AUSTRALIAN INSTITUTE OF CRIMINOLOGY

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Hon Justice M D Kirby

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By the Hon. Mr. Justice M.D. Kirby *
Chairman of the Law Reform Commission

> Grant me to be a plaintiff, Lord,
> And be it understood
> I crave nought further of your grace
> Than constant plaintiffhood.
>
> ...
>
> And from my growing hoard I'll make
> Thee offerings resplendant.
> But save me, Lord, at any price
> From being a defendant.
>
> A.G. Crawford *A Plaintiff's Prayer*
> (1973) 47 *A.L.J.* 409.

INTRODUCTION

At this Conference in May 1975, Professor Harold Luntz presented a stimulating paper on No Fault Liability. Those were heady days. The Report of the National Committee of Inquiry on Compensation and Rehabilitation in Australia [1] was then under active review. Legislation appeared imminent. The participants asked Professor Luntz to return to continue the debate.

Since then Harold Luntz has picked up his Chair. He is presently at Oxford. The debate on the National Committee's Report has waned somewhat. It has fallen to my lot to respond to the 1975 call. I set myself modest aims. They are in short:

* To put the National Committee's Report in its historical context;
* To explain why pressure has built up for various schemes of no fault compensation;

* To outline some of the principal objections to those schemes;
* To examine the National Committee's Report in the light of those objections; and
* To catalogue the principal objections that have been voiced to the Report, as presented, and evaluate them.

A CHRONOLOGY OF INQUIRIES

The social movements in Germany and England which produced the Australian Workers' Compensation Acts demonstrate a recognition in the last quarter of the nineteenth century that the common law of negligence provided inadequate redress for some classes of injury and damage. But it was not until the 1930s that proposals for a more general no fault liability scheme gained wide currency. No doubt the advent of the motor car and the growing toll it took upon life and limb provided the catalyst for such moves. In 1932 a detailed Report was made to the Columbia University Council for Research in the Social Sciences. The Report advocated a form of schedules benefits providing compensation for the victims of motor car accidents, analogous to those found in workers' compensation legislation.[2] It took thirty years for the proposal to get anywhere in the United States. It was consistently opposed by the American Bar Associations.

In 1933 a Select Committee of the House of Lords was established to consider the *Road Traffic (Compensation for Accidents) Bill.*[3] The Bill proposed compensation, also along the lines of the *Workers' Compensation Act*, without regard to negligence in the case of motor car accidents. The Committee reported against the scheme on the basis that "any such scheme would necessarily have a purely arbitrary basis".[4]

In 1934 a Resolution of the American Bar Association condemned the proposal and similar resolutions have recurred since then, based upon the same arguments. But in 1947 the Government of the Canadian Province of Saskatchewan received a Report on the study of compensation for victims of motor car accidents. It proposed legislation along scheduled compensation lines, analogous to workers' compensation and without proof of fault. The scheme left unaffected the right to a common law action. It was adopted by the Province in the *Automobile Accident Insurance Act 1952.*

In 1957 the Province of Nova Scotia established a Royal Commission, which recommended against a no fault scheme along Saskatchewan lines. The same recommendation emerged from a Victorian Royal Commission in 1959. The Royal Commissioner, Dr. Coppell Q.C., relied heavily on the views of the House of Lords Committee. He also pointed to the anamolies that would arise if, in Australia, this issue were dealt with differently from State to State.[5]

In 1963 the New Zealand Government received a Report from a Committee under the Chairmanship of the Solicitor-General for New Zealand, Mr. Wild Q.C. The Committee did not feel able to recommend a no fault scheme but suggested that the idea needed more study. In 1963 a Committee of the New South Wales Bar addressed its attention particularly to the possibility of no fault motor accident compensation. It recommended against the idea in terms akin to the resolutions of the American Bar Association. At the heart of the New South Wales objection was a fear that jury trial would be lost. As events transpired, jury trial was lost in New South Wales motor car cases but without the compensating benefit of a no fault scheme. Negligence continues to rule the plaintiff's entitlements.

