368

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VICTORIA FACULTY

SEMINAR ON WORKERS' COMPENSATION AND REHABILITATION

MELBOURNE, 17 NOVEMBER 1982

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

November 1982

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NOT A GOOD YEAR

The year past has not been a vintage year for workers' compensation. In Australia, Britain and most countries of the common law world, workers who are injured at work or on their way to work, receive money compensation and medical costs under no-fault insurance legislation. This legislation originated in Bismark's Germany. It only spread to the English-speaking countries much later, despite the fact that they had led the world into the first Industrial Revolution. As you know, English-speaking people never like to rush law reform – however necessary and however obvious!

In addition to compulsory no-fault statutory entitlements, various other forms of compensation are available:

* the negligence action, requiring proof of fault or breach of statutory duty on the part of an employer or a fellow employee;

* no-fault statutory compensation in some parts of Australia for injuries received in particular ways, e.g. in a car, at sport or as a result of a crime;

* full pay entitlements laid down in certain industrial awards;

* Commonwealth social security benefits, payable to invalids and others.

In the past 12 months, increasing dissatisfaction has been expressed about features of the present system, including its concentration on the provision of money and its lesser concern with the much more difficult task of helping positively in the rehabilitation of the injured and the support of dependants. Take a few English examples. In his latest book What Next in the Law, Lord Denning castigated the House of Lords for refusing to permit judicial invention of instalment damages ('...the House of Lords requires the judges to go by the present unsatisfactory state of the law, with all the problems it has created...'[1]). He also turned on the British Government for failing to implement the report of the Pearson Commission on reform of compensation for personal injuries ('Out of the monumental report...the Government have produced a laughable little mouse...Five years in the lives of Lord Pearson and his colleagues have been spent in vain. Scurvy treatment by an ungrateful Government'[2]). Lord Scarman in the House of Lords summed up the basic problem:

> 'Knowledge of the future being denied to mankind, so much of the award as is to be attributed to future loss and suffering - in many cases the major part of the award - will almost surely be wrong. There is really only one certainty: the future will prove the award to be either too high or too low'.[3]

In Australia, the voices of judicial disquiet become more insistent. In the High Court, Mr. Justice Murphy in a series of stinging dissenting judgments, has rounded on the way we approach compensation law.[4] In a recent decision he even claimed that the high rate of deaths and injuries in Australia had been contributed to by the judicial policy which refused to provide full restitution compensation. He suggested that in this way we have lost the stimulus toward the prevention of accidents and the rehabilitation of the victims.[5]

Judges not normally given to commenting on legal policy call boldly for reform. Chief Justice Gibbs and Mr. Justice Wilson lamented:

> 'The law relating to the assessment of damages for personal injuries is far from satisfactory'.[6]

Mr. Justice Stephen, before leaving the Bench, suggested the need for 'radical legislative intervention'.[7]

Trial judges in damages cases protest the unsatisfactory and unedifying game of legal chance into which they are thrust. Mr. Justice Lee, an experienced trial judge of the Supreme Court of N.S.W., declared in July 1981 that there was 'grave disquiet in the community in regard to verdicts in favour of severely disabled persons arrived at by the application of common law principles'.[8]

And now the pressure has begun to appear on the statutory workers' compensation schemes. It has come:

* In part, because of the inter-relationship of those schemes with the unsatisfactory damages cases.

* In part, because of the seemingly endless queue of cases waiting legal determination, and the continuing great delays, despite the appointment of more and more judges.

* In part because of the gnawing concern that the system is cost intensive in the delivery of benefits and contents itself with providing money handouts instead of addressing more vigorously the obligations of restoration and rehabilitation of the injured. Particularly in times of unemployment there is a risk at least that weekly compensation payments, without more vigorous attention to rehabilitiation, will in some cases produce - perhaps unconsciously - a disincentive to recovery.[9]

* Political parties are gearing themselves up to offer competing systems. The Federal Labor Party has already promised a major overhaul of Australia's compensation and rehabilitation laws.[10]

* But the greatest pressure for change is arising from the sudden escalation of workers' compensation premiums in all parts of Australia.

