LEGAL SERVICE BULLETIN

NATIONAL CONFERENCE ON HEALTH AND SAFETY AT WORK

SATURDAY 17 FEBRUARY 1979. 2.45 pm

ACCIDENT PREVENTION, COMPENSATION & LAW REFORM

The Hon. Justice M D Kirby
Chairman of the Australian Law Reform Commission

February 1979

LEGAL SERVICE BULLETIN

NATIONAL CONFERENCE ON HEALTH AND SAFETY AT WORK

SATURDAY 17 FEBRUARY 1979 2.45 p.m.

ACCIDENT PREVENTION, COMPENSATION & LAW REFORM

The Hon. Mr. Justice M.D. Kirby*

Chairman of the Law Reform Commission

> We are determined to place the security, the welfare of those who suffer incapacity through accident or sickness on a sure and certain basis - on the basis of confidence and freedom from financial anxiety for themselves and their families.
>
> E.G. Whitlam, Speech to the Australian Legal Convention, (1973) 47 A.L.J. 417

> It is unfortunate that the [Woodhouse] proposal was ever put forward for it diverted attention away from serious problems that were (and still are) plaguing some of the State systems of workers' compensation..while there are reasons for believing that the appointment of the Woodhouse Committee [was] not much more than a gesture ... All the way through planning for the scheme had been simplistic and superficial.
>
> C.P. Mills, Workers' Compensation (NSW) (2nd ed) 1979, xxix.xi

LIVING IS DANGEROUS

No society is immune from injury and disease. The modern economic order subjects members of our form of society to certain additional risks. Some of these risks are unavoidable. They are part of the price we pay for living in a modern community. There would be no risk of death or injury from aeroplane accidents if there were no aeroplanes. The apparently stable levels of the annual toll of the road could be removed, at a stroke, if we abandoned entirely the use of motor vehicles. But people were killed by horse drawn vehicles. Any form of propulsion involves risk. The almost daily

reminder of the personal tragedies that lie behind the statistics of injuries on the road and elsewhere produces no call for the total abolition of motor vehicles. When the Law Reform Commission looked at the problems of alcohol and drug dependence and their impact on road safety, it received many submissions proposing novel ideas for new and effective means of controlling this cause of death and bodily injury.[1] However, nobody suggested that the solution lay in the direction of a reversion to the society that existed before the invention of the internal combustion engine.

What is true of traumatic injuries, is equally true of disease. Even if faced squarely with the dangers of exposure to particular substances and product, many people in society simply choose to run the risk of disease, incapacity and even death. Can there be a clearer example of this than the stable statistics of smoking habits, despite the decade of efforts in community education, unprecedented public warnings and advertisement prohibition? In our form of individualistic society, the degree to which the State should or, in any case could, intervene to protect the individual against himself is still limited. We must live with the grim reality than man is heir to injury and disease. He is also willing to run certain risks on the basis that living is dangerous.

When an Australian industrialist recently bluntly said that certain production processes had a price in human life, there was an outcry. Doubtless part of the outrage arose from the blunt and somewhat insensitive way in which he expressed himself. But there is no doubt that some tasks in society are more dangerous than others. Some are truly perilous. World wide figures over many years, for example, demonstrate the fact that digging an underground tunnel normally exacts a price of one life for every mile completed. Tasks such as demolition are universally dangerous. No effort by authorities, employers, unions or individual workmen will reduce the risks of a demolitisher to the level of the dangers encountered by a window dresser. No effort of community education, no national

program of safety training and certainly no law passed by Parliament or reform proposed by a committee will abolish the dangers inherent in such tasks as quarry mining, timber felling and manning an off shore oil rig.

To state these obvious facts is not to fall victim to the "apathy" which is universally blamed as the principal cause for injuries in society.[2] It is simply to face the reality that there is a cost-benefit equation in community and employment safety and health. It is unpalatable to acknowledge this equation when it appears in cold print. Certainly, we all like to think that the benefit accrues to us and the cost is borne by others. But whatever the laws, however vigorously they were enforced and however mindful society is educated to be about injuries and disease, there would remain a level which could not be reduced certainly not without significant sacrifice which many, perhaps most, would be unprepared to make.

What follows from these statements of the obvious? First, our efforts should be directed to the reduction of traumatic injury and disease to the truly unavoidable level. Secondly, a just system of compensation and an effective machinery for rehabilitation should be designed for the victims of injury and disease. As there are, and will continue to be, large numbers of victims, a legal response to their predicament which unduly advantages some sections as against others will increasingly appear unjust and unacceptable. A legal system which delivers compensation and other benefits to those injured in certain circumstances (e.g. at work or arising out of the use of motor vehicles) but not others (e.g. arising out of unpredictable side effects of a drug or home injuries) will be seen for what it is: a staging post on the way to a conceptually tenable universal system in which society as a whole accepts responsibility for those who by birth or chance event are less fortunate than their neighbours and in need of help from them.

LEVELS OF INJURY & DEATH FROM INJURY

Turning first to prevention, what more can be done? Are the level of injury and disease unacceptably high, requiring a

new effort by society? If so, what form should that effort take?

