meting out "just" retribution in a tort suit.

Similar considerations apply to unintentional torts committed in a reckless or otherwise gravely reprehensible manner. On the other hand, liability for harm caused by the hazards of mechanical enterprise could conceivably be replaced by a system of general "loss insurance"⁸⁴ serving the victim's compensation: either by such insurance alone where the liability would be one for "negligence without fault," or, where a tort in a moral sense of the term was committed, in combination with criminal or "tort" fines⁸⁵ designed to admonish and deter. No such legislation can seriously be advocated at this time. Coverage of all losses would not only be prohibitively expensive, but would inevitably lead to state insurance with an increase of political control and management. Moreover, since such a scheme would include all groups of the population without regard to their social and financial status, its cost could not be distributed according to insurance principles and would eventually have to be defrayed by the taxpayer. Not even the Soviet Union has extended the idea of the welfare state to such extremes, and the Scandinavians, who have progressed furthest in rethink-

⁸² For Scandinavian inquiries, see Ussing, *The Scandinavian Law of Torts*, 1 AM. J. COMP. L. 359 (1952); STRAHL, FÖRBEREDANDE UTREDNING ANGÅENDE LAGSTIFTNING PÅ SKADESTÅNDS-RÄTTENS OMRÅDE (1951).

⁸³ This has even proved true in Soviet law. See HAZARD, LAW AND SOCIAL CHANGE IN THE U.S.S.R. 238 (1953).

⁸⁴ In my earlier presentations of this subject (*supra* note 7) I suggested this term to designate both accident and property-damage insurance in contrast to liability insurance. Dean Green, *The Individual's Protection under Negligence Law: Risk Sharing*, 47 N.W.U.L. REV. 751, 775 (1953), has adopted the term in a somewhat broader meaning.

⁸⁵ See *infra* note 175.

ing the law of torts, have, at least for the time being, for these reasons, decided to preserve tort liability in its present form.⁸⁶

2. Tort Liability Insurance

As a means for the distribution of inevitable loss, a liability so manifestly inadequate for this purpose could not have survived had it not been for its association with liability insurance: if liability for *negligence* were not insurable, courts would never have been able to extend this liability to cover *negligence without fault*. This peculiar relation has not only had a decisive and, in part, pernicious impact on tort law but has distorted the law of liability insurance as well.

a) Insurance as a Basis of Liability.—Since the availability of liability insurance, then, has been a necessary condition for the broadening of tort liability in general, we need not wonder at the increasing number of situations in which—a seeming paradox—availability of this insurance has helped in creating the very liabilities against which the insured seeks protection. Thus, immunity has been held to be "waived" by the taking of insurance;⁸⁷ and failure to take insurance may yet, itself, be construed as a basis of liability.⁸⁸

b) Direct Action.—Since automobile liability insurance ultimately owes its legality to the desire to protect the victim rather than the insured himself, courts have begun to emancipate recovery from the contractual rights of the insured. A start was made when statutes were upheld which granted the victim a direct action against the insurer in cases of the insured's insolvency.⁸⁹ Since then, courts have been increasingly inclined to approve legislation extending this privilege even to cases where protection has lapsed for other reasons—such as the insured's failure to pay the premium or to

⁸⁶ Ussing, *The Scandinavian Law of Torts*, 1 AM. J. COMP. L. 359 (1952). See also Schmidt, *Orsakspöblemet under Debatt*, [1954] SVENSK JURISTIDN. 209, 213.

⁸⁷ See Streit, *The Carrying of Liability Insurance as Creating Tort Liability*, [1952] INS. L.J. 602; Note, 2 KAN. L. REV. 188 (1953); and, in general, Ehrenzweig, *Assurance Oblige—A Comparative Study*, 15 LAW & CONTEMP. PROB. 445, 452 (1950). But cf. *Kreuger v. Schmichen*, 264 S.W.2d 311 (Mo. 1954). As to suits between parents and children see *supra* note 16. For a foreign analogy see Besson, [1951] RECUEIL DALLOZ . . . Hebdomaire, Jurisprudence 173, 176, discussing a decision in which the joint liability of parents of unidentified tortfeasors was based on their protection by a common insurer. See also 21 REVUE GÉNÉRALE DES ASSURANCES TERRESTRES 431 (1950) and 23 *id.* at 196, 198 (1952).

⁸⁸ See, in general, EHRENZWEIG, *NEGLIGENCE WITHOUT FAULT* (1951). A Norwegian court affirmed a judgment against a power plant partly on the ground that it could and should have protected itself by insurance and thereby have converted its liability into an annual premium. See STRAHL, *FÖRBEREDANDE UTREDNING ANGÅENDE LAGSTIFTNING PÅ SKADESTÅNDSRÄTTENS OM-RÅDE* 138 (1951), citing from [1940] NORSK RETTSTIDENDE 16.

⁸⁹ See *Merchants Mutual Aut. Liab. Ins. Co. v. Smart*, 267 U.S. 126 (1925); Comment, [1953] WIS. L. REV. 688, 693. See also Black, J., dissenting in *Maryland Cas. Co. v. Cushing*, 347 U.S. 409, 427, 431 (1954).

coöperate with the insurer.⁹⁰ Several countries have moved even farther in this direction without, however, finding the solution to a problem which is inherent in any system of liability insurance.⁹¹

c) Multiple Premium and Circuitous Recovery.—The anomaly of an insurance protecting a person other than the insured creates further problems wherever that person's interest is otherwise insured and thus doubly covered. The motorist who collects for the damage done to his car from another driver's liability insurer discharges his own collision insurer's obligation, although he has paid a premium to the latter; and a motorist who recovers from his own collision insurer may not recover from the other driver's liability insurer, although the latter has received premiums to cover the same loss. A subsequent reallocation of the loss, in the last-mentioned case, by subrogation among the insurers will only in part eliminate the multiple premium for the same risk, because the expense of subrogation is considerable and because subrogation proceeds are usually not calculated in the year of loss and therefore, in general, neglected in establishing premium rates.⁹²

Accident insurance is often "*sum*" insurance rather than *indemnity* insurance⁹³—as where the policy promises a fixed amount for a lost leg rather than reimbursement for damage actually sustained. In that case a concurring liability insurance will not lead to circuitous recovery, because the victim will be permitted to recover on both policies, and subrogation as a rule will not occur.⁹⁴ But multiple coverage may be a problem even in per-

⁹⁰ See, e.g., N.Y. VEHICLE AND TRAFFIC LAW, § 94-q(i) (1) under which the third party's right becomes "absolute" after the accident; Lavinsky, *Insurance*, 28 N.Y.U. L.Q. REV. 1444, 1445 (1953); and, in general, Dodge, *An Injured Party's Rights under an Automobile Liability Policy*, 38 IOWA L. REV. 116 (1952); Lassiter, *Direct Actions against the Insurer*, [1949] INS. L.J. 411; Leigh, *Direct Actions against Liability Insurer*, [1949] INS. L.J. 633; Note, 27 N.Y.U. L.Q. REV. 817 (1952); Notes, 1 A.L.R.2d 822 (1948); 31 A.L.R.2d 645 (1954). For a discussion of California law, see *Royal Indemnity Co. v. Olmstead*, 193 F.2d 451, 453 (9th Cir. 1951). As to "joinder statutes" see *supra* note 26. The Canadian law is discussed in Note, 32 CAN. B. REV. 333 (1954).

⁹¹ See Section 21 of the Swedish law of May 10, 1929 on automobile liability insurance; British M.I.B. (Motor Insurers' Bureau) agreement with the Minister of Transport of June 17, 1948. As to German law see A. EHRENZWEIG, SR., DEUTSCHES (OESTERREICHISCHES) VERSICHERUNGSVERTRAGSRECHT 374, 379 (1952).

⁹² See, in general, VANCE, LAW OF INSURANCE 786ff. (3d ed., 1951).

⁹³ *Id.* at 797. The term "sum insurance," lacking in Anglo-American insurance law, has been borrowed from Continental terminology to designate non-indemnity insurance. See A. EHRENZWEIG, SR., *supra* note 91 at 28.

⁹⁴ Denial of subrogation in personal-injury cases and nondeductibility of insurance proceeds from tort recovery or vice versa are not by any means self-evident. See, e.g., *Maryland Cas. Co. v. Employers Mut. Liab. Ins. Co.*, 208 F.2d 731 (2d Cir. 1953); and, in general and as to workmen's compensation, RIESENFELD AND MAXWELL, MODERN SOCIAL LEGISLATION 416ff. (1950). In Germany, a car occupant suing his host, or an employee suing his employer, must permit deduction from his claim of accident-insurance proceeds. See PRÖLSS, VERSICHERUNGS-

sonal-injury cases, as for example, in the relations between several joint tortfeasors who carry liability insurance concurrently.⁹⁵ The prohibition against contribution between such tortfeasors⁹⁶ precludes an expensive secondary reallocation among insurers, but fails to obviate multiple coverage of the same risk. Even in the absence of multiple premiums, liability insurance—where primarily designed for the victim's protection—represents a costly⁹⁷ detour.⁹⁸

d) "Adequate" Coverage.—One of the prenatal defects of liability insurance discussed earlier reveals itself perhaps even more significantly in determining "adequate" coverage. The difficulty of this determination lies at the root of current complaints about increasing insurance rates.

As we have seen, liability insurance has been, and can be, lawful only because it covers primarily accidents caused by insured motorists without moral fault. On the other hand, it is the availability of this insurance that will induce courts and juries to give and to permit verdicts against such blameless defendants. Failure to acknowledge this rationale has prevented the development of appropriate liability limits. The uninsured will be

VERTRAGSGESETZ § 49(4) (7th ed., 1952). In the case of *E. v. G.*, 152 R.G.Z. 199 (1936) the German Supreme Court justified the first result on the ground that the host by taking accident insurance for his guests had to that extent paid damages in advance of the accident. See also the decision of the Munich appellate court, May 27, 1952 in 3 *VERSICHERUNGSRECHT* 391 (1952). But *cf.* Orłowski, *Rechtsfragen der Insassenversicherung*, 5 *VERSICHERUNGSRECHT* 45 (1954). Concerning the British compromise solution, see Friedmann, *Social Insurance and the Principles of Tort Liability*, 63 *HARV. L. REV.* 241, 253 (1949); *LAW AND SOCIAL CHANGE IN CONTEMPORARY BRITAIN* (1951). As to the right of the French "guaranty fund" (*supra* note 21) to deduct social-insurance proceeds, see *e.g.*, Tribunal Correctionnel Montargis, Nov. 11, 1952, 24 *REVUE GÉNÉRALE DES ASSURANCES TERRESTRES* 62 (1953). Concerning pertinent provisions of the Czechoslovak law of July 11, 1951, see Luby, *Responsabilité des préjudices causés par les moyens de transport*, [1952] *BULLETIN DE DROIT TCHECOSLOVAQUE* 165, 170. For a specific problem involving multiple liability insurance, see Note, 52 *COL. L. REV.* 1063 (1952).

⁹⁵ See *infra* text at note 130ff. As to the concurrence of liability insurance policies in general, see Liénard, 8 *REVUE CRITIQUE DE JURISPRUDENCE BELGE* 113 (1954).