In 1967 a Royal Commission was established in New Zealand under the Chairmanship of Mr. Justice Woodhouse. The original Terms of Reference related to amendments to workers' compensation entitlements. However, these were subsequently extended to a general enquiry into personal injuries. The result was an important Report which produced 1972 legislation.[6] The legislation, which commenced in April 1974, abolished workers' compensation and common law damages in New Zealand, set up an Accident Compensation Commission and substituted for previous remedies an entitlement to no fault satutory compensation for injuries.

Not to be left behind, in 1972 the Tasmanian Law Reform Committee, as it then was, produced a Report on *No Fault System of Compensation for Motor Vehicle Accidents*. This Report resulted in the Tasmanian *Motor Accidents (Liability and Compensation) Act 1974*. The Victorian Parliament in 1973 passed the *Motor Accidents Act*. This Act gave compensation without fault to various victims of Victorian motor car accidents. The scheme has now been operating for several years. It provides scheduled payments for a limited time. It is said to have replaced common law litigation in all but major cases.[7]

In 1973 the New South Wales Government, not to be found wanting in this, announced the establishment of its own Committee under Mr. Justice Meares to report on liability without fault in motor car cases. But the work of that Committee was suspended when, immediately after the election of the new Labor Government in Australia in December 1972, a National Committee of Inquiry was established under the Chairmanship of Mr. Justice Woodhouse. Mr. Justice Meares was also appointed a Member of this Inquiry. The Committee proceeded with speed to report upon its Terms of Reference. That Report was delivered on 27 June 1974 and tabled in the House of Representatives on 10 July 1974.

Meanwhile, in the United Kingdom a Royal Commission on Civil Liability and Compensation for Personal Injury was appointed under the Chairmanship of Lord Pearson in March 1973. That Committee has sent representatives to Australia and New Zealand to study the Woodhouse scheme and its variant. Other countries and many other law reform bodies have produced reports dealing with no fault liability for injuries. In the United States legislation came into force in Massachussets in 1971 based on the no fault philosophy and despite the opposition of the legal profession. It has now spread to a number of States. The Saskatchewan and New Zealand models continue to exert very considerable influence upon the thinking of governments, law reformers and lawyers throughout the common law world.

REASONS FOR REFORM

Injustices:

The common law in this area calls out for reform. In the factory, large numbers of employees were put into close contact with fast moving and dangerous machinery or simply in environments which exposed them to far greater risks of injury than was formerly the case. The necessity to prove fault, the defence of common employment and the defence of contributory negligence all stood as barriers between an injured worker and his recovery of damages. The result was the gradual mitigation of the harsher aspects of the common law. Workers' compensation legislation was followed by the creation of statutory duties. The doctrine of common employment was abolished. Apportionment was introduced for contributory negligence. In the United Kingdom national insurance was introduced in 1946.

So far as motor car accidents were concerned, the injured plaintiff faced many perils. He had to prove negligence. He had to avoid the pitfall of latent defects or inevitable accidents. He had to circumvent the barrier of contributory negligence. If his injury was caused by his spouse, he had no recovery at common law.

Again, piecemeal reforms were attempted to mitigate this situation. Apportionment was introduced for contributory negligence and proscribed in the case of claims by dependent relatives. Late in the day, statutes were passed to entitle a spouse to sue for damages. Insurers lost a meritless defence that had caused much injustice.

The Problem of Numbers:

However, it was the sheer growth in the numbers of persons injured that put pressure upon governments for reform. At least 7,000 persons die annually in Australia from injury, more than half on the roads. Approximately 170,000 are injured at work each year.[8] These figures left few families without victims. The advent and proliferation of the motor car and the growth of industrial society exposed more and more people to the risk of fortuitous injury. Add to this the increasing education of members of our society, the expanded availability of legal aid, particularly through the trade union movement, and the general pressure for social reform and governments became faced in the 1960 . by pressure for fundamental change.