THE COSTS GO UP

The precise reasons for the rapid increase in employers' liability insurance premiums are not hard to find. They include a series of important High Court decisions which have increased significantly the average verdict recovered in industrial negligence cases[11], increasing numbers of claims - not unknown in times of economic downturn - and the reduced number of insurers offering to write workers' compensation business. This last mentioned reduction in competition has tended to put prices up. It is itself a response to what has become a not very profitable line of insurance. Six months ago gazetted minimum premiums in New South Wales were increased 20%, bringing gazetted increases for the financial year to 40%: a significant hike.[12] The scale of losses was illustrated by figures of the N.S.W. Insurance Premiums Committee in December 1981. These figures showed that the loss ratio for workers' compensation in New South Wales had jumped from 13% in the 1980 financial year to 165% in the year to June 1981. For every dollar the New South Wales industry received in premiums in 1980-81, it paid out $1.65 in claims.[13] Because a large proportion of the compensation market tends to be written by Goverment Insurance Offices, there is a more direct Government concern in costs of compensation

When some workers' compensation premiums looked like going up by 300% for 1982-83, the New South Wales Employers' Federation launched its own review. Surprisingly, one question asked - which would not have been asked just a few years back - was whether employers considered the present mix of private and Government underwriters was appropriate or whether workers' compensation should now be handed over to the public sector entirely as a form of social security.[14] True to the trends in the private sector, figures recently released disclose that the numbers of Federal Government employees claiming workers' compensation increased by more than 30% between 1976 and 1981.[15]

In response to these developments: problems of principle and problems of funding, Governments have launched inquiries into the reform of the compensation and rehabilitation system. In New South Wales, the State Law Reform Commission has moved rapidly to produce an Issues Paper setting out various options for law reform.[16] The paper canvasses four principal models:

* Patchwork reforms of the present compensation systems, basically preserving them in tact.

* Introduction of special no-fault accident compensation, for example, confined to road accidents as a supplement to the present system. This reform has already been achieved in Victoria and some other Australian States.

* Introduction of such no-fault schemes to replace entirely the common law negligence action; and

* Establishment of a comprehensive compensation and rehabilitation scheme akin to that proposed by the National Committee of Enquiry into Compensation Rehabilitation (the Woodhouse report) in 1974.

The paper offers no conclusion. It invites comment. The submission to the N.S.W. Commission by the N.S.W. Labor Council urges improvement of the current system. But it resists a comprehensive scheme such as the Woodhouse proposal now operating in New Zealand:

> 'The Union movement considers that the social security system should be enhanced as a means of providing adequate compensation to victims of misfortune other than work or motor vehicle related. To that extent, it is a Commonwealth responsibility and the State has little role to play'.[17]

A similar submission is reported on the part of the Insurance Council of Australia.

The N.S.W. enquiry is not the only one. On 11 October a report appeared in the Age that Victoria may launch its own enquiry into compensation laws.[18]

THE MAIN ISSUES

That indefatigable critic of the current compensation system, Professor Harold Luntz, has listed the chief objections to the present way we go about compensating injured workers in Australia.[19]

* Multiplicity: There is a confusing multiplicity of avenues through which victims can sometimes seek relief. Even within the one State, the injured and their dependants are not treated alike according to needs and relative injuries.

* Disparaties: Compensation payable varies enormously between the States. Loss of sight in Victoria under the State Act pays $23,260. In Western Australia, it is $48,027.

* Incomplete coverage: With a few limited exceptions, self-employed people are excluded from statutory workers' compensation benefits. Furthermore injuries at home are not covered, leading to the spectacle of one paraplegic recovering a verdict of millions of dollars - a sum that could be spent to povide a fuller life for 40 fellow workers whose injuries, by chance, occurred outside compensable circumstances and can recover no verdict or award.