Jamieson and Wigglesworth state that the current incidence of accident mortality and morbidity in Australia is approximately 6,800 deaths a year, 300,000 hospital admissions and 2.5m hospital bed day occupancy.[3] Wigglesworth concludes that these figures represent a failure in the effectiveness of present legal machinery and sanctions "of truly massive dimensions".[4]

In the United States in 1971 nearly one person in three of the "civilian non-institutional" population sustained an injury requiring medical attention or resulting in some limitation to his normal activity.[5]

The most recent detailed statistics of work and non-work related injuries and illnesses are to be found in Volume 2 "Statistics and Costings" of the report of the Royal Commission on Civil Procedure and Compensation for Personal Injury in the United Kingdom (the Pearson Report).[6] That Report starts with the lament that each year in the United Kingdom some 3 million people are injured and over 20,000 die as a result of injury. The figures on deaths following injury are as follows.[7]

TABLE 1 Deaths following injury

United Kingdom: averages in round numbers for 1973, 1974 and 1975 — Numbers

	All	Males 15 and over	Females 15 and over	Boys under 15	Girls under 15
At work[1]	1,300	1,270	30	—	—
Motor vehicle[2]	7,220	4,330	2,080	540	270
Other transport[3]	460	350	70	30	10
Violence	720	420	190	60	50
In private homes[4]	6,200	2,080	3,480	380	260
Other	5,520	2,250	2,800	360	110
All deaths	21,420	10,700	8,650	1,370	700

1 Employees only, excluding the self employed.

2 Excluding an estimated 400 deaths of employees while at work — 390 men and 10 women.

3 Excluding an estimated 30 deaths of employees while at work — 45 men and 5 women. The total of 510 comprises 72 deaths in traffic accidents involving only non-motor vehicles, and 438 involving air, water or rail transport.

4 Not in previous categories.

Source: Reports of the Registrars General (Reliability A), except injuries at work, which were estimated by the Commission (Reliability D).

TRENDS IN INJURY & DEATH FROM INJURY

In confirmation of the previous statement that levels of injury are fairly stable, it is instructive to examine the table which identifies trends in the number of injuries and deaths from injury.[8]

TABLE 2 Trends in the number of injuries and deaths from injury

Thousands

	1965	1966	1967	1968	1969	1970	1971	1972	1973	1974	1975
Deaths from injury (UK)											
In motor vehicle accidents	8.5	8.5	8.2	7.4	7.8	7.9	8.2	8.1	8.3	7.6	7.0
Other deaths from injury	13.7	14.2	13.5	13.8	13.4	14.0	13.7	13.5	13.7	13.8	14.0
All deaths from injury	22.2	22.6	21.6	21.2	21.2	21.9	21.9	21.6	22.0	21.3	21.0
Accidental deaths leading to payment of industrial death benefit (GB)	1.29	1.31	1.11	1.14	1.19	1.09	1.02	0.98	1.00	0.93	0.82
Hospital in-patients (GB)											
All injuries[1]	480	486	505	526	562	572	591	596	594		
Sickness benefit (GB)[2]											
New spells of absence through injury											
Males	750[3]	769	802	839	843	898	886[3]	839	908	953	
Females	144[3]	144	142	145	141	143	138[3]	138	152	138	
Injury benefit (GB)[2]											
Fresh industrial accidents											
Males	755[3]	757	734	739	716	710	612[3]	556	562	555	509
Females	89[3]	92	90	85	87	86	73[3]	68	68	68	68

1 Spells in hospital resulting in discharge during the year.

2 Year starting on first Monday in June of previous year.

3 53 weeks.

It is notable that there has been a downward trend in recent years in the number of injuries received at work. However, part of the decline is attributed to lower levels of employment and output and structural changes in employment in the economy.[9] The Royal Commissioners considered it "unlikely that the fall in the number of work accidents which occurred in the last decade would be repeated in the next".[10] Given the probable continuing increase in unemployment induced by technological change, I consider this prediction dubious. It is my view that a marginal decline in work caused injury and disease will continue because of likely higher levels of base unemployment in the future. Doubtless these levels of stable unemployment, especially among the young and early retired, will bring in their train problems, tensions and illnesses of their own.

The analysis of injury rates by industry reveal, as would be expected, marked disparities in the incidence of injury. For example, the number of reported injuries per 1,000 employees in insurance, banking, finance and business services was 4. In professional and scientific services, it was 8. In public administration it was 32. In metal manufacture, 77 and in mining and quarrying it was 198. An analysis of the most dangerous occupations, showing the number of deaths each year per 1,000 employees is as follows[11]

	Number of deaths a year per 1,000 employees
Coalmining	0.24
Quarrying	0.30
Offshore oil installations	2.80
All manufacturing	0.04
Iron and steel making	0.12
Shipbuilding	0.13
Construction	0.18
Railways	0.21
Merchant shipping	1.33
Deep sea trawlers	2.47

ARE ACCIDENTS REALLY "ACCIDENTS"?

