BOOK REVIEW

THE FORENSIC LOTTERY. By Terrence G. Ison. London: Staples Press. 1967. Pp. 218. $7.60.

In *The Forensic Lottery*, Professor Ison offers a critical evaluation of tort liability and other methods of compensation for the sick and injured and presents a detailed blueprint for a comprehensive plan of sickness and injury compensation.

Professor Ison studied law at the London School of Economics and received first-class honors in London LL.B. After post-graduate study, he received his LL.M. Degree from Harvard Law School. He is a member of the bar in England and Canada and a member of the faculty of law at the University of British Columbia. His work has included several Law Review articles.[1]

Chapters 1, 2 and 5 of *The Forensic Lottery* contain a historical review and a critical appraisal of tort liability. Chapter 3 outlines the significance of other sources of compensation and Chapters 4 and 6 are a tentative blueprint for reform. A relatively large portion of *The Forensic Lottery* is devoted to four appendices where the author analyzes the present compensatory system in England.

Appendix A of *The Forensic Lottery* is a note on "Who Handles Claims?" and Appendix B is a brief statement on "The System of Costs." Appendices C and D present the results of a collateral project conducted by Professor Ison. Questionnaires were sent out to 848 English solicitors or law firms and a total of 214 were returned completed for a response rate of 25%. The completed questionnaires contained particulars of 515 cases of which 494 cases were analyzed to obtain statistics on the following topics: Representation of parties, liability category, place of injury, the nature of the harm suffered, the stage at which claims are completed, the proportion of claims that succeed, the amount of

1. *See, e.g.*, Ison, *Enforcement of Morals*, 3 UNIV. BRIT. COL. L. REV. 263 (1967); Ison, *Legal Misconception of Monoply*, 2 UNIV. BRIT. COL. L. REV. 89 (1964); Ison, *Conflicts of State and Federal Jurisdiction in the Regulation of Natural Gas and Electricity*, 10 MERCER L. REV. 226 (1959); Ison, *Limitation of Actions in Tort Against Personal Representatives*, 21 MODERN L. REV. 558 (1958); Ison, *Pavement Hazards*, 21 MODERN L. REV. 21 (1958).

damages, plaintiff's costs paid by defendant, plaintiff's solicitor and client costs, defendant's costs paid by plaintiffs, defendant's solicitor and client costs, the breakdown of costs, non-legal costs, completion time, legal aid and trade union assistance and liability insurance, and reasons for abandonment of claims. The primary objective of the survey was obviously to obtain statistical information relating to personal injury claims without intending to support any argument or contention. The statistical information, however, is not entirely accurate. There was no effort to establish a representative sample, and in addition, the size of the random sample was too small to be statistically significant. Professor Ison's book is concerned primarily with elimination of the fault principle as a basis for injury compensation in England, but, with minor variations, his thesis and his blueprint for reform are relevant to the system of injury compensation in the United States.

In *The Forensic Lottery* Professor Ison argues that the fault principle must go and compensation should not depend on the cause of disability. His theory is based upon the premise that the need for income maintenance should be met for all sick and injured people, and that the cause of disablement is relevant only for the purpose of deciding how the cost of compensation should be borne.

The author's main objection to the fault principle is that compensation for the injured is made to depend not simply on his losses, his need, or the merits of his conduct, but largely on the fortuitous circumstance of whether he can blame anyone. Professor Ison is also very critical of the finality of the assessment of damages under the tort liability theory, the length of time involved in processing claims, the unequal bargaining position of the parties in most cases, and the cost of administering the system of tort liability. In addition, he points out that the tort liability system does not satisfy income security, lost compensation, or accident costs allocation because the system is neither universal in its application nor limited to an area the boundaries of which are defined by any rational basis.

The Professor notes that, while theoretically fault is always the criterion, in practice, there has been a strong tendency for liability to follow the incidence of insurance. In other words, Professor Ison points to the fact that liability is *quantitatively* significant only in areas in which it is customary for liability insurance to be carried—

a conclusion with which the reader can scarcely quarrel.[2] In criticizing the fault principle, he concludes:

> Measured in sentimental terms, liability undoubtedly has its attractions. The theoretical connection with the emotive moral precept that wrongdoers are to pay, the pagentry of litigation, the sporting element, and the long association of tort liability with established institutions make it altogether a more glamorous system than social insurance. But the whole approach reflected in tort liability is inappropriate to meet any social need. In effect, we have left it to the judges to tackle the problem of compensation by a pseudo-ecclesiastical process of moral condemnation instead of taking a pragmatic look at income security for the sick and injured as a task of social cost accounting.[3]

The objectives of a coherent policy on sickness and injury, according to the thesis presented in *The Forensic Lottery*, should be: (1) Prevention, i.e., to prevent the occurrence of injuries or disease and to minimize the severities of those that occur; (2) medical care and rehabilitation, including both physical and vocational rehabilitation; (3) compensation, here Professor Ison believes that the primary need is income security; (4) cost allocation, i.e., to allocate the cost of seeking the other objectives in some manner adjudged to be fair.