⁹⁶ See E. E. Davis, *Indemnity between Negligent Tortfeasors: A Proposed Rationale*, 37 *IOWA L. REV.* 517 (1952); Note, 39 *CORNELL L.Q.* 484 (1954). For an analysis of the problems arising in case of the concurrence of liabilities even under those laws which have adopted the principle of risk distribution, see Menghini, *Zur Frage der Kollision der Gefährdungshaftungen*, 49 *SCHWEIZERISCHE JURISTEN-ZEITUNG* 358 (1953). Concerning related questions arising between an employer paying continued compensation and the third-party injurer, see Taube, 4 *VERSICHERUNGSRECHT* 89 (1953). *Cf.* Calif. Legis. 1955 Session, S.B. 412 concerning "Contributions Among Joint Tortfeasors."

⁹⁷ Overhead will amount to between one-third and one-half of the losses paid. *WISCONSIN REPORT* 6 (see note 42 *supra*). Since at least one-third of the recovery will go to the attorney, only a fraction of the premium serves to indemnify the victim.

⁹⁸ The current controversy about the preferability of federal-employers-liability coverage over workmen's compensation may be pertinent here. See CONARD AND MEHR, *COSTS OF ADMINISTERING REPARATION FOR WORK INJURIES IN ILLINOIS* (1952); Conard, *The Impact of Expense on Injury Claims*, [1953] *ANNALS OF AMERICAN ACADEMY OF POLITICAL AND SOCIAL*

treated as if he were insured,⁹⁹ and the insured will be held without regard to the amount of liability insurance he carries. Incalculability of loss experience and pressure for higher liability limits and higher insurance rates are the unavoidable consequences of this disparity between the law and its rationale.

e) A Threat to Safety.—The present liability insurance, then, for the victim's sake, covers both guilty and innocent actions alike.¹⁰⁰ For this reason it must be a threat to the same safety and to the same promotion of care that the insurance industry has come to stress so effectively in defending the present system.

Some foreign laws attempt to maintain pressure for the promotion of care without jeopardizing the victim's recovery by compelling the insurer to sue his own insured in cases of wilful negligence.¹⁰¹ These schemes have failed because insurers are naturally reluctant thus to disrupt relations with their customers.¹⁰² Merit plans for the safe driver can be only a symptomatic remedy.¹⁰³ It has been said that one-fifth of the drivers cause four-fifths of the accidents.¹⁰⁴ If this is correct then it is time to re-examine our policy of giving this one-fifth the protection of liability insurance.

D

THE ANSWER: LOSS INSURANCE

Any attempt at formulating a new suggestion for the solution of our problem should, in the absence of conclusive factual studies, be preceded by a profession of faith. I believe that at this time the compensation due to persons injured by automobiles should be governed by the following six postulates:

(1) A voluntary scheme of private insurance with minimum control by the state both of underwriting and rating.

(2) No impairment of and, if possible, an addition to existing incentives for greater safety.

SCIENCES 110; Conard, *Workmen's Compensation: Is it More Efficient than Employers' Liability?*, 38 A.B.A.J. 1011 (1952).

⁹⁹ *Supra* notes 26, 87.

¹⁰⁰ Even punitive damages may be insurable. See 1 A.L.R.2d 407 (1948).

¹⁰¹ See Strahl, *supra* note 82 at 52, 111. See also Oppenheimer, *Insured to Kill*, [1953] INS. L.J. 14, 17; and Visscher, *Can Liability for Accidents Resulting from Intoxication be Excluded from Auto Policies?*, [1949] INS. L.J. 713, for similar proposals.

¹⁰² See Strahl, *supra* note 82 at 57.

¹⁰³ See McNiece and Thornton, *Automobile Accident Prevention and Compensation*, 27 N.Y.U. L.Q. REV. 585, 597 (1952); CALIFORNIA REPORT 25. For a German experiment based on refund of premiums to meritorious drivers, see WOLFF AND CUNTZ, *BEITRAGSRÜCKVERGÜTUNG IN DER KRAFTFAHRTHAFTPFLICHT- UND FAHRZEUGVERVERSICHERUNG* (1953).

¹⁰⁴ Ingraham, *Merit Plan Likely for Car Insurance*, New York Times, March 27, 1952, p. 38, col. 1, cited McNiece and Thornton, *supra* note 103 at 591. See also Blain, *The Automo-*

(3) No legislative interference with the common law of torts—but elimination of the present gamble of negligence suits.

(4) Saving of expense to the insuring public.

(5) Easy determination and equality of minimum awards measured by standards of low-income groups, leaving to additional optional coverage any excess requirement of those considering their potential claims greater than those offered by the scheme.

(6) Widest possible coverage of the public.

These postulates cannot be satisfied by insurance systems—optional or compulsory, self-sustaining or combined with other measures—based on the insured's liability in tort. But although tort law and tort insurance are the villains of the piece, the following plan does not propose to abolish either. Not only because such a proposal would have scant hope of adoption, but because both have legitimate fields of application. Nor do I, as I have stressed before, propose a reform of the present system of private insurance by the imposition of compulsory features either as to the insurer or the insured. All I suggest is, gradually and cautiously to replace liability insurance (and thus indirectly tort liability) as a means of distributing automobile-accident losses by a new device of private insurance. I further suggest that this device be a new type of what I have proposed to call "loss insurance" (in order to include accident and property insurance under a common designation, in contrast to liability insurance). This would close the circle opened one hundred years ago by the creation of liability insurance first as a branch and later as a competitor of loss insurance.¹⁰⁵ For insuring automobile losses where they fall a new type of accident insurance is here proposed as the principal element of a "voluntary compensation plan."

For this new type of accident insurance I am suggesting the name "full aid" insurance in analogy and contrast to its immediate model, the "first aid" clause of current automobile insurance policies. Similar attempts to reduce tort litigation and multiple premiums by adding loss insurance to, or substituting it for, tort claims and tort insurance, have been made at various times, in this country and abroad. The present plan will, I hope, appear more feasible after an analysis of the most significant attempts, although none of them includes *all* of the above-stated postulates for a workable scheme of automobile insurance and liability.

bile Accident—A Medical Problem, 3 J. OF CRIM. PSYCHOPATHOLOGY 272 (1941); Bristol, *Medical Aspects of Accident Control*, 107 A.M.A.J. 653 (1936), cited *ibid*.

¹⁰⁵ See *supra* note 84. Distribution of losses among motorists leaves open the question whether equal use of the road by non-motorists would not at some time in the future justify a taxpayers' contribution.

1. *Compulsory Compensation Schemes?*

Forty years ago, a crisis and a deadlock in the field of industrial accidents—similar to that now prevailing in the field of automobile accidents¹⁰⁶—led to workmen's compensation. Characteristic features of this legal revolution which since has become an integral part of our law are: liability without fault, exclusive remedies, administrative assessment, and compulsory insurance—in varying degrees and combinations.¹⁰⁷ Suggestions for the adoption of a similar scheme for automobile accidents have never ceased.

They all rely in substance on the earlier mentioned report by a study committee at Columbia University generally referred to as the Columbia Plan.¹⁰⁸ This plan, like the arguments advanced for and against it, has often been stated and rejected.¹⁰⁹ It must suffice to note here that the Columbia Plan fails to satisfy the first of the six postulates for a voluntary scheme of private insurance, because it "would be administered by a special board after the manner of workmen's compensation,"¹¹⁰ and "require every motorist to carry insurance for his liability to pay compensation."¹¹¹

The recommendations of the Columbia Plan have been followed in the Canadian province of Saskatchewan. The Automobile Accident Insurance

¹⁰⁶ Arguments advanced for and against reform were strikingly similar to those now current in the automobile controversy. See, e.g., in favor of reform: STATE OF NEW YORK, COMMISSION TO INQUIRE INTO THE QUESTION OF EMPLOYERS' LIABILITY AND OTHER MATTERS, REPORT (1910); against such reform: Mechem, *Employers' Liability*, 44 AM. L. REV. 221, 242 (1910). Concerning the differences between the problems of workmen's compensation and automobile liability see, e.g., Bohlinger, *Which Road for the Uninsured Motorist?*, [1951] INS. L.J. 433, 436.

¹⁰⁷ See, in general, Riesenfeld, *Contemporary Trends in Compensation for Industrial Accidents Here and Abroad*, 42 CALIF. L. REV. 531 (1954); RIESENFELD AND MAXWELL, *MODERN SOCIAL LEGISLATION* 381 (1950); Riesenfeld, *Forty Years of American Workmen's Compensation*, 35 MINN. L. REV. 524 (1951); James, *Social Insurance and Tort Liability: The Problem of Alternative Remedies*, 27 N.Y.U. L.Q. REV. 537 (1952); D. T. Steffen, *Tort Immunity and Workmen's Compensation*, 39 VA. L. REV. 951 (1953).

¹⁰⁸ *Supra* note 37.

¹⁰⁹ For a good summary see Note, [1953] ILL. LAW FORUM 263. See also, e.g., Grad, *Recent Developments in Automobile Accident Compensation*, 50 COL. L. REV. 300 (1950); James and Law, *Compensation for Auto Accident Victims: A Story of Too Little and Too Late*, 26 CONN. B.J. 70 (1952); Marx, *Let's Compensate—Not Litigate*, 3 FEDERATION OF INS. COUNSEL QUART. 62 (1953); McNiece and Thornton, *Automobile Accident Prevention and Compensation*, 27 N.Y.U. L.Q. REV. 585 (1953) and the controversy between Marx and McVay in *Symposium, Motorist Responsibility*, 15 OHIO ST. L.J. 101, 134, 150, 157, 161 (1954). For similar plans preceding the COLUMBIA REPORT see Carman, *Is a Motor Vehicle Compensation Act Advisable?*, 4 MINN. L. REV. 1 (1919); Rollins, *A Proposal to Extend the Compensation Principle to Accidents in the Streets*, 4 MASS. L.Q. 392 (1919); Marx, *Compulsory Compensation Insurance*, 25 COL. L. REV. 164 (1925). On simultaneous Scandinavian efforts, see Ussing, *The Scandinavian Law of Torts*, 1 AM. J. COMP. L. 359, 364 (1952).

¹¹⁰ COLUMBIA PLAN 213; see note 37 *supra*.

¹¹¹ *Id.* at 212.

Act,¹¹² passed there in 1947, has since become another object of vigorous, if not always dispassionate, discussion.¹¹³ The administrators of this plan report highly satisfactory results of its operation. It remains doubtful, however, whether these results permit any conclusions for the workability of such a plan in this country. And this much is certain: The Saskatchewan scheme, in addition to being compulsory and having partially excluded private insurance, falls short of another essential aim of a desirable solution—it perpetuates the negligence gamble by permitting the victim, as well as the state claiming subrogation, to bring suits in negligence.¹¹⁴

Some of these shortcomings could—and no doubt will—be remedied, and this or a similar plan may yet prove a workable answer.¹¹⁵ As long as there is a chance, however, that the insurance industry itself, without state participation, can offer another solution, no compulsory scheme need be considered. In this sense, some of the following voluntary devices for displacing tort law and tort insurance by the addition or substitution of accident or other loss insurance may be considered as hopeful new beginnings; as beginnings toward a system of insurance in which we no longer insure each other as adversaries in a contest between victims and wrongdoers but—to use Jeremy Bentham's words—as partners of the "great social enterprise" united "without knowledge or choice . . . , without the power of separation."