The Pearson Commissioners also examined the link between work and disease. In some cases there were simply no dispute. Each year in the United Kingdom 16,000 people contract one of the diseases which is specifically notifiable under the Social Security Act 1975. Such injuries include Pneumoconiosis, dermatitis, traumatic inflamation of the tendons of the hand or forearm etc. However, results of a separate survey suggested -

> "That there were substantial numbers of illnesses where there appeared to the sufferer to be a probably link between the illness and conditions at work, possibly amounting to five times the number of prescribed diseases".[12]

Informants were asked whether in their view their employers could have done anything to prevent the conditions which caused the work illnesses. Allowing for the considerable subjective element in the results, no more than a third thought that employers could have taken action to improve working conditions in a relevant way.[13] 39% of people in this class took full or part sick pay during illness. 37% received no sick pay.

18% took no time off. 3% were self-employed. The remaining 3% were either not working at the time of illness or were not the subject of acceptable information.[14]

It is interesting to compare the employees' own assessment of the preventability of injuries and the views of successive expert committees. A research paper prepared for the Robens Committee on Safety and Health at Work, reviewed the relevant literature and found that there was no agreed theory identifying the factors leading to work accidents.[15] The Pearson Commission concluded:

> "An indication of the extent to which work injuries might be prevented is given by an analysis of a random sample of accidents in factories and in construction industry during the second half of 1972 carried out by the Factory Inspectorate. They found that for about half of all accidents, no reasonably practicable precautions were available. Where precautions were available but not taken, the failure to do so was more often the responsibility of management than work people".[16]

THE CARROT v THE STICK

These observations about "responsibility", "predictability" and "fault" are plainly relevant to the effectiveness of the orthodox common law machinery developed to deal with injuries to the person. For various reasons, the common law of England, inherited in this country, preferred the "carrot" of a damages verdict to the "stick" of positive court orders directed at the future conduct of litigants before the court. No-where is this more clearly seen than in the area of defamation. In Europe, the remedies which developed to deal with proved defamation included court ordered publication of corrections and court ordered rights of public reply. The English civil law of defamation preferred the damages verdict, in the belief that the threat of having to pay such a verdict would appropriately discipline the conduct of publishers. It is only now that proposals for reform of the law of defamation, put forward by the Law Reform Commission, envisage use of the "stick" to supplement the "carrot" in Australian civil defamation law.[17]

What is true in the context of defamation applies equally in respect of work and other injuries. Instead of empowering the court, seised of the facts of a serious accident at work, to order modification of the work process to prevent like injuries in the future (or to restrain the process altogether) the tort action awards the successful individual plaintiff a sum of money. The underlying cause of harm may go uncorrected, unless the peril of similar awards in the future or other proper feelings are sufficient to pursuade the defendant to mend his ways. The advent of workers' compensation legislation, almost totally removed the necessity of the workmen to prove the element of fault in certain employment cases. The advent of no fault motor vehcile cover gave a like protection in the case of certain injuries arising out of the use of motor vehicles. But the basic tort machinery and remedies remain: the award ex post of money to the individual person injured.

Although the Pearson Commission recommended, as will be shown, the preservation of the tort remedy, it did not do so because of any conviction that the remedy was an effective deterrent to careless behaviour. The figures collected show that proportionately few victims of accidents are compensated by the "stately" proceedings in tort, that the entitlement to compensation depended too much on chance, that the system was unduly slow and that it was extremely expensive to administer. Dealing with the alleged justification that the existing system encourages individual responsibility and deters unsafe conduct the Commissioners concluded:

> "We find this a doubtful proposition. It is unrealistic to suggest that the cost of tort compensation is borne wholly or even largely by the [person] responsible for an injury. Third party claims are met by insurance funds to which [drivers and employers] are required to contribute and the element of loss incurred by the negligent ... is in practice limited to the possible loss of his no claim bonus or an increase of premium on renewal of his policy. We doubt if the prospect of such a penalty weighs heavily ... The criminal law and fear of personal injury together provide a more effective deterrent.[18]

NEW APPROACHES OVERSEAS TO SAFETY LEGISLATION

Even allowing that tort and other compensation scheme play a minor part in preventing injury and promoting care and safety, a "dubious preposition", what more can be done to diminish the toll of injury and disease?

Among the recurring suggestions are:

* The gathering of more information and statistics, so that we have a better appreciation of the causes of the injuries and disease.
* The encouragement of public awareness and information campaigns directed at key personnel.[19] It is a mistake to believe that eduction is the "cure-all". Experience teaches the need for repetition and constant reinforcement of public education campaigns. Nevertheless knowledge, including knowledge of criminal and civil consequences of causing injury, can sometimes play a part in reducing the toll of injury, at least for a short time.[20]
* The promotion of expert attention to injury avoidance, preventive design of the environment, the equipment, vehicles, product testing and so on.[21]

Recent legislation in Britain, the United States, Sweden and Canada provide Australian legislators with some of the options available to them in modernising our excessively complex and unstructured factory and other work safety legislation. At the same time provision could be made for providing a "new catalyst" to co-ordinate the existing fragmented efforts which seek to cope with the safety problem in Australia.[22]

