423

CSIRO OFFICERS' ASSOCIATION

ANNUAL DINNER, CANBERRA, 3 JUNE 1983

LAW REFORM, SCIENCE AND THE GOOD SAMARITAN

June 1983

CSIRO OFFICERS' ASSOCIATION

ANNUAL DINNER, CANBERRA, 3 JUNE 1983

LAW REFORM, SCIENCE AND THE GOOD SAMARITAN

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

THE LAW REFORM COMMISSION AND SCIENCE

The Australian Law Reform Commission is a permanent body established by the Federal Parliament for the review, modernisation and simplification of Federal laws in Australia.

One of the chief forces which has caused the need for law reform in Australia today is the impact on the law of science and technology. This impact is illustrated in a number of ways, by reference to some of the chief scientific and technological developments of our time.

For example, the changes in energy sciences have implications for the law and law reform. A committee in South Australia has examined the changes in the law that would be needed to accommodate to a community more heavily dependent upon solar energy. When access to sunshine is something more than convenience or cosmetics, when it affects energy needs, the law may be needed to step in to provice enforceable protections to such a valuable right.

Probably the most dynamic technology today is that of informatics. Many tasks of the Law Reform Commission illustrate the impact of the microchip on the law. For example, a major project on privacy protection illustrates the need for new laws to guard the privacy of individuals. As more and more information is retained in computerised format, personally referable to everyone in society, new laws are needed for data protection and data security. Similarly, the Law Reform Commission's inquiry into the law of evidence illustrates the need to adapt the basic rules of court procedure for the world of the computer printout. The English legal system, which we have inherited, had a fascination with oral testimony. But the advent of informatics makes it necessary to adapt the trial system and to adjust it to accept computerised and computer generated evidence.

Possibly the most puzzling scientific developments are occurring in the field of biology. Scarcely a day goes by but we have new social problems of bioethics posed by scientific and technological advances. The Australian Law Reform Commission was asked by Attorney-General Ellicott to examine the law on human tissue transplants. The report produced by the Commission in this inquiry is now the basis of the law in all Australian jurisdictions, save for Tasmania. This project, though dealing with a sensitive matter, is but the first of many that will be needed to tackle the legal and social problems of bioethics. In vitro fertilisation is another illustration. It was recently announced that a moratorium had been imposed on certain of the activities of the in vitro fertilisation team in Melbourne. The Victorian Government has imposed the moratorium pending the final report of the Waller Committee of Inquiry. This development is a warning to scientists and technologists in Australia today. Unless we can find a better method of communicating the problems and opportunities of science to the broader community, there will be calls for more moratoria. Unless we can find institutions that help our Parliaments, Governments and bureaucrats to face up to the moral and social implications of science, there will be more moratoria. The Australian Law Reform Commission stands as one means of addressing problems of this kind. Its success in a number of sensitive projects illustrates that it is possible to bring together the experts and the general community and to provide acceptable solutions without unduly impeding science and technology.

DUTY OF CARE AND THE GOOD SAMARITAN

I was asked to speak about the duty of care. The present Australian law, which reinforces the duty of care, is the common law of negligence, developed in village England. This civil law or tort is now grossly overworked. It is required to provide solutions to the sophisticated problems of a dangerous modern society. This legal entitlement, developed for a very different rural society, is now used as the basis for providing compensation and instilling good conduct in society, the latter for fear of careless people being sued.

Over the past century, we have seen a number of steps in the direction of liberalising the law on entitlement, in the case of injury or loss. Thus in Bismarck's Germany, workers' compensation legislation was developed to provide no-fault compensation for people injured at work. Later, this spread to English-speaking countries including Australia. Later still it extended to injuries received on the way to or from work. Still later, with the advent of motor cars, compulsory third-party insurance was introduced. But negligence still had to be proved to recover compensation. If a plaintiff could prove that his injuries arose out of negligence, however slight, he could recover an appropriate verdict. If he could not prove negligence then, no matter how great his loss, he fell outside the protection of compensation law.

Various steps are now being taken to correct these limitations of the law. Within the last week the New South Wales Law Reform Commission has produced a working paper on accident compensation. It suggests no-fault compensation in the case of motor vehicle accidents. But such compensation would be to the exclusion of negligence damages. In New Zealand a still more radical reform has been introduced. Under the Woodhouse National Compensation Scheme, negligence proceedings are completely abolished for accident cases. Instead, a social security approach is taken. Everyone is covered, at work, at home and at play. The price of such universal coverage is that everyone gets less; but the artificial distinctions imposed by our present law are abolished.

Suggestions have been made that the law of negligence discourages doctors, health workers and others from assisting people in the case of an emergency accident. Such suggestions have led to the passage in the United States and Canada (and also in Queensland) of so-called 'Good Samaritan statutes'. These provide that doctors and others in a defined class, giving aid in an emergency, are not liable to be sued, even for proved negligence. The object is to encourage people to help. However, though such legislation has proved politically fashionable, it does not appear to be necessary in Australia. There is no evidence that people are discouraged in this country from helping in a crisis, by the faint prospect of litigation. Furthermore, there seems little reason to excuse people if they are careless. Negligence allows the courts to take into account the emergency circumstances of the incident. Sometimes people who help will be insured. To deny an entitlement to sue, if negligence can be established, seems unjust. Furthermore, there are now emergency services which sometimes render the well meaning bystander a positive nuisance. Good Samaritan legislation, by providing immunity, might encourage interference rather than appropriate restraint.

Quite outside the sphere of personal injuries, the decisions of English and Australian courts are now extending the scope of legal action for negligent advice. People, particularly those holding responsible positions or having apparent expertise, should be especially careful in offering advice, even gratuitous advice. If it is offered in circumstances that a person may reasonably rely on it, and he does so to his detriment, he may well have an entitlement to sue and to recover compensation for his loss.

I am delighted to be asked to address the CSIRO Officers' Association. I applaud responsible unionism. Before my appointment to the Bench I was always a member of a union myself. Those who take the benefits and advantages of union activity should be prepared to join and participate in their union.

I am delighted that Dr J P Wild has attended the dinner. It was my pleasure, last year, to attend a graduation ceremony of the University of Newcastle, when Dr Wild was honoured with an Honorary Doctorate of the University. The honour was for him -- and for this Organisation. I am delighted to meet so many officers of the CSIRO. Like all Australians, I am appreciative and proud of the achievements and jealous of the reputation of the Organisation.