Fundamental Change:

The pressure I refer to was the claim for a speedier trial from which was removed the miscellaneous and often meritless dangers inherent in negligence litigation. The fact that 85% of persons, at least, recovered compensation on the fault principle was hardly a reassuring figure for those who failed to recover because of a capricious jury, amnesia on the part of witnesses, unfavourable impressions caused years after the event by a fading recollection and legal anomalies, some of which have been recounted. In Australia, there was also a general call for a uniform approach to the problem, especially because of increased motor car movement between the States and Territories. Many asserted that the present workers' compensation and damages schemes did little to promote rehabilitation. On

the contrary, the adversary system might even discourage recovery. Above all, there was a feeling that the removal of litigation about fault would save significantly the fees and costs that were being incurred in delivering compensation to the victims of accidents in Australia. It was said that it cost forty cents to deliver one dollar's compensation. This was too much.

THE OBJECTIONS

The chronology of reports and legislative inactivity is sufficient to make it clear that no fault liability is not without its opponents. This is not the occasion to catalogue the grounds of opposition. At the heart of the opposition is the fact, which can scarcely be denied, that the notion of "fault" is deeply ingrained in our society. It offends our sense of justice that people who bring accidents upon themselves should recover equally as those who are innocent victims of the fault of others. Yet, the effectiveness of fault as a deterrent is immediately diminished by the realities of life. The existence of widespread, even compulsory, insurance makes the claim of personal cost and liability a theoretical one. If liability can be passed on to an insurer, it is scarcely a matter that will greatly deter the insured.

But there were other objections. It was said that the premium to cover no fault liability would have to rise fourfold. That, especially in the area of motor car accidents or injuries at home, it would give rise to much fraud and malingering. Whereas there is enough link between a worker and his employer, to diminish fraud, the link between the participants in a motor car accident is transitory in the extreme. The opponents of no fault schemes point to the disadvantages of bureaucratic and particularly governmental controlled administration. They see such schemes as yet another example of "creeping socialism".[9]

In the United States, the American Bar Association in 1960 listed many of the above objections. It pointed to the inadequacy of workers' compensation benefits and suggested that, inevitably, if all victims of injury are to be compensated, adequate compensation for the victims of wrongful and negligent injury will have to be pared down in order to ensure that all may recover, no matter who was to blame or who was at fault.

THE WOODHOUSE REPORT

Benefits:

It was against this background that the Report of the National Committee of Inquiry was delivered in July 1974. Volume I of the Report deals with the injury and sickness scheme. Volume II deals with safety and rehabilitation. This is not the occasion to list all of the benefits proposed. Some are already set out in Professor Luntz's paper. I will do no more than sketch the broad outline.

It was proposed that the injury compensation scheme should commence in July 1976 and should be immediately effective. The sickness scheme was not to commence until 1 July 1979 because of the additional cost that would be incurred by extending benefits beyond injury to cases of illness.

At the heart of the Report was the intention that the scheme proposed should be exclusive of common law and workers' compensation entitlement. Clause 91 of the Bill attached to the Report is in these terms:

> 91(1) It is the intention of the Parliament that a benefit in respect of incapacity or death as the result of personal injury or sickness is to be in substitution for any damages recoverable or payable in respect of that injury, sickness or death, whatever the cause of action or basis of liability and whether the cause of action is actionable at the suit of, or the liability is enforceable by, the incapacitated person or some other person.
>
> ...
>
> (3) An action or other proceeding does not lie in respect of damages to which this section applies.

The substituted benefit was a weekly entitlement equivalent to 85% of the average weekly earnings of the person injured. If the person injured was not in receipt of earnings (e.g. housewives, communards, working children, etc.) a notional wage of $50.00 was arbitrarily fixed. To compensate for inflation, allowance was made to update the average by reference to a price index and a fixed allowance for national productivity.

The benefit was not to commence until after the completion of the first week of incapacity. "Incapacity" was to be calculated by reference to the American Medical Association Guide to Impairment in 5% rests.

The second Volume titled "Rehabilitation and Safety" was described by the Committee and the Government as even more important than the first. It proposed the establishment of a National Safety Office with proper statistical, research and inspectoral facilities to promote safety and rehabilitation.