In Britain, the Robens Committee was extremely critical of existing industrial safety and health legislation. I believe that the Committee's conclusions could apply equally to the position that now obtains in the Australian Federation[23]

> "Present regulatory provisions follow a style and pattern developed in an earlier and different social and technological context. Their piecemeal development has led to a haphazard mass of law which is intricate in detail,

> unprogressive, often difficult to comprehend and difficult to amend and keep up to date. It pays insufficient regard to human and organisational factors in accident prevention, does not cover all work people, and does not deal comprehensively and effectively with some sources of serious hazard. These defects are compounded and perpetuated by excessively fragmented administrative arrangements.23

As a result of consideration of the Robens report, the United Kingdom Parliament enacted the Health and Safety at Work Act 1974. The Act consolidated the piecemeal legislation into one enactment covering virtually all people at work. It established a Health and Safety Commission and Executive responsible to administer the legislation and to provide a central office to supervise research and training and to provide adequate advice on health and safety. The Commission is empowered to issue approved codes of practice for the purpose of improving protection standards for people at work and the public. Safety inspectors are empowered to issue "on the spot" enforcement in prohibition notices. The thrust of the legislation is, however, towards consultation, advice, persuasion and assistance. Its critics suggest that this has led to inadequate enforcement of proper safety standards, evidenced by the provision of inadequate inspectoral staff, the launching of insufficient prosecutions and the enforcement of trivial fines.

In the United States, the Congress first took a comprehensive approach to industrial safety when it enacted the Occupational Safety and Health Act 1970.[24] The purposes of this Federal legislation are declared to be

> "To assure safe and healthful working conditions for working men and women; by authorising enforcement of the standards developed under the Act; by assisting and encouraging the States in their efforts to assure safe and healthful working conditions; by providing for research, information, education and training in the field of occupational safety and health; and for other purposes."

Section 2(b) declares the purpose of the Congress and its policy to be

> "To assure, so far as is possible, that every working man and women in the nation has safe and healthful working conditions and to preserve the nation's human resources".

As a result of this Federal enactment, many confused and outdated State laws have been supervened, many previously voluntary standards and codes of practice have been rendered mandatory. The requirements of the Act are extensive and detailed. They are enforced by a substantial inspectorate and there is far more resort to the courts and to punitive sanctions than in the United Kingdom. Employees are empowered to request inspections if they believe their working conditions violate relevant Federal standards. Provision is made for a program to collect relevant information, to develop appropriate standards and to conduct research.

In Sweden, industrial safety has been placed squarely into the context of the well developed industrial democracy of that country. A Work Environment Act 1978 extends previous legislation about safety and the work environment to include organisation of work tasks, the adaptation of work to human needs and to improving the quality of life. Provision is made for joint safety committees. This last mentioned procedure has now been followed in the United Kingdom. From October 1978 unions have had the legal right to appoint safety representatives and members of joint safety committees in factories. The appointment of 150,000 trade unions representatives for this purpose, is envisaged.[25] The Trades Union Council has trained hundreds of union officers and tutors and prepared teaching kits and a handbook on health and safety at work. A more direct approach was taken in the Canadian Province of Ontario with the Employees Health and Safety Act 1976. This Act gives an employee who believes that a machine or work place is unsafe or does not comply with the safety

regulations, the right to refuse to work pending an inspection. It also allows the Minister of Labour to order the establishment of joint employer-employee health and safety committees and provides for the appointment at a work place, from among employees, of safety representatives with the right to inspect plant and to make recommendations. The right of employees to withdraw their labour in dangerous situations was considered an important weapon to enforce and raise safety standards.

In October, 1978, the Canadian Centre for Occupational Health and Safety Act 1978 was proclaimed. This Federal Act's purpose is to 'promote the fundamental right of Canadians to a healthy and safe working environment by creating a national institute concerned....with occupational health and safety'. The Institute's governing body includes representatives from the Provinces, trade unions, employers and government agencies. Its objects include promotion and establishment of standards and the collection of data relating to occupational health and safety. The progress of these Canadian initiatves will be closely watched by Australians.

A NATIONAL APPROACH TO SAFETY IN AUSTRALIA?

In Australia the National Committee of Inquiry into Compensation and Rehabilitation reported in July 1974. Part of its report dealt with proposals for adopting a more scientific approach to safety. The submission made on behalf of the Royal Australiasian College of Surgeons asserted:

> "The prevention of trauma is as much an applied science as is the prevention of disease. For maximum community benefit a scientific approach to the totally injury problem should be adopted.26

Orthodox proposals were made concerning the collection of statistical and research material and the provision of funds and other assistance for safeguards and design. More novel was the proposal for the establishment of a new National Safety Office to co-ordinate and help to fund safety projects, research, the definition of standards and "an integrated attack on the accident problem as a whole".[27] The Safety Office would also have a function to endeavour to co-ordinate the slow-moving activity designed to harmonise or unify Australia's State and Territory safety laws.[28] The Committee recommended that, to the extent that it could be done within constitutional limits, the objective of a "single comprehensive framework of legislation" should be pursued in Australia.[29]