¹¹² See, e.g., CALIFORNIA REPORT 160; J. Green, *The Automobile Accident Insurance Act of Saskatchewan*, 31 J. OF COMP. LEG. & INT. L. 39 (3d ser., 1949); also J. Green, same title, 2 CHITTY'S L.J. 38 (1952). A similar plan was before the California Legislature at the 1953 regular session. 1953 Session, A.B. 8 (Collins Bill).

¹¹³ See, e.g., Fines, *The Saskatchewan Plan*, 3 FEDERATION OF INS. COUNSEL QUART. 51 (1953); Kilroe, *Necessity for Preservation of the Judicial Process in the Interest of Persons Injured in Automobile Accidents*, 25 N.Y. ST. B. BULL. 315, 324 (1953) ("pure, unadulterated socialism"); ALBERTA REPORT 21, 45. Benefits have recently been raised by from 25 per cent (weekly benefit) to 150 per cent (medical expenses).

¹¹⁴ A similar scheme is advocated by McNiece and Thornton, *Automobile Accident Prevention and Compensation*, 27 N.Y.U. L.Q. REV. 585, 611 (1952). But cf. Marx, *Let's Compensate—Not Litigate*, 3 FEDERATION OF INS. COUNSEL QUART. 62 (1953).

¹¹⁵ McNiece and Thornton, *supra* note 114; Marx, *supra* note 114. It may be hoped that Dean Green will elaborate upon his "comparative risk sharing arrangement supported in part by compulsory comprehensive loss insurance required of owners of all machines and employers engaged in dangerous operations of every character, coupled with comprehensive accident insurance for the operators of such machines and employees engaged in dangerous operations, by which risks of personal injury, death, and property damages could be shared by the individual and the group on a basis of all the data involved in the tragedy." Green, *The Individual's Protection under Negligence Law: Risk Sharing*, 47 N.W.U. L. REV. 751, 771 (1953). Coleman, *A Suggestion for the Disposition of Automobile Negligence Cases*, 28 CONN. B.J. 389, 390 (1954) recommends "the creation of a system for the disposition of automobile cases within the framework of the *judicial department* which would follow the general plan of that created by the Workmen's Compensation Act." (Italics added.)

2. *New Beginnings*

a) Cumulative Loss Insurance.—The United States government maintains numerous *airports in Great Britain*, which it occasionally leases to British air carriers. To reduce the possibility of negligence suits by injured passengers, the carrier is compelled to certify to the United States that all its aircraft are protected by accident insurance for their passengers in certain minimum amounts for each person and accident. Additional provisions release the United States from any negligence liability and contain the undertaking that all accident-insurance policies so stipulated "will contain an endorsement providing a waiver of any right of subrogation the insurance company may have against the United States by reason of any payment under the Policy." It is apparently expected that passengers injured in an airport accident, if protected by such policies, will be less likely to sue the United States, or if they do, will be less likely to recover. The same thought may have caused one of the largest German reinsurance companies to stipulate that the primary insurer write property insurance rather than the more expensive liability insurance for tankers visiting American ports, to cover the real and personal property adjoining the harbor.¹¹⁶ And the same thought underlies a proposal widely discussed in negotiations for the conclusion of an international convention concerning carriage by road, according to which insurance of the same risk by the shipper and carrier would be replaced by an "assurance unique."¹¹⁷

On a voluntary basis, the *first-aid clause* of the American automobile liability-insurance policy fulfills the same function as did at one time the so-called "liberality insurance" on the Continent under which the victim could recover from the insurer in the absence of the insured's liability.¹¹⁸ Under the first-aid clause the insured is authorized to pay—without regard and prejudice to the question of fault—first medical expenses, either only to passengers in the car, or to members of his household in general,¹¹⁹ or to any third party injured in the accident.¹²⁰ To this extent tort litigation is

¹¹⁶ I am indebted for this information to Dr. E. R. Prölss, the author of a leading German insurance-law commentary. See note 94 *supra*.

¹¹⁷ See INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW (Rome U.D.P., 1950), Doc. 20, with critical comments (mimeographed).

¹¹⁸ This type of insurance was apparently written for the first time in 1901, by the Swiss company "Zürich." Sieg, *supra* note 59, at 66, 275.

¹¹⁹ See CALIFORNIA REPORT 154. On a "voluntary industry plan" which would expand this device, see Lemmon, *Insurance and the Automobile—Where Are We Headed?*, [1954] *Ins. L.J.* 369, 377. See also N. Y. Laws 1952, c. 298. Such insurance is now written up to \$2,000 and may include surgical and funeral expenses. Cumulation of tort claim and first medical payment, held permissible in *Severson v. Milwaukee Auto. Ins. Co.*, 265 Wis. 488, 61 N.W.2d 872 (1953), may have to be excluded by the policy. See Engelhard, *Medical Payments Coverage Goes Double or Nothing*, [1954] *Ins. L.J.* 303, 327.

¹²⁰ 8 APPLEMAN, *INSURANCE LAW AND PRACTICE* (1942, Supp. 1952), § 4895. To avoid

reduced. But although this approach thus offers a clue to the solution proposed in this plan, it remains unsatisfactory because of its limited scope and continuing multiplicity of premiums. The following attempts of legislators, courts, and parties at substituting without resorting to compulsion, loss insurance for tort insurance (as well as for the tort claim itself) are, therefore, of particular importance.

b) Substituted Loss Insurance.—Before discussing legislative models for "full aid" insurance, certain practices should be mentioned by which, without legislative action, tort litigation has been greatly reduced, significantly in an area in which the inherent vices of tort litigation would directly affect the insurers themselves. This has been achieved by the *exclusion of subrogation* against the liability insurer.

Whether or not the policy so provides, the insurer who pays a collision loss is entitled to pursue the insured's tort claim—in other words, he is entitled to claim subrogation.¹²¹ This mainly on the ground that the "wrongdoer" must not be permitted to escape the consequences of his wrong. The insurer's right to this subrogation is thus hard to explain in those cases where the wrongdoer is permitted to escape these consequences by insuring against them. Indeed, as has been shown, the lawfulness of this insurance is based on the very fact that the so-called wrongdoer ordinarily has not committed a wrong.

Abroad, these considerations have led a few legislatures to deny subrogation to the collision insurer—not only against the liability insurer, but also against the insured "wrongdoer" himself¹²² (unless the latter was grossly negligent). This legislation is significant for the solution of our problem in this country, because traces of this approach may be found in American law, both statutory and judicial.

Thus, statutes in many states have abolished the fire insurer's right to recoup his loss from railroad companies whose locomotives had caused the fire by the "negligent" emission of sparks.¹²³ And there are cases in which

double insurance, passengers of the other car are not covered. Several states have refused to permit this type of insurance without a license for the writing of accident insurance.

¹²¹ VANCE, *LAW OF INSURANCE* 787 (3d ed., 1951).

¹²² See Section 25 of the Scandinavian insurance codes; HELLNER, *FÖRSÄKRINGSGIVARENS REGRESSRÄTT* (The Insurer's Right of Subrogation) (1953), reviewed Ehrenzweig, 2 AM. J. COMP. L. 562 (1953). See also decision of Danish Supreme Court, [1945] *Ugeskrift for Retsvaesen* 436; Ussing, *Scandinavian Law of Torts*, 1 AM. J. COMP. L. 359 (1952); Strahl, *supra* note 82, at 102. For England, see Friedmann, *Social Insurance and the Principles of Tort Liability*, 63 HARV. L. REV. 241, 254 (1949); for Germany, A. Ehrenzweig, Sr., 2 VERSICHERUNGSRECHT 285 (1951); Ebel, *Sozialrechtliche und privatrechtliche Unternehmerhaftung*, 2 VERSICHERUNGSRECHT 281 (1951) (on a statutory limitation of subrogation to criminal negligence); Bach, 4 VERSICHERUNGSRECHT 348 (1953); Schmidt, 4 VERSICHERUNGSRECHT 456 (1953). See James, *Social Insurance and Tort Liability: The Problem of Alternative Remedies*, 27 N.Y.U. L.Q. REV. 531, 561 (1952).

¹²³ See, e.g., *British American Assur. Co. v. Colo. & So. Ry. Co.*, 52 Colo. 589, 125 Pac. 508

subrogation has been denied where the defendant was found not to have been the "principal tortfeasor."¹²⁴ Prohibition against contribution between tortfeasors may be similarly explained;¹²⁵ as may the abolition of the defense of contributory negligence where the "wrongdoer" is in terms or fact held as a distributor of the loss;¹²⁶ the denial of the government's claim for indemnity against its employee under the Federal Tort Claims Act;¹²⁷ the denial of the hospital insurer's subrogation against a third party tortfeasor;¹²⁸ and what may be a trend in conflicts law against the application of foreign subrogation statutes.¹²⁹ In all these situations, it is apparently felt that once an accidental loss has been distributed by insurance, it should not be reallocated by a tort liability based primarily on our solicitude for the victim rather than on a desire to punish a wrongdoer.

While these legislative and judicial considerations remain limited to isolated instances, they have for other reasons been given wide effect by insurers among themselves. In order to avoid sterile expense, insurers all

(1912); *Farren v. Maine Central Ry. Co.*, 112 Me. 81, 90 Atl. 497 (1914); *New England Box Co. v. New York Central Ry. Co.*, 210 Mass. 465, 97 N.E. 140 (1912); *Boston Ice. Co. v. Boston & Maine R.R.*, 77 N.H. 6, 86 Atl. 356 (1913). And, conversely, see MASS. GEN. LAWS c. 160, § 234 (1921), entitling the railroad held liable for spark damage "to the benefit of any insurance effected upon such property by the owner thereof, less the cost of premium and expense of recovery."

¹²⁴ See, e.g., *American Alliance Ins. Co. v. Capital National Bank*, 75 Cal.App.2d 787, 171 P.2d 449 (1946); and cf. *Standard Accident Ins. Co. v. Pellecchia*, 15 N.J. 162, 104 A.2d 288 (1954); *Maryland Casualty Co. v. Aetna Casualty & Surety Co.*, 191 Va. 225, 60 S.E.2d 876 (1950). For a similar doctrine in workmen's compensation, distinguishing between "passively" and "actively" negligent co-tortfeasors, see, e.g., *Hunsucker v. High Point Bending & Chair Co.*, 237 N.C. 559, 75 S.E.2d 768 (1953). Cf. *Crowell v. Eastern Air Lines*, 240 N.C. 20, 81 S.E.2d 178 (1954). It is unfortunate that the Supreme Court of the United States has refused to employ a similar reasoning in its interpretation of the Federal Tort Claims Act under which the United States government is obligated to share the negligence liability of other entrepreneurs. In *United States v. Aetna Casualty & Surety Co.*, 338 U.S. 366 (1949) the Court confirmed the insurers' right under this Act to subrogation against the government. See Blanton, *Subrogation*, 7 VAND. L. REV. 190, 195 (1954); *infra* note 127.

¹²⁵ See *supra* note 96; WILLIAMS, JOINT TORTS AND CONTRIBUTORY NEGLIGENCE (1951).