* Delays: Both workers' compensation and damages actions usually take months or even years to be heard. Moreover, they are extremely cost-intensive, as may be expected from the high involvement of judges, lawyers, investigators, medical witnesses and the adversary trial process.

* Rehabilitation: The lure of the lump sum provides incentives against rehabilitation. Sometimes the lack of funds whilst waiting determination or verdict deprives the worker of the wherewithal to secure prompt rehabilitative treatment.

* Industrial safety: The concentration on providing compensation and the interposition of an insurer, frequently remove incentives for employers attending to longstanding problems of industrial safety and disease.[20]

* Adequacy of compensation: The system tends to undercompensate the most seriously injured, not to compensate at all many who are seriously injured at home, in recreation or in non-fault situations and sometimes to overcompensate those with relatively minor injuries.

* Cost: Professor Harold Luntz has described the present system as 'almost unbelievably costly'. Some estimates put the cost ratio of delivering the compensation dollar (including lawyers, investigators, etc.) at 35%. Whilst this sum is disputed, it is plain that any system that relies so heavy upon highly trained and talented people in a court setting to resolve disputes is going to be a very costly one. Recognition of this fact raises the issue of whether some other just procedure could be devised which diverts funds presently spent on administering the scheme, the victims, their dependants and their rehabilitation. The cost ratio under the New Zealand Accident Compensation Scheme is less than 10%.

Numerous other criticisms have been voiced about our present system. Senator Evans has denounced it as 'complicated, slow and capricious'.[21] Mr. Justice Enderby has criticised the irrational differences from one part of Australia to another.[22] The concentration in statutory compensation on income capacity deprives some people with quite serious, but not incapacitating injuries, of compensation.[23] There are numerous anomolous exceptions to compensation rights, leading to a patchwork of efforts of reform either in Parliament or in the courts.[24] The latest decision of the High Court on the rights of servicemen is an example of the latter.[25] Perhaps most serious of all, on a national plane, is the lack of concentrated attention to prevention and rehabilitation. The system that too often salves its conscious by a money handout, often inadequate at that, to the injured and to dependants of the dead.

WHAT CAN WE DO?

The options for change have been identified in the New South Wales Law Reform Commission's paper. Certainly the one that retains the most fascination is the Woodhouse proposal, adapted from the New Zealand Accident Compensation Scheme. This approach would abandon forever the myriad of common law and statutory rights and substitute a social security solution for compensation. It would also permit greater concentration upon rehabilitation and preventative safety measures. The Woodhouse scheme has numerous critics, including in Australia. Mr. G.E. Murphy, President of the Law Council of Australia, is one of the most vocal. His criticisms include:

* It is too bureaucratic. Lawyers, though expensive, can protect injured working people best.

* It seeks to solve a general social problem by depriving injured workers of hard won rights.

* By turning the whole problem over to the Government, it provides the temptation, in times of economic downturn, to reduce benefits below an acceptable social level.

* It offends the instinctive feeling that where some party is at fault, he should completely compensate his victims.

* It would have serious consequence for the legal profession, the insurance industry, the trade union movement and others all whom are actively involved in the current system.

* It runs into significant constitutional and funding problems which have never been adequately solved.