Professor Ison believes that any plan of sickness and injury compensation should have, as its primary goal, income security. He defines income security as maintaining the real income of anyone disabled from earning through sickness or injury at a level not greatly below that which he had reached on a steady basis prior to the disability. The proposal should provide for universal coverage, and compensation should be payable without any requirement of fault and without inquiry into the cause of the claimant's condition. The plan should be integrated with a general scheme of social

2. Also, there is a significant movement towards strict liability in products liability cases and the theory of these cases apparently is based upon cost allocation and availability of insurance as opposed to any consideration of the actor's conduct. *See, e.g.*, Greenman v. Yuba Power Products, 59 Cal. 2d 57, 63, 377 P.2d 897, 901, 27 Cal. Rptr. 697, 701 (1962):

> The purpose of such liability is to insure that the cost of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves.

It seems obvious that the court has in mind either the availability of insurance to the manufacturer or the manufacturer's ability to spread the costs of the risk.

3. T.G. ISON, THE FORENSIC LOTTERY, 107 (1967).

insurance, and any wasteful duplication of compensation systems should be avoided. He regards compensation for transitory pain and suffering as of no real concern. Further, he regards compensation for disfigurement, for loss of bodily functions not involving vocational disability, and for long-term pain and suffering as possibly desirable, but certainly not vital to the program.

Generally speaking, in England, losses for injury and sickness may be compensated by National Insurance Benefits, by sick pay, by personal accident insurance payments, by National Assistance, or by liability insurance. Professor Ison proposes an enlargement of the function of National Insurance as a basis of a comprehensive system of sickness and injury compensation. He advocates that all causes of action in tort for damages arising from personal injuries should be abolished, and a compensation fund administered by the state should be established in its stead.

The income for the fund would be derived in two ways: (1) To the extent that the cost borne by the fund results from injuries or diseases that are readily attributable to identifiable activities, there would be a charge on those activities. (2) To the extent that the costs are not covered under the first principle, they would be met in the same way as other costs of National Insurance.

Applying the above two principles, Professor Ison points out that the income of the fund would be derived from: (1) A charge on the use of motor vehicles (e.g., increasing either the road license fee or the gas tax); (2) a charge on employment which could be levied by increasing the employer's contribution to National Insurance. Since employers would be relieved of the cost of liability insurance their contributions to the fund could be correspondingly increased without adding to their total burden; (3) any premiums or taxes which, in the light of experience and statistical evaluation, should be imposed upon persons engaged in extrahazardous occupations or hobbies; (4) income tax and other public revenues.

The principal benefits available for the fund for both partial and total disability would be income allowances and lump sum payments based on tables for disabilities where the effect on social life is more damaging than its impact on earnings.

A reader of *The Forensic Lottery* might be immediately struck by the similarity between Professor Ison's proposal and the

proposal set forth by American writers,[4] particularly, the program advocated by Professor Marc Franklin of Stanford University School of Law.[5]

Professor Franklin has proposed a form of social insurance, with selective reimbursement, which provides for the victim's exclusive legal remedy to come from a government-operated fund. The fund would compensate for all medical expenses and it would also pay eighty-five percent of lost income up to a maximum of $125.00 per week. The proposal provides for a deductible in all cases, and the possibility of a further reduction to as little as seventy-five percent of lost income if a court determines that the victim's injury was caused by his own "serious misconduct." There would be no awards for pain and suffering, and all persons could take out first party insurance against any loss not covered by the fund, although no insurance of any type would be compulsory.

Professor Franklin proposes that the fund be created from a general tax base plus a sum collected from private motorists. This sum, to be levied in the form of a license fee, represents a percentage of the total anticipated payouts arising from private motoring accidents. Separate administrative measures, not related to the fund, would be developed to make careless motorists and traffic law violators pay higher fees. The fund would be entitled to reimbursement against individual enterprises without regard to fault for all payouts resulting from harms caused in the course of their business activities. The proposal does not provide for any other form of reimbursement.