¹²⁶ See, in general, *id.* at 207, where Williams, against Winfield, maintains that contributory negligence is available as a defense even against strict liability. But cf. *id.* at 213, where he notes that this defense has "happily" been abolished in workmen's compensation. "Get thee to the workhouse; thy man was a careless rogue" (*ibid.*) remains dramatically true in the law of automobile accidents.

¹²⁷ *United States v. Gilman*, 347 U.S. 507 (1954). The Supreme Court of the United States in that case relied in part on the consideration that, while "perhaps the suits which would be instituted under [a liability rule] . . . would mostly be brought only when the employee carried insurance," any liability so found would not be limited to the amount of such insurance. (*Id.* at 509.)

¹²⁸ *Michigan Hospital Service v. Sharpe*, 339 Mich. 357, 63 N.W.2d 638 (1954) using a contract rationale to reach this result.

¹²⁹ See in general Riesenfeld, *Contemporary Trends in Compensation for Industrial Accidents Here and Abroad*, 42 CALIF. L. REV. 531, 572 (1954).

over the world have entered into so-called "knock-for-knock"¹³⁰ or "loss-sharing" agreements.¹³¹ Under these agreements they have waived, wholly or in part, their liability claims against each other; and replaced loss distribution through the insurance of the loss itself. In the United States, agreements of this kind have been outlawed¹³² and have had to be replaced by arbitration proceedings to achieve similar results.¹³³ This is probably due to a misunderstanding of the function of these agreements as an indispensable corrective of what has become an obsolete system of tort law.¹³⁴

¹³⁰ A Lloyds automobile insurance underwriter assured the author that he could not do business without such agreements. Their validity and usefulness has never been doubted in England. See SHAWCROSS, *THE LAW OF MOTOR INSURANCE* 717 (2d ed. 1949); and *Bell Assurance Ass'n v. Licensees and Gen. Ins. Co.*, [1923] 17 LL. L. Rep. 100; *Morley v. Moore*, [1936] 2 K.B. 359, 2 All E.R. 79.

¹³¹ See the "sharing agreements" between member companies of HUK (liability insurers), Hamburg, and certain health insurers in Cologne; German Supreme Court, Jan. 31, 1951, 2 *VERSICHERUNGSRECHT* 65 (1951); Note, 5 *VERSICHERUNGSRECHT* 16 (1954); Höring, *Teilungsabkommen Krankenkasse-Haftpflicht VU*, 5 *VERSICHERUNGSRECHT* 377 (1954); Haidinger, *Schadenteilungsabkommen mit Haftpflichtversicherern*, 2 *VERSICHERUNGSRECHT* 57 (1951); Prölss, *Wesen und Wirkung von Schadenteilungsabkommen in der Haftpflichtversicherung*, 16 *JURISTISCHE RUNDschau FÜR DIE PRIVATVERSICHERUNG* 113, 115 (1939); Chomse, *Teilungsabkommen und Kraftfahrzeugpflichtversicherung*, 17 *id.* at 169 (1940); Chomse, "Probefahrt"-*Teilungsabkommen*, [1949] *VERSICHERUNGSWIRTSCHAFT* 380; Gerlach, *Teilungsabkommen oder Regressverzicht in der Kraftfahrversicherung?*, 65 *ZEITSCHRIFT FÜR VERSICHERUNGSWESEN* 323 (1942); Mueller, *Zur Frage des Regressverzichts in der Fahrzeugversicherung*, *id.* at 270; Schmidt-Tuengler, *Die Regressregelung in der Kraftfahrzeug-Kaskoversicherung*, 62 *id.* at 657 (1939); Ernst, *Sicherungsscheine und Teilungsabkommen*, 72 *DEUTSCHE ÖFFENTLICH-RECHTLICHE VERSICHERUNG* 39 (1940); and *VERÖFFENTLICHUNGEN DES REICHAUFSICHTSAMTS FÜR PRIVATVERSICHERUNG* 141 (1931), 90 (1932), 164 (1933), 141 (1934). In accordance with their importance, these agreements have been widely discussed abroad. Concerning the questions arising in cases of doubtful liability, see, e.g., Loppuch, *Beiträge zur Kraftfahrzeugversicherung*, 60 *ZEITSCHRIFT FÜR VERSICHERUNGSWESEN* 1231 (1937); Prölss, *supra*; Haidinger, *supra*; Voss, 5 *VERSICHERUNGSRECHT* 109 (1954). On similar agreements in ocean marine insurance (with its great difficulty of ascertaining the facts in collision cases) see Schierenbeck, *Warum kleine Kollisionsprozesse?*, 60 *ZEITSCHRIFT FÜR VERSICHERUNGSWESEN* 929 (1937). The French practice seems to be adverse to such agreements. See 3 MAZEAUD, *RESPONSABILITÉ CIVILE* §§ 2731, 2733-2 (4th ed. 1947).

¹³² REPORT OF CASUALTY AND SURETY COMMITTEE, PROCEEDINGS OF THE 78TH ANNUAL SESSION OF THE NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS 353 (1947). But *cf.* RYDER, *AUTOMOBILE INSURANCE* 160 (1924) recommending such agreements; Daily, *Common Casualty Claims*, [1948] *THE SPECTATOR* 163 (discussing these agreements as frequent); GORDON, *AUTOMOBILE CLAIM PRACTICE* 172 (1940).

¹³³ Nationwide Intercompany Arbitration Agreement, Feb. 1, 1952. According to data available as of January 19, 1954, 215 companies writing more than 70 per cent of all American property-damage insurance and 40 per cent of bodily injury insurance have joined in the agreement, thus eliminating by arbitration and prearbitration disclosure the vast majority of subrogation claims. (I am indebted for this information to Mr. Ralph G. McCallum of the Association of Casualty and Surety Companies.) See Note, [1954] *INS. L.J.* 503. Similar agreements in fire insurance seem to be in continued general use. See National Underwriter, June 23, 1949. On the other hand, subrogation in fire losses is recommended in *Subrogation and Soft Hearts*, National Underwriter, Feb. 27, 1947.

¹³⁴ But *cf.* *Groom v. Crocker*, [1937] 3 All E.R. 844, *aff'd*, [1938] 2 All E.R. 394, posing

As subrogation is eliminated by legislation, case law, or contract, there arises the question, so significant in our quest for the least expensive scheme of distributing losses, why the insured, as a group, should continue to pay more than one premium for one loss; or, in other words, why they should be forced to protect themselves by liability insurance against a potential liability which may be made ineffective by the elimination of subrogation. In certain isolated more progressive fields of commercial insurance, the justification of this question has been recognized, and taken account of, by agreements entitling the insured initially to waive the insurer's subrogation claim.¹³⁵ Here and in certain typical relations such as that between the marine insurer and the carrier—who, too, acts as a distributor of inevitable loss—a final solution as to the ascertainment of the most suitable sole insurer may be on the way.¹³⁶

In general, however, the assistance of the legislature will be required for creating the inducement necessary for the voluntary substitution of loss insurance for tort law. The following three *legislative models* will exemplify available techniques.

(1) Some workmen's-compensation acts contain a rule—not connected with compulsion and, indeed, often present in "elective" statutes whose benefits the parties are free to reject or elect¹³⁷—under which the injured workman, once he has obtained compensation, ordinarily¹³⁸ loses his tort claim.¹³⁹ Tort liability is thus effectively excluded by a type of insurance which, though in most states referred to as a liability insurance sui gen-

the problem caused by the loss of merit rating under such an agreement. *Cf. Morley v. Moore*, [1936] 2 All E.R. 79; *Chorley*, 2 Mod. L. Rev. 65, 66 (1938).

¹³⁵ See, e.g., Mortimer, *Adjusting Practices*, INLAND MARINE AND TRANSPORTATION INSURANCE 393, 394 (1951). See also text, *supra* at note 116.

¹³⁶ See, e.g., Rodda, INLAND MARINE AND TRANSPORTATION INSURANCE 111 (1949); Young, *Cargo Carriers' Liability and the Effect of Shippers' Insurance*, [1952] INS. L.J. 727. In *Globe & Rutgers Fire Ins. Co. v. Winter Garden Co.*, 9 F.2d 227 (2d Cir. 1925) nondeclaration to the carrier of excess value was held not to violate a policy clause prohibiting release from liability. See, in general, Note, 169 A.L.R. 666 (1947). Concerning the treatment of this problem in France, see Rodière, *Introduction à la responsabilité des transporteurs de marchandiss*, 7 REVUE TRIMESTRIELLE DE DROIT COMMERCIAL 1, 3, 19 (1954).

¹³⁷ For a (shrinking) list of states which have preserved this type of statute (owing its creation to constitutional objections no longer valid), see Riesenfeld, *Contemporary Trends in Compensation for Industrial Accidents Here and Abroad*, 42 CALIF. L. REV. 531, 569 (1954).

¹³⁸ For a summary of exceptions, see *ibid.*

¹³⁹ *Ibid.* See also James, *Social Insurance and Tort Liability: The Problem of Alternative Remedies*, 27 N.Y.U.L.Q. REV. 537 (1952); Plummer, *The Exclusive Remedy Theory of the Workmen's Compensation Laws*, 18 INS. COUNS. J. 32 (1951). This rule is "reciprocal compensation to industry for the burden it assumes as an aggregate unit in providing . . . relief for workmen injured in extrahazardous work, and their families and dependents . . . regardless of questions of fault." *Koreski v. Seattle Hardware Co.*, 17 Wash.2d 421, 135 P.2d 860 (1943) (denying an employee's common-law claim even after a waiver of his compensation claim). See also *Jonathan Woodner Co. v. Mather*, 210 F.2d 868, 873 (D.C. Cir. 1954). But *cf.*, e.g., *United Gas Corp. v. Guillory*, 207 F.2d 308 (5th Cir. 1953).

eris,¹⁴⁰ has in substance the effect of accident insurance.¹⁴¹ But for models of outright substitution of loss insurance for tort claims and tort insurance we must look abroad.

Such substitution could of course be promoted effectively by making abolition of tort claims the quid pro quo for the benefits of loss insurance, or, on the other hand, by imposing greater liability in cases of failure to carry such insurance.

The latter approach is widely used in workmen's compensation.¹⁴² Outside this field it is rare, but can occasionally be found. For example, an Austrian law establishes an irrebuttable presumption of negligence against the warehouseman who fails to obtain fire insurance for all his goods.¹⁴³ More frequent is the former approach. Beginnings may be seen in such early statutes as the German (strict) Liability Law for Railroads according to which in certain cases accident-insurance proceeds were to be deducted from tort recovery.¹⁴⁴ But more significant are developments in two other fields of modern transportation.

(2) Air law with its more dramatic factual and legal problems and its more recent history offers the most striking examples. Here, even more often than in automobile accidents, attempts at ascertaining the true cause of an accident may be hopeless, because the crash may have wiped out essential evidence.¹⁴⁵ The imposition of strict liability in the Warsaw Convention of 1929 and many national laws was one result of this fact.¹⁴⁶

Moreover, a plane crash even more often than an automobile accident may cause a whole series of law suits against several "tortfeasors," such

¹⁴⁰ See RIESENFELD AND MAXWELL, *MODERN SOCIAL LEGISLATION* 369 (1950).

¹⁴¹ This in view of the elimination of the fault test and the independence, to a large extent, of the worker's claim from continuing and valid insurance coverage. *Id.* at 388.