There are many legal impediments in the way of Australia's achieving a national Act of the kind now operating in the United Kingdom or the United States. Our Constitution did not, in terms, asign compensation, rehabilitation, safety or the prevention of accidents to the catalogue of responsibilities of the Commonwealth Parliament. How is it that in the United States, also a Federation with limited constitutional powers, such a comprehensive Act was passed by the Congress as recently as 1970? That Act deprives the States of a traditional area of responsibility and secures a uniform national law which now covers at least two thirds of the total work force?[30] The answer to this question is to be found less in the differences of language between the Constitutions of the United States and Australia than in the narrow construction by the High Court of Australia of what are basically the same provisions.

Section 2 of the United States Act firmly bases the legislation upon a finding

> "that personal injuries and illnesses arising out of work situations impose a substantial burden upon, and are a hinderance to, interstate commerce in terms of lost production, wage loss, medical expenses and disability compensation payments".

Under the Australian Constitution, the Commonwealth Parliament has power under s.51(i) to make laws "with respect to trade and commerce with other countries and among the States". In the United States a doctrine of "commingling" or "integration" of inter-and intra-state trade has been accepted. This doctrine permits Federal regulation of such intrastate trade as is incidental to interstate or overseas trade, at least where, in economic fact, the two are so closely associated that uniform control is reasonable. This argument has not been accepted by the High Court of Australia.[31] The inconveniences of the present restricted interpretation of s.51(i) are manifest and have been criticised by some Justices.[32]

There would be no impediment to the establishment by the Commonwealth Parliament of a National Safety Office with research, information collection, design, advice and even certain co-ordination functions. It is the necessity to add "teeth" by way of the provision of an Inspectorate and the enforcement of sanctions that raises the constitutional question.

It seems likely to me that in time the High Court will expand the scope of the trade and commerce power. The growing integration of the Australian market economy makes this probable. The resistance to the comingling doctrine will wane and a fuller scope will be given to the Commonwealth's powers under section 51(i), potentially most valuable for national economic legislation.[33] An interpretation of the Australian trade and commerce power equivalent to that adopted in the United States would probably permit the valid enactment of a national law similar to the Occupational Safety and Health Act of 1970.

There are other impediments to a national approach which need not be explored in any detail. For example, the power of the Australian Conciliation and Arbitration Commission to make an award in the settlement of an industrial dispute has been held to be limited to matters within the industrial

relationship of the parties.[34] Various matters within the scope of so-called "management prerogatives" have been held outside the legitimate ambit of an award. Thus a provision relating to the deduction of union dues from weekly wages was held beyond power.[35] Management prerogatives are neither as clear nor as untrammelled as 20 years ago.[36] Indeed, it is increasingly recognised that every union demand in some way entrenches upon what were formerly managerial prerogatives.[37] However, the extent to which the industrial tribunals can provide in their awards detailed provisions in relation to safety, is limited by legislation (and in the Federal sphere, possibly, by the Constitution). Provisions do exist in awards for the supply of protective devices or appropriate clothing, the provision of first aid equipment and other rudimentary facilities. Despite disapproval on the part of the tribunals, there is an increasing tendency for awards to permit the payment of a disablity allowance in lieu of the provision even of these limited entitlements.[38] It seems likely to me that the next decade will see the unions, more sensitive to the industrial disadvantages of unsafe working conditions, pressing the Arbitration Commission to an exploration of its powers in respect of provision for the health and safety of employees under Federal awards. A parallel development, unhampered by constitutional limitations, will probably occur in the State industrial tribunals.

IMPROVING THE PRESENT AUSTRALIAN LAWS:

Short of a single national Act, of the kind now in force in the United States and Britain, it is likely that we will see in Australia rationalisation and modernisation of State laws and a movement towards uniform standards, although at a somewhat languid pace. The Australian Federation is not noted for its success in securing uniform laws. Industrial safety and health legislation is merely one instance of this.

The South Australian Industrial Safety, Health and Welfare Act, 1972-1976 is the model that was largely followed by Tasmania in 1977. A committee for the review of the Victorian legislation reported in 1978. An inter-departmental committee is considering the New South Wales legislation. The Departments of Labour Advisory Committee (D.O.L.A.C.) has made a variety of recommendations, some of which have found their way into State laws. However, because this body comprises busy Permanent Heads of Federal and State departments and meets annually, the limits of what it can achieve are obvious. In 1972 the Woodhouse report declared that a new catalyst for action was needed and that uniformity and simplification of laws was a prime objective for an effective attack on industrial accidents. These conclusions remain apposite today. Under its Act, the Australian Law Reform Commission has statutory responsibilities in matters referred to it by the Attorney-General to review, modernise and simplify Commonwealth laws. It also has an obligation to consider proposals for uniformity of laws. It has shown an ability to work with relevant experts in a wide range of disciplines, in order to assist Parliament to improve the legal system. One area where disparity of laws creates confusion and injustice is defamation. Shortly, the Commission will be publishing its proposals for a single law of defamation in Australia. This project might be considered as a model for a like Commonwealth initiative, through the vehicle of the Commission or otherwise, in the area of industrial, health, safety and welfare. A new catalyst is surely needed.