Machinery:

The cost of the scheme, estimated to be 325 million dollars in the first year (for the injury scheme alone) was to be borne by a 10% levy on petrol (to compensate for motor car accidents) and a 2% levy on employers and self employed persons. As well, the savings in administration by the avoidance of litigation was, it was said, a major fund available to finance the scheme.

Essentially the system was to be operated in a Department of State. However, appeals against departmental decisions would lie to appeals tribunals. These would comprise a lawyer, a medical practitioner and a third person. On a point of law, an appeal would lie to the proposed Superior Court of Australia.[10]

Whatever Happened to the Report?

Soon after the Bill, based on the draft attached to the Report, reached the Parliament, it was referred by the Senate to the Standing Committee on Constitutional and Legal Affairs. This Committee was especially concerned about the constitutional validity of the Bill, particularly Clause 91. Other assaults on the scheme arose from quarters closer to the Government. The trade union movement was concerned with some of the proposals and its concern was supported by the legal profession. Anomalies were pointed out so that the responsible Minister, Senator J.M. Wheeldon, established a Working Committee in his Department to re-examine the proposed scheme in the light of the complaints made. In October 1975, Senator Wheeldon proposed a new method of funding the scheme. This involved a petrol tax of five cents per gallon and a tax on employers which, it was said, would bring in 89% of the necessary revenue for an injury scheme.[11] The Departmental Working Committee was about to

produce a major report suggesting a large number of changes when the Government was dismissed in November 1975. On 18 November 1975 the Caretaker Government announced its proposals for a national compensation scheme. In essence, it supported the "no fault" entitlement in principle. However, it favoured the maintenance of common law rights and the achievement of a national scheme by co-operation with State Governments, the trade union movement and the insurance industry.[12] At the same time the Departmental Committee's Report was released, proposing a large number of important amendments to the original Woodhouse Report.[13]

Following the Election, the new Minister, Senator Guilfoyle established a National Compensation Programme Steering Committee.[14] This Committee, armed with the Woodhouse Report, has sought to secure State co-operation in a national scheme. On 9 November 1976 Senator Guilfoyle in answer to a question in the Senate had to confess:

> "Not a great deal of progress had been made...not all States are prepared to commit themselves to participating in a national compensation policy".[15]

That is where the matter rests at the moment. The scheme lies becalmed in the doldrums of Commonwealth-State relations. There is not a hint of the fair wind that is needed to put it on its course again.

EVALUATION

Criticism:

Any law reformer soon learns that it is easier to criticize than to construct. Nevertheless, important objections have been voiced to the Woodhouse proposals and they must be recountered.

i *The Approach:* Fundamentalists point to the Terms of Reference and the choice of Sir Owen Woodhouse as Chairman. Far from seeking the best possible national system of compensation, the Government avowedly sought rather the adaptation of the extant New Zealand scheme. The Terms of Reference make it plain that the Government had "in principle...decided to establish" a national scheme. According to some, this led to a result oriented study and effected the whole way in which the Committee of Inquiry approached its task.[16]

ii *Diminished Benefits:* The trade union movement emphasized the step backwards involved in certain of the benefits. The first week which had been gained in workers' compensation law by gradual legislative amendment in the 1930s and 40s was lost. One hundred percent compensation which had been gained in South Australia[17] and by industrial decisions throughout the country[18] was to be substituted by eighty-five percent. The benefits for young widows particularly were criticized. The absence of provision for pain and suffering, loss of the enjoyment of life and other intangibles was objected to. The inconsistency of providing up to $10,000 for cosmetic injury but not for other intangibles was noted. In South Australia, the loss of statutory solatium in the case of death was seen as the abandonment of an imaginative indigenous benefit.[19] Calculation of compensation on the basis of the last job was criticized as artificial. Many other anomalies were attacked. In fairness, it should be said that many of these anomalies were in the process of correction by the Departmental Committee which had charge of review of the scheme. Significant improvements were announced in November 1975, after the change of Government.[20]

iii *Administration:* The administrative arrangements were criticized as neither fish nor fowl. The scheme was not to be administered wholly as a social service benefit. Yet doubts existed about the independence of the proposed tribunals to resolve differences. It was feared by some that they would not be sufficiently independent of the Department. It was criticized by others that they would not be sufficiently integrated into the social security system.[21]

iv *Funding:* The proposals for funding the scheme were attacked as unsophisticated and insufficiently thought out. Quite apart from retrogressive nature of indirect taxation, taxes on petrol obviously burden country dwellers more heavily than those living in the city. The Report generally dealt inadequately with the financial side of the scheme. The Bill ultimately left the problem to the Treasurer, although revised systems of funding were subsequently announced.