¹⁴² See Riesenfeld, *Contemporary Trends in Compensation for Industrial Accidents Here and Abroad*, 42 CALIF. L. REV. 531, 560 (1954).

¹⁴³ See Austrian Warehouse Law of April 28, 1889, Reichsgesetzblatt [Official Gazette] No. 64, § 15 providing in effect that any warehouse shall be liable as if it had been negligent unless, when receiving the goods, it obtained fire insurance for all goods in its custody. *Cf.* also those workmen's compensation laws in which the employer who has failed to obtain his elective insurance, in addition to being deprived of his common-law defenses, will be met by a presumption of negligence. See, e.g., CAL. LAB. CODE § 3708.

¹⁴⁴ Law, June 7, 1871, Reichsgesetzblatt [Official Gazette] No. 25, § 4 at 270. See Sieg, *supra* note 59 at 42. For early Scandinavian proposals to a similar effect, see Ussing, *The Scandinavian Law of Torts*, 1 AM. J. COMP. L. 359, 366 (1952).

¹⁴⁵ See Orr, *Accident Investigations of the U.S.A. Civil Aeronautics Authority*, 21 INS. COUNS. J. 123 (1954).

¹⁴⁶ See Note, 17 J. OF AIR L. & COMM. 225 (1950) concerning the American Bar Association resolution urging strict liability and increased liability limits. But *cf.* Orr, *The Rio Revision of the Warsaw Convention*, 21 J. OF AIR L. & COMM. 39, 46 (1954), presenting the standpoint of the insurance industry. See also *Prentiss v. National Airlines*, 112 F.Supp. 306 (N.J. 1953); and, in general, Gardner, *Comparative Air Law*, 20 J. OF AIR L. & COMM. 34 (1953); Vold, *Strict Liability for Aircraft Crashes*, 5 HAST. L.J. 1 (1953); *infra* note 208.

as airport owners, carriers, and manufacturers.¹⁴⁷ All these, in view of the threat of bankruptcy, are compelled to take liability insurance, thus insuring at least a portion of the same risk concurrently at unwarranted expense.¹⁴⁸

It was this last element of multiple insurance which induced a French writer as early as 1925 to advocate compulsory accident insurance accompanied by an abolition of liability.¹⁴⁹ No such scheme has been developed as yet in France despite strong support. But there has been a scheme in force in Germany since 1943, from whose history and experience certain conclusions for our problem can perhaps be drawn.

Until 1943 German air carriers took out accident insurance for those passengers willing to waive their tort claims.¹⁵⁰ This practice was replaced in 1943 by Section 29(g) of the German Air Law. By this provision the carrier has been relieved of tort liability to the extent that the passenger is indemnified under his accident policy which the carrier is under an obligation to take out on his behalf.¹⁵¹ Similar provisions exist in Italy¹⁵² and in Spain,¹⁵³ and have been recommended for adoption in this country.¹⁵⁴ In Switzerland, Swissair obtains a similar result by taking out accident insurance for its passengers, in amounts approximating its maximum lia-

¹⁴⁷ See, particularly, ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, COMMITTEE ON AERONAUTICS, REPORT ON AIRCRAFT MANUFACTURERS' PRODUCT LIABILITY, 6 N.Y.C.B.A. RECORD 319 (1951). See also Turner, *The Recent Trend in Liability of Manufacturers*, 18 INS. COUNS. J. 44 (1951); Eastman, *Liability of the Ground Control Operator for Negligence*, 17 J. OF AIR L. & COMM. 170 (1950); Grönfors, *Schwedische Rechtsprechung auf dem Gebiete des Luftrechts*, 3 ZEITSCHRIFT FÜR LUFTRECHT 58, 61 (1954).

¹⁴⁸ See text at notes 95ff., 127ff. *supra*.

¹⁴⁹ LONIEWSKI, ASSURANCE ET RESPONSABILITÉ EN MATIÈRE DE TRANSPORT (Paris: 1926). See also KAFTAL, RÉPARATIONS DES DOMMAGES OCCASIONNÉS AUX PASSAGERS ET AUX EXPÉDITEURS DE MARCHANDISES PAR LES CATASTROPHES DE COMMUNICATION COMMERCIALE AÉRIENNE (1927). But see *infra* note 153.

¹⁵⁰ See Weimar, *Die obligatorische Fluggastunfallversicherung gemäss § 29g LVG*, 2 ZEITSCHRIFT FÜR LUFTRECHT 220, 223 (1953); and in general, DORING, VERSICHERUNG UND LUFTVERKEHR (1921); DORING, LUFTVERSICHERUNG (1928).

¹⁵¹ Law of Jan. 26, 1943, Reichsgesetzblatt [Official Gazette] I, No. 11, at 70. See WEIMAR, DIE VERSICHERUNGSPRAXIS 12 (1953); Achtnich, *Luftrechtliche Betrachtungen*, 1 ZEITSCHRIFT FÜR LUFTRECHT 323, 341 (1952). This law is still in effect in Austria. Raft-Marwil, *Länderberichte: Österreich*, *id.* at 146, 147 (1952).

¹⁵² Codice della Navigazione of March 3, 1942, Art. 941.

¹⁵³ Law of Sept. 26, 1941, and decree of May 8, 1942. See also the Russian law of Feb. 3, 1938, text 46; and, in general, MANES, HAFTPFLICHTERSICHERUNG 10 n. 1 (early railroad law); EHLERS, DEUTSCHER ANWALTSTAG XXIV, 335 (ocean marine). For France see Picard, *Responsabilité et Assurance dans le Transport Aérien*, 24 REVUE GÉNÉRALE DES ASSURANCES TERRESTRES 217, 226 (1953).

¹⁵⁴ See Sweeney, *Is Special Aviation Liability Legislation Necessary?*, J. OF AIR L. & COMM. 166 (1952). A draft regulation submitted by the Civil Aeronautics Board (Release No. 58) 14 CFR Part 271 (1952) which favors a compulsory financial-responsibility law for air carriers, has been attacked as unconstitutional. Tipton and Bernhard, *Compulsory Insurance for Air Carriers*, 20 J. OF AIR L. & COMM. 58 (1953).

bility against which the proceeds of this insurance may be used as a set-off. Substantial reductions of the liability insurance premium have thus been made possible.¹⁵⁵

If a lesson may be drawn from the successful working of these schemes, it may be this: if accident insurance protection is high enough to make the proceeds of accident insurance correspond roughly to the popular estimate of an adequate minimum award, tort claims and tort insurance will not be missed. This conclusion is fortified by experiences both in this country and abroad in fields in which this relation between coverage and minimum need was not established. Reference has already been made to the Saskatchewan plan under which, presumably because of inadequate accident-insurance protection, common-law claims have had to be preserved.¹⁵⁶ And in American law concerning the liability of international air carriers, negligence litigation continues to plague the courts (despite the Warsaw Convention which provides for minimum accident recovery), because the inadequacy of the "accident coverage" of \$8,300 induces juries to find "gross" negligence in order to be able to award more substantial indemnities. In a version avoiding this shortcoming the basic idea of the Warsaw Convention has been recommended in the draft of a statute prescribing the carrying of "liability or accident (admitted liability) insurance."¹⁵⁷

(3) Another example, from the field of property insurance, may further illustrate both the need of the loss-insurance coverage for adequacy and the feasibility of the general approach. Since 1932 German courts have upheld clauses in the standard contracts of freight forwarders,¹⁵⁸ exempt-

¹⁵⁵ For this information I am indebted to Mr. D. Hagmann, Secretary General of I.U.A.I., Zürich. See also Achtnich, *supra* note 148. As to Air France, see Weimar, *supra* note 150 at 228. Introduction of a similar scheme on an international basis was rejected at the ICAO Conference in Geneva in 1949, ICAO-DOCUMENT 6014 LC/III, 71. See also ICAO DOCUMENT LISBON 239 (1948), *id.* Montreal 275 (1949). But cf. MEYER, AKTUELLE LUFTRECHTSFRAGEN, WELTLUFTFAHRT 200 (1951). For trends in Switzerland toward further extension of accident insurance, see Berenstein, *L'extension de l'Assurance Obligatoire contre les Accidents*, RECUEIL DE TRAVAUX 262, 264, 270, 278, 284, 292, 301 (Geneva: 1952). See, in general, Heuberger, *Der Tier-Automobil-und Flugzeughalter im schweizerischen Haftpflichtrecht*, 101 ABHANDLUNGEN FÜR SCHWEIZERISCHES RECHT 58 (Neue Folge, 1935). I am indebted to Mr. Boris E. Gutmann, of Sayre and Toso, Inc., Underwriters and Lloyds' correspondents in San Francisco, for the information that attempts at introducing a similar scheme in this country have failed so far because the supplying of accident insurance to the passenger ("guest voluntary settlement") may be construed as unlawful rebate.

¹⁵⁶ See text at note 114 *supra*.

¹⁵⁷ Sweeney, *Is Special Aviation Liability Legislation Essential?*, 19 J. OF AIR L. & COMM. 166, 178, 317, 329 (1952). But cf. Knauth, *Air Carriers' Liability in Comparative Law*, 7 AIR L. REV. 1, 26 (1936). A similar approach was favored by the air-law panel of the Fourth International Congress of Comparative Law in Paris, August 1954, under the chairmanship of Professors Moeller (Hamburg) and Hémard (Paris). Cf. 4 ZEITSCHRIFT FÜR LUFTRECHT 50 (1955).

¹⁵⁸ Adopted on April 26, 1927. See Krien, *Die Allgemeinen Geschäftsbedingungen des Speditionsverkehrs* (ADSp) 26 (Wiesbaden: Robert Stroh, 1948).

ing them—on the condition that they take out “liability” insurance on their customers’ behalf¹⁵⁹—from their liability for what had already then become “negligence without fault.”¹⁶⁰ And since 1939, when these clauses were declared mandatory for the insurance industry to serve the rigid uniformity of the Nazi regime,¹⁶¹ they have had statutory effect, although they lost their compulsory character after the war.¹⁶²

Under this scheme, the freight forwarder—unless expressly instructed to the contrary by his customer¹⁶³—is obligated to take out insurance on his customer’s behalf, who may recover directly from the insurer for any loss “for which the freight forwarder’s liability shall be claimed by virtue of his contract and for which he is liable according to law.”¹⁶⁴ The freight forwarder’s liability is in effect one without fault. Therefore, what appears in this scheme as a “liability” insurance on a third party’s behalf is in effect loss insurance.¹⁶⁵ This result is secured by the freight forwarders’ general practice to admit their legal liability in proceedings for the establishment of the customer’s claim. This the freight forwarder can well afford because—and this is the heart of the scheme—(a) the taking out of insurance on his customer’s behalf completely relieves the freight forwarder of any tort liability,¹⁶⁶ and (b) the insurer, except for a “deductible” of ten per cent,¹⁶⁷ is not subrogated against him. Such controversies as might arise from this scheme despite the virtual exclusion of tort liability are subject to arbitration.¹⁶⁸

There may be room for improvement, particularly by an open substitution of loss insurance for liability insurance¹⁶⁹ and by a further clarification of the relation between the various insurers. Yet the freight-forwarding industry in Germany, as well as related industries in other countries,¹⁷⁰

¹⁵⁹ RGZ [German Supreme Court, Civil Matters] CXXXV, 174 (Feb. 6, 1932). Before this, courts had invalidated such exemptions as violating “good morals.”