Programs such as those suggested by Professor Franklin and Professor Ison are undeniably an improvement because they focus on treatment of all victims in terms of economic loss and call for quick reparation to all victims without depending on fault or the actor's solvency. It would seem patently clear that the compensation should not be confused with the deterrence, and if substandard conduct is to be punished then it should be punished without reference to the welfare of the victim.

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4. *See* Calabresi, *The Decision for Accidents: An Approach to Nonfault Allocation of Costs*, 78 HARV. L. REV. 713 (1965); Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499 (1961); Friedmann, *Social Insurance and the Principles of Tort Liability*, 63 HARV. L. REV. 241 (1949). *Cf.* James, *The Future of Negligence in Accident Law*, 53 VA. L. REV. 911 (1967).

5. *Cf.* Franklin, *Replacing the Negligence Lottery: Compensation and Selective Reimbursement*, 53 VA. L. REV. 774 (1967).

However, some immediate questions come to mind in regard to implementing such an extensive and completely revolutionary system of compensation: (1) Should the system be state-wide or federal? (2) Should established systems of compensation such as Medicare, Disability Insurance and Workmen's Compensation be retained with some system of set-offs to assure that duplication will not take place? (3) Should income awards be taxed? (4) What can be done to adequately compensate permanently disabled non-wage earners and young children who are not yet wage earners? (5) What effect will the tremendous reallocation of costs and administration have upon interested industries, particularly the insurance industry, and upon government machinery? (6) What will the cost of such a comprehensive plan of compensation be to a tax payer if the fault concept is eliminated (apparently there are no available actuarial studies available to forecast the possible tax burden)?

The reform proposed by Professor Ison in *The Forensic Lottery* is so revolutionary that it and similar plans have received little support. However, there has been a great deal of interest in developing an automobile compensation plan which would treat automobile cases under one plan while leaving all other civil cases to the tort system.[6] Of course, this type of plan is inadequate in Professor Ison's opinion because it would retain a focus on the source rather than on the nature of the harm suffered, and it only protects a few of the sick and injured.[7]

6. Senate Bill No. 2, commonly known as the "Keeton-O'Connell" bill introduced to the Senate of California by Senator Dymally on January 9, 1968, makes automobile compensation plans a pressing issue in California. Briefly, the Keeton-O'Connell plan proposes compulsory automobile insurance in the form of a so-called "basic protection plan." In an automobile accident or an injury in or about an automobile, the insured would make a claim against his own insurance company for certain of his losses within carefully defined limits. The concept of fault, or negligence within these limits, would be completely eliminated. The limits apply to cases developing no more than $10,000.00 in lost wages, medical expenses and other damages from bodily injury, the first $100.00 of net loss for bodily injury being deductible and the property damage not being within the plan. Moreover, any recovery for pain and suffering would be nonexistent for cases that were determined to have recovery for pain and suffering in the sum of less than $5,000.00. Loss of wages would be limited to a maximum of $750.00 per month. The right to jury trial would be abrogated for personal injury actions that fall within this plan, and any insurance benefits available from collateral sources would be deducted from any payments made under the plan. *See generally* BLUM & KALVEN, PUBLIC LAW PERSPECTIVES ON A PRIVATE LAW PROBLEM: AUTO COMPENSATION PLANS (1965); KEETON & O'CONNELL, BASIC PROTECTION FOR THE TRAFFIC VICTIM (1965).

7. The National Safety Council reports that in 1964, of 105,000 accidental deaths, 47,700 were caused by automobile accidents. On the injury side, of 10,300,000 accidental injuries, 1,700,000 resulted from automobile accidents. NATIONAL SAFETY COUNCIL, ACCIDENT FACTS (1965).

There is no doubt that Professor Ison is correct in his belief that a legal or "forensic lottery" exists when identical victims can suffer identically disabling injuries, and one victim can recover thousands of dollars under fault rules while another equally innocent victim may recover nothing. Although *The Forensic Lottery* does not contain any significant new proposals, and it is not likely that Professor Ison's proposed reform will be adopted either in England or in the United States in the near future, the continued advocacy of such reform by responsible legal scholars should have the beneficial effect of at least stimulating improvements in the existing tort liability system.[8]

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8. Some general improvements which have been suggested are: (1) Liability insurance requirements should be universal and compulsory; (2) comparative negligence should take the place of contributory negligence; (3) coverage should be unlimited; (4) the universal liability policy should have an automatic payment scheduled for income replacement and medical care; (5) the "collateral source rule" should be eliminated; (6) law suits should be allowed directly against the insurance carriers; (7) guest laws, various governmental, charitable, and intra-family immunities and death action limits should be terminated; and (8) judicial budgets should be increased to assist in eliminating delay in resolving tort suits.

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