FROM FAULT TO SOCIAL WELFARE

The Industrial Revolution, the development of the internal combustion engine and other technological and social changes produced a recognition in some quarters in the last part of the Nineteenth Century that the traditional provision for recovery

in the case of proved fault was an inadequate way of dealing with the increasing numbers of human and social problems caused by traumatic injury and disease. The first fruits of this realisation were the workers' compensation Acts which spread from Germany to England and later throughout the Empire and most of the developed world. It was not until the 1930s that proposals for a more general no fault liability scheme gained widespread currency. No doubt the advent of the motor car and the growing toll it took upon life and limb provided a new impetus 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 scheduled benefits providing compensation for the victims of motor car accidents, analogous to those found in workers' compensation legislation.[39] It took thirty years for the proposal to get anywhere in the United States. It was consistently opposed by the American Bar Association. In 1934 a Resolution of the American Bar Association condemned the proposal and similar resolutions have recurred since then, based upon the same arguments.

In 1933 a Select Committee of the House of Lords was established to consider the Road Traffic (Compensation for Accidents) Bill.[40] 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 lagainst the scheme on the basis that "any such scheme would necessarily have a purely arbitrary basis".[41]

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 anomalies that would arise if, in Australia, this issue were dealt with differently from State to State.[42]

In 1963 the New Zealand Government received a Report from a Committee under the Chairmanship of the Solicitor- General for New Zealand, Mr. Richard Wild Q.C., later to be Chief Justice of New Zealand. 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 this day to rule the plaintiff's legal 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 legislation in 1972.[43] The legislation, which commenced operation 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 statutory compensation for injuries.

In 1972 the Tasmanian Law Reform Committee 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.[44]

In 1973 the New South Wales Government announced the establishment of its own Committee under Mr. Justice Meares. The Committee was to report on liability without fault in motor car cases. But the work of that Committee was suspended when, shortly after the Federal Election in December 1972, a National Committee of Inquiry was established under the Chairmanship of Mr. Justice Woodhouse. Mr. Justice Meares was later 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. It appended draft legislation for a National Compensation Act [illegible] compensating benefit of a no fault scheme. Negligence

Meanwhile, in the United States, legislation had come into force in the State of Massachussets in 1971 based on the no fault philosophy, despite vigorous opposition from the legal profession. That legislation continues to spread to a number of States. The Saskatchewan and New Zealand models have exerted very considerable influence upon the thinking of governments, law reformers and lawyers throughout the common law world. They remain before us in Australia today.

In March 1973 a Royal Commission was established in Britain charged with the duty to report upon the circumstances in which and the means by which compensation should be payable in respect of death or personal injury. The Royal Commission was required to consider whether such compensation should be payble "only on proof of fault or under the rules of strict liability". It was required to consider the cost and insurance

implications of its proposals. The Commission reported in March 1978. Unlike the Woodhouse Report, the Pearson Commission's Report favoured the retention of tort remedies alongside a significantly expanded social security system. No fault compensation was recommended for motor vehicle injuries. The no fault provisions for work injuries were to be improved. New benefits for severely handicapped children were recommended. A series of specific proposals were made but no fault schemes were rejected in respect of sea and inland waterways, rail transport generally, products liability, medical treatment, occupiers' liability and injury by animals.

The Government of the United Kingdom appears likely to introduce legislation in 1979 based upon the Pearson recommendations. In Australia the focus of the debate remains the Woodhouse Report, with its much more radical proposals.

THE OBJECTIONS

The chronology of reports and general 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 the general sense of justice that people who bring accidents upon themselves should recover equally to those who are innocent victims of the fault of others. The effectiveness of fault as a deterrent is 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 to pay damages can be passed on to an insurer, it is scarcely a matter that will greatly deter the insured. Nevertheless the feeling of blameworthiness and the belief that people injured wrongfully should be fully compensated is one that is strongly held in Australian society.

There were other objections. It was said that the premium to cover no fault liability would have to rise fourfold.

Especially in the area of motor car accidents or injuries at home, it was argued that 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".[45]

In the United States, the American Bar Association in 1960 listed many of the above objections although no mention was made of the lawyer's immediate professional interest in maintaining the status quo. The A.B.A. 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. It was proposed that an injury compensation scheme should commence in July 1976 and should be immediately effective. A 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.