¹⁶⁰ See text at note 165 *infra*.

¹⁶¹ Decree of Dec. 29, 1939, published in Reichsanzeiger, Jan. 5, 1940.

¹⁶² See decision of the German Supreme Court of Dec. 1, 1953, 1 ZR 113/52, 5 VERSICHERUNGSRECHT 163 (1954). As to the continued validity of these clauses see Krien, *supra* note 158, at 27.

¹⁶³ ADSp., *supra* note 158 at § 39. As to property damage, such customers may be protected by inland marine insurance.

¹⁶⁴ Standard Freightforwarders Insurance Policy (SVS) § 2(1). In view of the usual waiver of liability, the clause would more properly read: “for which the freightforwarder would be liable under general liability provisions.” (This is a suggestion made by Professor H. Moeller, Hamburg.)

¹⁶⁵ See SCHIERING, HAMBURGER RECHTSSTUDIEN, XV (1932).

¹⁶⁶ ADSp. *supra* note 158 at § 41. See also SVS, *supra* note 164 at § 15(2).

¹⁶⁷ SVS, *supra* note 164 at § 14.

¹⁶⁸ *Id.* at § 18.

¹⁶⁹ But see again the law of Sept. 17, 1952, concerning motor carriers, which provides for compulsory insurance “against any harm for which the carrier may be liable.” See Roesch, 6 NEUE JURISTISCHE WOCHENSCHRIFT 331 (1953).

¹⁷⁰ Concerning Sweden, Denmark, and Norway, see Krien, *supra* note 158 at 27.

has proved, in a practice of 25 years, that private, voluntary property insurance can replace tort liability and tort insurance without impairment of safety or morals and without additional cost, and thus satisfy the above-stated six principal postulates for a workable scheme for the distribution of calculable loss. The concluding chapter of this study presents a scheme which could, I believe, produce a similar result concerning bodily injuries caused by automobile accidents, by the use of a modified form of accident insurance. This presentation is limited to this socially most pressing problem, although the underlying principle is probably applicable to property damage caused by automobile accidents and to other fields of enterprise liability.

I shall first outline what I consider a workable legislative program of voluntary "full aid"¹⁷¹ accident insurance; and in conclusion describe a contractual device which, pending efforts to realize this program, might offer an intermediate solution.

E THE "FULL AID" PLAN

(1) *Any owner or operator of an automobile who carries "full aid" accident insurance in statutory minimum amounts for all injuries inflicted by the operation of his vehicle would, under a new Automobile Insurance Law, be relieved from his common-law liability for ordinary (in contrast to criminal) negligence.*¹⁷²

(2) *Any person, except a member of the injurer's own family, injured by a car not so insured, and otherwise unable to recover for his harm (because the injurer is either not liable or insolvent), would be entitled to recover the same amounts from an uncompensated-injury fund¹⁷³ which would be administered by the automobile insurers licensed in the state.*¹⁷⁴

(a) This fund would be fed from "tort fines"¹⁷⁵ collected by the fund (either alone or in coöperation with the accident-victim or with the injurer's

¹⁷¹ This term has been chosen to contrast the proposed scheme which is designed to give full compensation to the victim with a clause now in use in liability insurance, which, by a similar technique (that is, the avoidance of negligence litigation), offers compensation limited to "first aid." See *supra* note 119ff.

¹⁷² The "occurrence" type of policy would probably be preferable in relating the claim to an objectively verifiable event. See Snow, *Occurrence v. Accident—Just What is Covered?*, 21 INS. COUNS. J. 30 (1954); Berger, *Coverage under the "Occurrence" Clause*, [1954] INS. L.J. 305.

¹⁷³ This term has been chosen in contrast to the unsatisfied-judgment fund, recovery from which presupposes a judgment based on common-law litigation. See text at note 63ff *supra*.

¹⁷⁴ This feature is borrowed from the New Jersey unsatisfied-judgment fund, *supra* note 64.

¹⁷⁵ For the suggestion and the term I am indebted to VON EYBEN, FORSIKRINGSRET, ERSTATNINGSRET OG POLITIRET, FESTSKRIFT TIL USSING 126 (1951), who speaks of "erstatningsbøder" (at 130). The idea may be traced back to Jeremy Bentham who found it "highly desirable that

liability insurer) from injurers or accident victims whose criminal negligence has contributed to the accident, such fine being measured primarily by the gravity of the crime and the financial circumstances of the defendant; and

(b) such contributions from tax sources as might be deemed to correspond to the taxpayer's saving achieved under the new scheme¹⁷⁰ and to his fair share in the burden of automobile losses as a nonmotorized user of the road. Payment of benefits by the fund would be contingent upon assignment to it by the victim of all his common-law rights to recovery.¹⁷⁷

Such a plan, supplemented by provisions presently to be discussed, would, I submit, satisfy the six postulates stated above. When the postulates are referred to in analyzing this plan, the following picture emerges.

1. *Voluntary Private Insurance With Minimum Control*

The plan would require merely an extension of the scope and effect of the first-aid clause now written in liability insurance.¹⁷⁸

A Voluntary Scheme.—It would leave any owner or operator free to reject its benefits, who wishes to rely on his superior skill and good fortune for both his own protection from the risk of a negligence suit and his potential victim's protection from a judgment-proof debtor. It could be expected, however, that even without compulsion¹⁷⁹ the number of motorists adhering to the plan would quickly increase.¹⁸⁰

Private Insurance.—The proposed scheme would be entirely in the hands of private insurance, whose competitive and inventive spirit would be likely to develop new and more effective devices. This would not only benefit the public, but also the insurance industry and its agents whose activity would be essential in spreading and operating this scheme.

Minimum State Control of Underwriting.—Since minimum coverages

the fund of compensation due to offences should be amassed from among the delinquents themselves" BENTHAM, *THEORY OF LEGISLATION, PRINCIPLES OF THE PENAL CODE*, c. xxii (London: 1876) (transl. by Hildreth from Dumont's translation).

¹⁷⁶ See McNiece and Thornton, *Automobile Accident Prevention and Compensation*, 27 N.Y.U. L.Q. REV. 585, 589 (1952). The annual outlay for the New York City court system now amounts to \$20,000,000.

¹⁷⁷ An alternative arrangement would be that suggested by Swiss and British schemes under which the government (Switzerland) or a central private fund (England) in turn take insurance with private carriers. See Bolgár, *Motor Vehicle Accident Compensation: Types and Trends*, 2 AM. J. COMP. L. 515, 519 (1953). See also the Swiss regulation concerning foreign vehicles of Jan. 1, 1953, Steinlin-Fritzsche, *Die Deckung der durch ausländische Motorfahrzeuge verursachten Schäden*, 49 SCHWEIZERISCHE JURISTEN-ZEITUNG 353 (1953).

¹⁷⁸ See text at note 118 *supra*.

¹⁷⁹ A compulsory first-aid clause in voluntary liability insurance contracts would perhaps encounter constitutional objections.

¹⁸⁰ See text at note 231 *infra*.

would be prescribed by statute, there would be small need for state control of underwriting practices once certain questions of general policy have been resolved—such as the choice of the unit of exposure¹⁸¹ which, as in liability insurance, should probably be the vehicle rather than the owner or operator. Some adjustment might have to be made in the licensing provisions of some states so as to permit automobile underwriters to engage in the type of insurance here proposed.

Minimum State Control of Rating.—State control of rating practices would not pose any problems other than those now encountered in both liability and accident insurance.

A system of subsequent approval might be found insufficient for effective control and uniformity.¹⁸² Adoption of filing and *prior-approval* requirements analogous to those of the Model Casualty and Surety Regulatory Bill¹⁸³ should, therefore, be considered.¹⁸⁴ Close coöperation with, and extensive use of the facilities of, the National Association of Insurance Commissioners would be beneficial.

The rating techniques not specifically covered in the bill could be similar to those now used in accident and liability insurance with what in effect would be a combination of *pure-premium and loss-ratio*¹⁸⁵ computation.¹⁸⁶ How far merit and experience rating plans¹⁸⁷ should be allowed to disturb uniformity on the state rate level will perhaps be more easily decided once the 1953 Massachusetts rating plan has supplied experience in this field.¹⁸⁸

The premium-loading percentage would probably be kept the same for

¹⁸¹ See, in general, RIESENFELD AND MAXWELL, *MODERN SOCIAL LEGISLATION* 372ff. (1950).

¹⁸² CAL. INS. CODE §§ 1857ff.

¹⁸³ Casualty and Surety Rate Regulatory Bill, as amended Jan. 24, 1947. NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS, PROCEEDINGS 397 (1946). See Matthias and Robinson, *State Regulation of Insurance Rates*, [1952] INS. L.J. 537; Moser, *Operation of Independents under the Rate Pattern*, 15 LAW & CONTEMP. PROB. 522 (1950).

¹⁸⁴ An Accident and Health Insurance Bill has been adopted in several states but has not been approved by the commissioners.

¹⁸⁵ See, in general, Kulp, *The Rate Making Process in Property and Casualty Insurance—Goals, Techniques and Limits*, 15 LAW & CONTEMP. PROB. 493, 498, 506 (1950). The lag between the experience and rating year may require introduction of an adjustment factor of the type inserted in the standard computation of workmen's compensation rates. See Riesenfeld, *Basic Problems in the Administration of Workmen's Compensation*, 36 MINN. L. REV. 119, 136 n.98 (1952).

¹⁸⁶ See Riesenfeld, *Rate-Making and Administration for Private Compensation Insurance* in RIESENFELD AND MAXWELL, *MODERN SOCIAL LEGISLATION* 372 (1950); Riesenfeld, *Basic Problems in the Administration of Workmen's Compensation*, 36 MINN. L. REV. 119, 138 (1952); KULP, *CASUALTY INSURANCE* 513 (1942); Brewster, *Automobile Liability Ratemaking*, 164 WEEKLY UNDERWRITER 1523 (1951); FAULKNER, *ACCIDENT AND HEALTH INSURANCE* 140 (1940).

¹⁸⁷ See *supra* note 103ff.

¹⁸⁸ Mass. Stats. 1953, c.570. See Cutter, *A Quarter Century of Massachusetts Compulsory Automobile Insurance—Its Ratemaking Aspects*, [1953] INS. L.J. 671.

both *mutual- and stock-company insurers*, as it is in workmen's compensation.¹⁸⁹

Accident insurance allocates to *premium loading* 55 per cent (including 35 per cent for acquisition, 10 per cent for general administration, 3.6 per cent for claim expense and 2.5 per cent for profit) and 45 per cent to cost of benefits (within the total benefit cost of \$7 for each unit of indemnity, \$1.75 to death claims, \$1.67 to total disability and \$2.32 to medical reimbursement).¹⁹⁰ A well-known text on accident insurance written by a leader in the industry states that "most underwriters, if they are frank, will admit that a loading of 50 or 55 per cent even in good times is too large."¹⁹¹ Whether or not that is so, simplification of adjustment procedures by standardization of benefits under the proposed scheme should reduce this expense materially.