v *Constitutional:* Most fundamental of all objections, however, was the constitutional objection. Here too the Report was curiously silent. There is hardly a word about the scope of placitum xxxiiiA adopted after the Referendum of 1946. The scope of the insurance power (placitum xiv the incidental power and other Commonwealth powers is not reviewed. Certainly opinions have been expressed that the scheme, as drafted, went beyond present Commonwealth constitutional competence. The histor of placitum xxiiiA might, however, give confidence to those who, in this area, would seek an extension of Commonwealth power from the people.

Evaluation

All this being said, the fact remains that the debate can never be the same in Australia following the Woodhouse Report. Already Victoria and Tasmania have limited no fault schemes. The scope of social security in a modern State expands apace. Society grows increasingly intolerant of the injustices inherent in the fault principle. Excruciating legal anomalies may be cured by ad hoc legislation. The fundamental problem remains for the victims of injury: the maimed and his relatives, the deceased and his dependents. There would seem to me to be little doubt that no fault liability schemes will continue to exert their persuasive influence over legislatures. Whether they should be to the exclusion of common law and other rights, is a matter of judgment. I believe that those who expect that they have heard the last of the Report of the National Committee of Inquiry on Compensation and Rehabilitation in Australia have a few shocks coming to them. The question is not *whether* no fault entitlements will come. The question is *how* it will come, *when* and from *whom*.

FOOTNOTES

* B.A., LL.M., B.Ec. The views expressed are the author's own and not those of the Law Reform Commission.

1. The National Committee of Inquiry, *Compensation and Rehabilitation in Australia*, A.G.P.S., Canberra, 1974.
2. "Liability without Fault: The Claim that a Change of Law is Necessary" (1963) 37 *A.L.J.* 209 at p.210.
3. *Ibid*, p.214.
4. *Loc cit.*

5. *Ibid*, p.214.

6. *Accidents Compensation Act, 1972* (N.Z.): Commenced 1 April 1974. See National Committee Report p.132. *Cf* J.C. Clad, "Fault and Social Insurance in Tort: New Zealand and the Soviet Union" [1976] *N.Z.L.J.* 211; D.R. Harris "Accident Compensation in the New Zealand Insurance System" (1974) 37 *Modern L.R.* 361.

7. A.K. Clarke "Motor Accidents: No-Fault Compensation in Victoria (1975) 49 *Inst. Journal* 314. See also p.350.

8. National Committee Report, Volume 2, *"Rehabilitation and Safety"* pp.98ff.

9. (1963) 37 *A.L.J.* at p.225.

10. J.F. Keeler, "Report of the National Committee of Inquiry into Compensation and Rehabilitation in Australia" (1975) 5 *Adelaide L.R.* 121 at p.131.

11. *Australian Financial Review* 29 October 1975, pp.1,8.

12. *Australian Financial Review* 18 November 1975, pp.1,13.

13. *Loc cit.*

14. (1976) 1 *Commonwealth Record* 89.

15. *Commonwealth Parliamentary Debates (The Senate)*, 9 November 1976, p.1708.

16. Keeler, p. 123.

17. *Ibid* p.124.

18. *In re Dispute - Building Trades Re Accident Pay* [1974] *A.R.(N.S.W.)* 24 *Cf Ex parte Master Builders' Association of N.S.W.* [1971] 1 *N.S.W.L.R.* 655

19. Keeler, p.125.

20. *Australian Financial Review*, 18 November 1975, p.13.

21. Keeler, pp.126-7.