There is no doubt that we will be hearing more about this issue in the weeks ahead. The Federal Labor Party's policy assures this. But the impetus for action now comes less from 'bleeding hearts' than from 'bleeding pockets'. Insurance for accident compensation is no longer profitable. Insurers and employers for the first time are seriously talking of getting out of the business of compensating the worker and leaving it to the community as a whole.[25]

Few thoughtful observers doubt the anomolies, inadequacies and injustices of our present system of compensation. But the debate is not about that. It is about what we can substitute that will be better. To get full coverage for accidents and disease in a national compensation scheme worthy of that name would require considerable national determination, not a little constitutional and legal ingenuity and a degree of compromise and self-sacrifice that is not common in Australia in such matters. States would have to withdraw from a traditional field of legislative activity. Insurers would have to withdraw from an area that once was profitable. Lawyers would have to look elsewhere, in a time when other activities (such as conveyancing) are under threat. Unions would have to surrender some entitlements hard won for their members in order that the same members, and others, were better covered at all times. All of this would have to be done to get a system more rational and coherent than at present and one which ensured that victims of accidents (and disease) are adequately compensated because they are fellow members of society and not just because they happen to be squeezed into legal categories which developed in a muddled way to respond to the dangers and risks of modern living.

We may live to see such a change. Let us hope that this Conference contributes thoughtfully to the process.

As we proceed to our discussion, let us keep in mind the indictment of the present system offered by a 1977 Californian Commission and which applies, in part at least, in our country:

'...[W]e do not believe that the society should be required to accept a...system which:

* pays to injured people less than half the dollars that it collects;
* systematically overcompensates the slightly injured and undercompensates the seriously hurt;
* encourages use of the highest cost mechanism for resolution of disputes, regardless of the scale of the injury or the issues that it presents;
* delays resolution of cases without regard to financial capacity of the injured to endure delay;
* provides no point in the decision process where the overall economic effects of changes in rules of law can be taken into account;
* leaves every category of citizens...ever more deeply in doubt about what their rights and responsibilities are and how to provide for them'.[26]

FOOTNOTES

1. Lord Denning, What Next in the Law, 1982, 140.

2. ibid, 156-7.

3. Lord Scarman in Lim Poh Choo v. Camden and Islington Health Area Authority [1980] AC 174, 182-3

4. Raimondo v The State of South Australia (1979) 23 ALR 513, 520f.

5. Todorovic v Waller (1981) 37 ALR 481, 519-20.

6. ibid (1981) 56 ALJR 59, 66.

7. Barrell Insurance Pty. Ltd. v Pennant Hills Restaurants Pty. Limited (1981) 34 ALR 162, 185.

8. Skow v Public Transport Commission of New South Wales, unreported, Supreme Court of New South Wales, 10 July 1981.

9. The Australian, 22 September 1982.

10. Senator G. Evans, Press Release 36/82, 21 June 1982.

11. The cases are discussed in New South Wales Law Reform Commission, Accident Compensation, Issues Paper, 1980. See also A. McCathie, 'Futures Change for Insurers', Australian Financial Review, 22 October 1982, 12.

12. The Australian, 1 July 1982.

13. Australian Financial Review, 28 October 1982.

14. Australian Financial Review, 1 September 1982, 5.

15. Melbourne Sun, 21 October 1982.

16. N.S.W.L.R.C., Accident Compensation, n 11 above.

17. Labor Council of N.S.W. Submission to the enquiry by the Law Reform Commission into Accident Compensation, 1982, mimeo, 18.

18. The Age, 11 October 1982.

19. H. Luntz, Law Institute of Victoria Journal, November 1981. See also G. Barker, 'Reform hindered by self-interests', the Age, 28 September 1982.

20. Cf M.D. Kirby, Industrial Safety and Law Reform, forthcoming paper for First National Conference on Industrial Safety, Sydney, 18 November 1982.

21. G. Evans, Press Release, 36/82, n 10 above.

22. Quoted [1982] Reform, 93.

23. Sydney Morning Herald, 24 September 1982.

24. Groves v. the Commonwealth of Australia (1982).......ALR.........

25. The Insurance Broker vol 5 no 2, March 1982, 1.

26. California Citizen's Commission on Tort Reform, 1977, cited by W.H. Pedrick, 'Palmer's Compensation for Incapacity: The New Zealand and Australian "No-fault" Story', 1 Utah Law Rev. 115, 128 (1981).