2. *Promotion of Safety*

Far from impairing existing incentives for care and safety, the proposed scheme would add new ones: It would, in contrast to both liability and accident insurance,¹⁹² deny its benefits to criminally negligent injurers; it would assure proper action against such injurers by providing for ex officio recovery, by the uncompensated-injury fund, of tort fines¹⁹³ to be measured by the gravity of the offense and the defendant's financial circumstances; it would replace the obsolete penalty for "contributory negligence" by the levy of similar tort fines upon criminally negligent victims of automobile accidents; and it would reduce the moral hazard by the limitation of benefits to fixed amounts.

Denial of Relief from Liability for Criminal Negligence.—One of the principal features of the proposed scheme is the denial of relief from liability in cases of criminal negligence. Such denial, while promoting safety, would, however, unjustifiably discriminate between those injured in an ordinary traffic accident, who would be limited to "full aid" recovery, and the victims of drunken or reckless drivers, who would retain their tort claims—although the gravity of the offense in itself has little relation to the harm suffered. It is proposed to reduce this discrimination by obligat-

¹⁸⁹ MINNESOTA LEGISLATURE, INTERIM COMMISSION ON WORKMEN'S COMPENSATION 23 (1953). Average operating cost of mutuals, however, is usually almost one-third below that of stock companies. *Id.* at 16. See FAULKNER, ACCIDENT AND HEALTH INSURANCE 138 (1940); Marttyott, *Mutual Insurance under Rate Regulation*, 15 LAW & CONTEMP. PROB. 540 (1950).

¹⁹⁰ RIEGEL AND MILLER, INSURANCE PRINCIPLES AND PRACTICES 273 (1947).

¹⁹¹ FAULKNER, ACCIDENT AND HEALTH INSURANCE 178 (1940).

¹⁹² Even automobile accident policies no longer exclude intoxicated drivers. See, e.g., the North American and Lumbermens policies now in use. But cf. FAULKNER, ACCIDENT AND HEALTH INSURANCE 97, 130 (1940). For the history and an analysis of this problem abroad, see Sieg, *supra* note 59 at 61ff, 274.

¹⁹³ See *supra* note 175.

ing any such victim to turn over a statutory percentage of his net recovery, from 10 to 50 per cent according to the amounts involved, to the newly constituted uncompensated-injury fund.¹⁹⁴ Proper deduction from this levy of "full aid" insurance benefits would establish the equilibrium between those victims covered by "full aid" insurance and those not so covered.

"Tort Fines."—To promote the admomitory aim of the criminally negligent's liability regardless of the victim's decision, the fund would be authorized itself to seek recovery against such drivers on its own behalf. These "tort fines" would—like criminal fines—be measured by the gravity of the defendant's fault and his financial circumstances rather than by the extent of the harm done. This device would probably prove more effective than that used in Scandinavia, where the insurer in certain cases of criminal negligence is obligated to sue its own insured.¹⁹⁵ To prevent another discrimination between criminally negligent operators protected by liability insurance and those not so protected, the fund would be permitted to recover twice, once from the liability insurer and again from the insured wrongdoer. This double recovery, while socially not undesirable, could be eliminated after a sufficient spread of "full aid" insurance and corresponding displacement of liability insurance. But to achieve the purpose of the scheme fully, liability insurance itself would ultimately have to be declared ineffective in cases of criminal negligence, thus closing the circle begun with the early development of this anomalous type of insurance.¹⁹⁶

Safety would finally be promoted by allowing tort fine recovery not only against the criminally negligent injurer, but also against the criminally negligent victim. At present, even an ordinarily negligent victim is automatically deprived of his entire claim, although this penalty may be entirely out of proportion with the degree of his fault and the consequences of this sanction.¹⁹⁷ The obsolete and generally rejected defense of contributory negligence having been eliminated, its policy could be more effectively served by the tort fine which again could more properly be adjusted to degrees of fault and financial circumstances.

Reduction of Moral Hazard.—Inducement to suicide and self-maiming would, as in all kinds of accident and life insurance, be reduced by a clause in the policy excluding recovery in cases of intentional causation of the

¹⁹⁴ See text at note 235 *infra*. While there is little rational excuse for ever letting the victim keep even part of this quasicriminal recovery, this may be desirable in order to supply an incentive for prosecution by a kind of informer's reward; and, in addition, the desire for revenge, however irrational, may justify an outlet for personal gratification. See, in general, Ehrenzweig, *A Psychoanalysis of Negligence*, 47 N.W.U.L. REV. 855 (1953).

¹⁹⁵ See text at note 101 *supra*.

¹⁹⁶ See text at note 59 *supra*.

¹⁹⁷ As to "comparative negligence" statutes, see *supra* note 18, 19.

insured event,¹⁹⁸ and indeed, if compared to a liability insurance faced with unlimited verdicts, be insignificant because of the modest benefits provided under the scheme.

3. *Elimination of Gamble in Litigation*

Without tampering with the common law of torts, or, for that matter, with the institution of the jury or accepted judicial procedure, the proposed scheme would eliminate the gamble of the automobile negligence suit, thus producing the following beneficial results:

More Efficiency.—Courts would be relieved of a load now seriously impairing their efficiency and accessibility and, consequently, increase public confidence in the legal process.

More Certainty.—There would be avoided the uncertainty, expense, and delay of recovery now deterring many victims from prosecuting just claims and reducing the effectiveness of legal relief even in the cases of successful litigation.¹⁹⁹

More Frankness.—Courts and parties would cease to engage in the game of hide and seek now disgracing both the institution of insurance and court procedure.²⁰⁰

4. *Saving of Expense to the Insuring Public*

Although no final conclusion can, of course, be drawn without a thorough actuarial analysis, the prediction may be ventured that both the victim's and the motorist's protection would be considerably less expensive than under the present system. Following are some costs that could be saved:

A considerable part of the cost now incurred in adjusting losses, since only the fact of the accidental causation and the type of injury would have to be ascertained, and the assessment of the benefits would be greatly facilitated by tariffs of recoveries to be discussed presently.

All expense of negligence litigation and settlement.²⁰¹

The victim's counsel fees now often reaching 50 per cent of the final indemnity and admittedly taken into consideration in any jury assessment.²⁰²

Ultimately, the multiple insurance of the same loss, now unavoidable because the careful potential victim must, besides his liability insurance,

¹⁹⁸ See VANCE, *LAW OF INSURANCE* 948 (3d ed. 1951). As to the moral hazard in accident insurance see FAULKNER, *ACCIDENT AND HEALTH INSURANCE* 127 (1940).

¹⁹⁹ See text at note 27 *et seq. supra*.

²⁰⁰ See text at note 23 *et seq. supra*.

²⁰¹ In addition to the great saving accruing to the taxpayer, caused by the reduction and ultimate elimination of traffic cases involving ordinary negligence. See *supra* note 176.

²⁰² See text at note 35 *supra*.

also carry accident insurance, not being able to count upon his recovery from the other motorist.²⁰³

5. *Easy Determination of Equal Minimum Awards*

In determining an optimum schedule of benefits, accident-insurance policies (whose pattern has remained substantially unchanged for almost 100 years)²⁰⁴ would furnish the most appropriate models. But sight should not be lost of the primary purpose of the proposed scheme—to meet minimum social needs, such as those met in workmen's compensation. Experiences gathered in this field should, therefore, be used with particular regard to the Federal Employees' Compensation Act,²⁰⁵ the benefits of which are perhaps most generally recognized as adequate.

General Principle.—The indemnity would have to be based on fixed tariffs as in accident insurance, rather than on actual earnings or earning power as in many systems of workmen's compensation.²⁰⁶ This tariff would be based on the minimum needs of low-income groups. For, it is these groups that offer the most urgent social problem; besides, low awards would reduce both the moral hazard and the expense of the scheme. As everybody 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. The proposed scheme which would fix the maximum recovery is considerably fairer to this potential well-to-do victim than the present one, under which the uncertainties of recovery inherent in distribution based on the liability and liability insurance of the "other" car makes intelligent planning of protection impossible.²⁰⁷

Awards must be high enough so as not to force juries to find criminal negligence merely for the sake of being able to give adequate compensation, as they have done almost consistently where this was not the case.²⁰⁸

²⁰³ See text at note 92 *supra*.

²⁰⁴ See FAULKNER, ACCIDENT AND HEALTH INSURANCE 6 (1940).

²⁰⁵ 5 U.S.C.A. § 751.

²⁰⁶ Riesenfeld, *Contemporary Trends in Compensation for Industrial Accidents Here and Abroad*, 42 CALIF. L. REV. 531, 557 (1954). Against the preference for more flexible standards, expressed by McNiece and Thornton, *Is the Law of Negligence Obsolete?*, 26 ST. JOHN'S L. REV. 255, 274 (1952), see Jaffe, *Damages for Personal Injury: The Impact of Insurance*, 18 LAW & CONTEMP. PROB. 219, 244 (1953). See also Sieg, *Schadenersatz und Versorgung*, 9 JURISTENZEITUNG 337 (1954).

²⁰⁷ Optional additional insurance will also have to remove those inequities, familiar in present accident-insurance schedules. See RIEGEL AND MILLER, INSURANCE PRINCIPLES AND PRACTICES 272 (1947).

²⁰⁸ See ORR, *Airplane Tort Law*, 4 S. C. L. REV. 193, 199 (1952). See also Hyman, *Inadequacy of Liability Limits under the Warsaw Convention*, [1952] INS. L.J. 533. Concerning unsuccessful American attempts at raising the maximum by 200 per cent see Beaumont, *The Proposed Protocol to the Warsaw Convention of 1929*, 20 J. OF AIR L. & COMM. 264, 269 (1953). For a full discussion of the 1953 draft, see Note, 3 ZEITSCHRIFT FÜR LUFTRECHT 165, 179, 198, 206 (1954).

Nor should awards be exposed to the same criticism so often leveled against workmen's compensation benefits which, in many states, have become entirely inadequate.²⁰⁹

Unit of Indemnity.—The basic unit of indemnity should, as in most accident²¹⁰ and workmen's compensation insurance policies, be the weekly indemnity. In order to avoid amounts either so high as to produce moral hazard and prohibitive premiums, or so low as to fall short of minimum needs, a weekly indemnity of \$50 would seem appropriate at this time.²¹¹ A proviso might possibly be added that certain sizable cost-of-living index fluctuations would automatically increase or decrease this amount as well as the corresponding premium.

On the weekly unit basis specific benefits would be computed as follows:

In the event of *death*, the lump-sum payment of 200 weekly indemnities usually provided in an accident policy would fail to offer a minimum subsistence to the bereaved family. Therefore, a percentage, perhaps 45 percent, of the weekly indemnity should be the primary claim until death or remarriage of widows or widowers prevaillingly dependent on the deceased; an additional 15 per cent for each child until death or majority; the total not to exceed 75 per cent of the basic indemnity.²¹² A lump sum of \$500 could be added for funeral expenses;²¹³ and to accelerate and simplify adjustment, recipients might be given the option to request a lump-sum payment of \$10,000 for each death, or amounts computed on the basis of existing mortality tables. Whether—and if so, how—administrators or executors would be entitled to recovery on these dependents' behalf, would have to be determined under the law of the state in which the accident occurred, since otherwise relief from liability might not coincide with such recovery. Unlawful continuation of receipt should be discouraged by punishment.²¹⁴

Total permanent disability would entitle the accident victim to the basic

²⁰⁹ See Katz and Wirpel, *Workmen's Compensation 1910-1952: Are Present Benefits Adequate?*, [1953] INS. L.J. 164; REED, *ADEQUACY OF WORKMEN'S COMPENSATION* (1947); MINNESOTA LEGISLATURE, INTERIM COMMISSION ON WORKMEN'S COMPENSATION 44 [1953]. For California, see SENATE INTERIM COMMISSION ON WORKMEN'S COMPENSATION BENEFITS, REPORTS 1949 and 1951.