Machinery:

The cost of the scheme, estimated to be $325 million 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 itigation 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 Federal Superior Court.[46]

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. 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.[47] The Departmental Working Committee was about to produce a major report suggesting a large number of changes by the time 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.[48] At the same time the Departmental Committee's Report was released, proposing a large number of important amendments to the original Woodhouse scheme.[49]

Following the election, the new Minister, Senator Guilfoyle established a National Compensation Programme Steering Committee.[50] 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".[51]

In February 1977 a National Compensation Bill was introduced as an opposition measure, but it did not proceed. At one stage, it was understood that a Backbench Committee of the Government Parties would have the responsibility of considering the Woodhouse Report and the objections to it. There the matter presently rests. Without a change of heart among the States and, possibly a change in the economic climate, no great progress can be anticipated towards enactment of fundamental reforms in our approach to compensation of the victims of injuries and disease. Changes will continue to occur. Compenstion rates will improve. The scope of entitlements and of those embraced by workers' compensation and motor vehicle no fault legislation will continue to expand. Reforms of the more fundamental kind proposed by the National Committee of Inquiry do not appear to be on the legislative horizon.

CRITICISMS OF THE WOODHOUSE SCHEME

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

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 which affected the whole way in which the Committee of Inquiry approached its task.[52] At this distance criticisms of such a kind appear irrelevant. The issue is the desirability of the scheme, not its authors or origin.

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[53] and by industrial decisions throughout the country.[54] But this was to be substituted by eighty-five percent. The benefits for 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.[55] Calculation of compensation on the basis of the income in 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, but after the change of Government.[56]

iii Administration: The administrative arrangements were criticized. 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 ldifferences. 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.[57] Since 1975 important reforms of administrative law in the Commonwealth sphere relevantly diminish the force of their objections.

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 comparatively silent. There is hardly a word about the scope of placitum xxxiiiA adopted after the Referendum of 1946. It empowered the Commonwealth Parliament to make laws with respect to certain social security allowances. 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 the present constitutional competence of the Commonwealth Parliament. The history of placitum xxiiiA might, however, have given confidence to those who, in this area, urged seeking an extension of Commonwealth power from the people.

EVALUATION OF WOODHOUSE

All this being said, the fact remains that the debate can never be the same in Australia following the Woodhouse Report. Already Tasmania and Victoria have limited no fault motor vehicle schemes. The scope of social security in a modern State expands apace. Society grows increasingly intolerant of the injustices inherent in the fault principle. Unacceptable 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. The Pearson Royal Commission thought not. Speaking at the New Zealand Legal Conference in April 1978, Mr. Justice Woodhouse was unrepentant. The demise of tort mentality and

the construction of a social welfare compensation attitude required, in his view, nothing less than the complete removal of the lingering features of tort damages.[58]

It is not for me to say what should now be done with the Woodhouse Report. It stands in marked contrast to the Pearson Report approach. Unlike the sectoral no fault legislation, it proposes a new concept, which takes the procedures for compensating ill and injured fellow citizens out of the realm of pseudo damages actions. It is perhaps noteworthy that in New Zealand, the insurance industry, the legal profession and the trade unions now accept the Woodhouse scheme. The country has not been bankrupted by it. There is no talk of going back.

The last part of the twentieth century will see the continuation of these debates in Australia. It is likely that a National Safety Office, or some variant of it, will be established by the Commonwealth. New attention will be given to the scope of the Commonwealth's constitutional power to expedite the modernisation, simplification and uniformity of safety laws, particularly in industry. The Arbitration Commission may come to have an increasing role as the concerns of unions and their advocates become more diverse. Structural changes in employment will continue to have a marginally favourable effect upon the decline in injuries at work. Increasing industrial democracy and consultation between employer and employed, will, as in Sweden, direct new attention at preventive measures designed to promote safety and to prevent avoidable accidents.

Ad hoc provisions will continue to be developed to confront the grosser injustices of the present system for compensating the victims of injury. Reformed national health, national compensation and national superannuation will continue to preoccupy proponents of a improved Australian society. It seems likely to me that we will live to see implemented a variant of the Woodhouse scheme: the constitutional hurdles overcome; the funding difficulties surmounted; the

inconsistencies in benefits removed and the machinery for fair and independent scrutiny of entitlement decisions assured. But when this will be, only the future will tell.

* The views expressed are the author's own and are not those of the Law Reform Commission.

FOOTNOTES

1. See the Law Reform Commission (Aust.) Alcohol Drugs and Driving, 1976 (A.L.R.C.4).

2. Report of the Committee of Inquiry, Safety and Health at Work (Lord Robens, Chairman), 1972, Cmnd. 5034. (Hereafter "Robens")

3. K.G. Jamieson and E.C. Wigglesworth, "The Dimension of the Accident Problem in Australia" (1977) 47 A.N.Z. Surg 135, 135-8. See also report of the National Committee of Inquiry (Aust.) Compensation and Rehabilitation in Australia, 1974 (A.O. Woodhouse, Chairman) (hereafter "Woodhouse"), vol.1, 209. According to Woodhouse, accidental death accounts for three quarters of the fatalities that occur in the age group 20-24 and is the leading cause of death in Australia up to the age of 35.

4. E.C. Wigglesworth, "Negligence Compensation and Accident Prevention", mimeo, Paper for the Legal Service Bulletin.

5. Woodhouse, Vol.3, 22.

6. Royal Commission on Civil Liability and Compensation for Personal Injury, Report, (Lord Pearson, Chairman) (hereafter "Pearson"), 1978, Cmnd. 7054 (2 vols.).

7. Pearson, Vol.2, 8 (Table 1).

8. Id, 11 (Table 3).

9. Id, 46-7.

10. Ibid,

11. Id, 49 (Table 33).

12. Id, 51.

13. Id, Chapter 19, "Personal Injury Survey: Work Illnesses". See especially 132-3.

14. Id, 134.

15. Robens.

16. Pearson, Vol.2, 49.

17. The Law Reform Commission (Aust.) D.P.1 Defamation - Options for Reform, 1977, 13; J.G. Flemming, "Retraction and Reply: Alternative Remedies for Defamation" (1978) 12 U.B.C.L. Rev. 15,30.

18. Pearson, Vol.1., 211 (para 989)

19. A.L.R.C.4, 132.

20. Ibid.

21. Id, 154.

22. Woodhouse, Vol.2, 101.

23. Robens, 152 (para.458).

24. Public Law 91-596 (December 29 1970), (United States) 84 Stat 1590.

25. As reported in The Times, 17 March 1978, 3 (Mr. L. Murray, General Secretary of the T.U.C. quoted). If D.A. Castle Safety Representatives and Safety Committees - Power Without Responsibility? (1978) New LJ 944.

26. Woodhouse, Vol. 1, 209.

27. Id. 212.

28. Id. 213-4.

29. Ibid.

30. Cf. Department of Productivity (Aust.), "Safety and Health at Work", mimeo (W.E.S.4) 63.

31. R. v. Burgess, ex parte Henry (1936) 55 C.L.R. 608,621,671-2; Wragg v. New South Wales (1953) 88 C.L.R. 353,385-6.

32. Cf. Windeyer J. in Deacon v. Mitchell (1965) 112 C.L.R. 353,367,371. Contrast Dixon C.J. in Wragg, quoted above, 253. Somewhat different, and wider, concepts have been adopted in respect of the intrastate implications of s.92 of the Constitution. See C. Howard, "Australian Federal Constitutional Law" (2 ed.) 1972, 257,336.

33. But note the decision of the majority in Minister for Justice of Western Australia; ex rel Ansett Transport Industries (Operations) Pty. Ltd. v. Australian National Airlines Commission and the Commonwealth (1975) 12 A.L.R. 17. Only Murphy J. at 45 (Mason J. not deciding; Barwick C.J., Gibbs and Stephen JJ. contra) was prepared to revise the established view of s.51(i) of the Constitution.

34. Caledonian Collieries Ltd. v. Australian Coal and Shale Employees Federation (1929) 42 C.L.R. 527.

35. R. v. Portus; ex parte A.N.Z. Bank Limited (1972) 127 C.L.R. 353.

36. See e.g. Robinson J. in A.T. & A.E.A.; re Dendy Theatre 1974 A.I.L.R. 172.

37. See Macken J. in Public Hospitals (Medical Officers) Award 1975 A.I.L.R. 990).

38. Re Wool and Basil Workers Award (1962) 101 C.A.R. 274. For a recent example of disability allowance for work in chemical fumes, see A.S.E. v. C.S.R. Chemicals Ltd. 1975 A.I.L.R. 1006.

39. "Liability Without Fault: The Claim that a Change of Law is Necessary" (1963) 37 A.L.J. 209,210.

40. Id. 214.

41. Ibid.

42. Id. 214.

43. Accidents Compensation Act 1972 (N.Z.). Commenced 1 April 1974. See Woodhouse Vol.1, 132. For commentary see 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 Mod.L.R. 361.

44. A.K. Clarke, "Motor Accidents: No Fault Compensation in Victoria" (1975) 49 Law Inst.Journal 314. See also Id. 350. The Victorian legislation was more recently reviewed and reforms recommended. See Report of the Board of Inquiry into Motor Vehicle Accident Compensation in Victoria (Sir John Minogue Q.C.), 1978.

45. (1963) 37 A.L.J. 225.

46. J.F. Keeler, "Report of the National Committee of Inquiry into Compensation and Rehabilitation in Australia" (1975) 5 Adelaide L.Rev. 121, 131.

47. Australian Financial Review, 29 October 1975, 1, 8.

48. Id., 18 November 1975, 1, 13.

49. Ibid.

50. (1976) 1, Commonwealth Record 89.

51. Commonwealth Parliamentary Debate (The Senate), 9 November 1976, 1708.

52. Keeler, 123.

53. Id., 124.

54. 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.C 655. See now Workers' Compensation (Rates) Amendment Act 1977 (NSW) providing 100% compensation for the first 26 weeks of incapacity.

55. Keeler, 125.

56. Australian Financial Review, 18 November 1975, 13.

57. Keeler, 126-7.

58. A.O. Woodhouse "Compensation for Personal Injury in 1978", paper for the N.Z. Law Conference, April 1978, mimeo, 13-15; see also K.L. Sandord, "Accident Compensation - Its Development and Future", a paper for the N.Z. Law Conference, mimeo.