²¹⁰ The relation, for "level insurance," between the principal sum (\$1,000 for death) and the weekly indemnity (\$5) has remained fixed since 1864. FAULKNER, *ACCIDENT AND HEALTH INSURANCE* 136 (1940).

²¹¹ This would be somewhat in excess of maximum weekly benefits paid in workmen's compensation. See, in general, Katz and Wirpel, *Workmen's Compensation 1910-1952: Are Present Benefits Adequate?*, [1953] INS. L.J. 164, 166, 175. The minimum rate payable to federal employees is \$112.50 a month. 5 U.S.C.A. § 756(c).

²¹² *Id.*, § 760.

²¹³ *Id.*, § 761.

²¹⁴ *Id.*, § 760(1).

weekly indemnity for life.²¹⁵ Here, too, both the insurer and recipient might, as in the case of death, be given an option to request a lump-sum payment, either fixed in the policy or computed on the basis of mortality rates. Loss, or loss of use, of both hands, arms, feet, legs, or eyes should be considered *prima facie* evidence of total permanent disability;²¹⁶ and, in contrast to most workmen's compensation schemes and ordinary accident insurance, objective standards should be given general preference.²¹⁷

Partial disability, temporary or permanent, and temporary total disability would of course raise questions in the ascertainment of fractional or temporary claims; and, concededly more so than in present-day liability or accident insurance with their usual maximum benefit periods of from three to four months.²¹⁸ These difficulties will have to be faced, however, if the social purpose of the proposed plan is to be safeguarded; they are, after all, being faced in workmen's compensation today.²¹⁹ Arbitration agreements in the policy²²⁰ may expedite investigation and decision. A great deal might be gained by giving both the insurer and the insured, or merely the latter, the option of lump-sum payment for certain typical injuries. Compensation could be fixed in terms of the weekly indemnity or of flat amounts on the model of accident insurance²²¹ or the Federal Employees' Compensation Act.²²² In addition, attendant's care and long time hospitalization would be compensable in fixed percentages of the basic weekly rate,²²³ while modern rehabilitation provisions might help in facili-

²¹⁵ Such accident insurance has been written since 1913. See FAULKNER, ACCIDENT AND HEALTH INSURANCE 12 (1940).

²¹⁶ 5 U.S.C.A. § 753. See, in general, FAULKNER, *supra* note 215, at 71, 227.

²¹⁷ Concerning the "any occupation" in contrast to the "his occupation" test see Riesenfeld, *Basic Problems in the Administration of Workmen's Compensation*, 36 MINN. L. REV. 119, 124 (1953); Faulkner, *supra* note 215 at 65ff.

²¹⁸ See, e.g., Faulkner, *supra* note 215 at 97.

²¹⁹ See, in general, Riesenfeld, *Basic Problems in the Administration of Workmen's Compensation*, 36 MINN. L. REV. 119, 122 (1953).

²²⁰ For early practices to this effect in workmen's compensation, see *id.* at 130. In fire insurance such agreements are the rule. See also text at note 168 *supra*.

²²¹ See, e.g., RIEGEL AND MILLER, INSURANCE PRINCIPLES AND PRACTICES 264 (1947): 200 weeks for one hand and one foot, hand or foot and one eye; 100 weeks for either hand or foot; 65 weeks for one eye; 50 weeks for thumb and index finger. See also FAULKNER, ACCIDENT AND HEALTH INSURANCE 70 (1940) for similar schedules.

²²² See 5 U.S.C.A. § 755(a): 205 weeks for one foot; 244 weeks for one hand; 160 weeks for one eye. As to workmen's compensation in general, see Riesenfeld, *Basic Problems in the Administration of Workmen's Compensation*, 36 MINN. L. REV. 119, 125 (1952). In contrast to awards in that field, automobile compensation, being based on minimum needs rather than earning power (*supra* note 206), will have to stress objective standards and leave to excess accident insurance (see text at note 207 *supra*) any individual hardship caused by this computation.

²²³ See 5 U.S.C.A. § 756(b); Lockhart, Book Review, 39 MINN. L. REV. 344, 345 (1955). Surgical and initial medical expenses would be payable in full. See 5 U.S.C.A. § 759.

tating the adjustment problem.²²⁴ A considerable reduction of premiums, which has been estimated at 20 per cent, could be achieved by providing for a waiting period of seven days, which is said to eliminate 32 per cent of accident claims;²²⁵ and by taking into account payments received by the victim from other sources (such as independent accident insurance)²²⁶ for cash expenses (such as surgery) though not for loss of income²²⁷ or unmeasurable harm.²²⁸

Third-Party Claimants.—Several problems now existing as to the groups of third parties entitled to recovery would be eliminated by substituting accident insurance for liability insurance. It would be clear that a man or woman has a right to recover from his spouse's, and a child from his parent's, insurer.²²⁹ Nor would it be doubtful that a guest would be entitled to recover in an accident caused by his host, and whatever danger of collusion there may exist would be reduced by the limitation of recovery.²³⁰

6. *Widest Possible Coverage*

Although the proposed scheme would be entirely voluntary, it should, for the following reasons, soon succeed in replacing liability insurance. With certain inevitable exceptions which, as stated below, would be covered otherwise, this scheme should offer almost complete protection to the road-using public.

Expected Spread of "Full Aid" Insurance.—Nonconformists would remain subject to the *continued pressure of financial-responsibility laws*.²³¹ These, once amended to require accident insurance rather than liability

²²⁴ See Riesenfeld, *Contemporary Trends in Compensation for Industrial Accidents Here and Abroad*, 42 CALIF. L. REV. 531, 555, 557 (1954); 5 U.S.C.A. § 756(d); Somers and Somers, *Rehabilitation and Workmen's Compensation*, [1954] INS. L.J. 71.

²²⁵ The American Accident Table indicates that almost one-half of all industrial accidents cause disability lasting one week or less. See REEDE, *ADEQUACY OF WORKMEN'S COMPENSATION* 30 (1947). 5 U.S.C.A. § 752 denies compensation to federal employees for the first three days, unless the disability exceeds 21 days or is followed by permanent disability. See FAULKNER, *ACCIDENT AND HEALTH INSURANCE* 155 (1940).

²²⁶ In contrast to the prevailing practice in accident insurance. With the spreading of the proposed scheme, independent accident insurance would tend to become insurance for the desired excess over "full-aid" recovery.

²²⁷ As in accident insurance, continued receipt of wages should probably not be taken into account. Experience has failed to show any increase of moral hazard. Moreover, the opposite rule would create new problems of subrogation. See *supra* note 96.

²²⁸ Many questions, still largely unsolved in workmen's compensation, will have to await further study—e.g., the questions of the victim's claim against the tortfeasor and the latter's right to contribution; the "full-aid" insurer's right to subrogation; and manifold problems of conflict of laws. See RIESENFELD AND MAXWELL, *MODERN SOCIAL LEGISLATION* 401, 402ff, 416ff, 440 (1950).

²²⁹ *Supra* notes 12, 16.

²³⁰ *Supra* note 20.

²³¹ See text at notes 75ff. *supra*.

insurance after the first accident, would substantially promote adherence, though leaving relief of the victim of the "first free bite" to the uncompensated-injury fund.

To the extent that juries would become acquainted with the "full aid" scheme, they would increasingly incline to decide for the plaintiff,²³² taking into consideration the fact that the defendant had intentionally *failed to take out "full aid" insurance* and thus to avail himself of a chance to avoid such liability.²³³ In fact, it could probably be expected that there would soon develop what would amount to a presumption of negligence in such cases.

Cheaper premiums for "full aid" insurance within the statutory limits would attract most persons now carrying liability insurance for considerably higher amounts, while channeling excess coverage into additional accident insurance.²³⁴

Uncompensated-Injury Fund.—Automobile victims who would remain uncompensated under the proposed plan would only include those injured by cars whose owners and operators would carry neither liability nor "full aid" insurance. For these victims an uncompensated-injury fund²³⁵ would offer compensation within the "full aid" benefit limits.

The fund would be administered by the casualty insurers of the state²³⁶ and, as suggested above, be fed from two sources: tort fines recovered from operators or victims found criminally negligent;²³⁷ and such contributions from general tax sources as should be found appropriate in view of the saving achieved for the taxpayer by the elimination of negligence litigation, and the benefit derived from the use of the road by the general public.²³⁸ To avoid constitutional objections in relation to such contributions, state coöperation in the administration of the fund could be secured.

All payments under the scheme would be contingent upon assignment by the victim to the fund of any common-law claim he may have against third parties; and subject to deduction of any payments received from other public funds.²³⁹

²³² See text at note 11 *supra*.

²³³ *Supra* note 88, and text at note 99 *supra*.

²³⁴ Professor Lockhart, Book Review, 39 MINN. L. REV. 344, 345 (1955) justly points out the absence of proof for this assumption in my earlier presentation. Since, however, pertinent facts and figures can be obtained only with the cooperation of the insurance industry, I had no choice at this time but to try to induce such cooperation by offering my scheme in its present form.

²³⁵ *Supra* note 173.

²³⁶ *Supra* note 174.

²³⁷ *Supra* notes 175, 192ff.

²³⁸ *Supra* note 176.

²³⁹ *Supra* note 94ff.

F

THE "FULL AID" CLAUSE—AN INTERMEDIATE SOLUTION

Until legislation of the kind proposed in this study can be obtained, insurers finding merit in the proposed plan would be able to engage in experiments which, while useful potentially as a testing ground, would not involve any risk.

Part of the result ultimately to be achieved by legislation could be obtained by automobile liability insurers who would insert in their policies what I should like to call a "full-aid" *clause*. Under this clause, the victim of an insured car could, in his discretion, request payment to himself of benefits of the size and type outlined in the above legislative scheme, in consideration of a waiver by him of any tort claim he may have against the insured. At least one progressive insurance company has devised an "Alternative Compensation Insurance" Endorsement adopting this approach.²⁴⁰

A certain adverse selection could of course not be avoided. But I submit that the attractiveness of immediate payment unencumbered by the expense and delay of negligence litigation would induce the majority of accident victim to choose this option. This expectation seems justified in the light of the experience gathered under similar plans now in operation abroad in the field of aviation insurance.²⁴¹ In any event the experiment should be well worth the effort since it might furnish in the most conclusive manner evidence of the feasibility of voluntary "full aid" insurance for the traffic victim.

²⁴⁰ With great pleasure and much appreciation I am able to report that, subsequent to the publication of my book on "Full Aid" Insurance, the Farm Bureau Mutual Automobile Insurance Company, at Columbus, Ohio, has devised an "Alternative Compensation Insurance" Endorsement substantially along the lines here suggested but based upon independent study. It may be hoped that forward looking Insurance Commissioners will cooperate in creating the legislative and regulatory basis for the approval of such endorsements.

²⁴¹ See text at notes 147 *et seq. supra*.