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The Pearson Report - Something for Everyone?

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THE PEARSON REPORT—SOMETHING FOR EVERYONE?

Judged in political terms, the Report of the Royal Commission on Civil Liability and Compensation for Personal Injury (the Pearson Commission) is a remarkable success.[1] It manages to propose reforms which have been cautiously welcomed by some of those in favour of universal accident compensation.[2] At the same time, the Commission has not provoked a major outcry from those interests opposed to radical change, for example the legal profession and the insurance industry.[3] But although the Pearson Report is a remarkably successful political document, it is a confused and intellectually undistinguished report. One is left with the very strong feeling that the Commission achieved its success by proposing marginal reforms.

What does the Commission propose?

The Commission recommended that industrial injuries benefits should be increased and the improved industrial injuries scheme would serve as the basis for a new road accident scheme. The new road accident scheme would be financed by a levy on petrol and administered by the Department of Health and Social Security. The Commission also recommended that a special benefit should be introduced for severely handicapped children (whatever the cause of their handicaps). All these three classes of no-fault beneficiaries are to be allowed to continue to sue in tort.

The remaining changes are pretty marginal. Strict liability is to be introduced in some areas (e.g. for products liability, for vaccinations recommended by the state and for injuries cause by things or operations of an unusually hazardous nature). The Commission also recommends some changes in computing damages; in particular the courts are to be given power to award index-related periodic payments in cases of death and serious injury. Social security (but not, inexplicably, private insurance) benefits are to be deducted in full and non-pecuniary damages are not to be recoverable in respect of the first three months after the injury.

None of the above changes can be truly described as radical. The most far-reaching change—that proposed for road accident victims—does not go

[1] *The Report of the Royal Commission on Civil Liability and Compensation for Personal Injury* (1978; Cmnd.7054) Vol. I, *Report;* Vol. II, *Statistics and Costings;* Vol. III, *Overseas Systems of Compensation.* Unless otherwise indicated, subsequent references are to Vol. I.

[2] See e.g. Ogus, Corfield and Harris, "Pearson: Principled Reform or Political Compromise?" (1978) *Indust. L.J.* 143, 145 where the authors state: "Certainly, the arrangements would be more satisfactory than at present, and indeed better than no reform at all".

[3] The T.U.C. must also be regarded as a major opponent of change. In the words of the Report: "The T.U.C. told us that their approach had been to see what might be done to improve the industrial injuries scheme and the tort system, rather than abolish them. That has been our approach too"; Para. 939.

as far as the recommendations of some law reform commissions in North America which have recommended abolition of the tort action.[4]

Why not a universal compensation scheme?

The first question that the Commission had to deal with was whether to adopt a New Zealand type of no-fault scheme. The Commission rejected a New Zealand type of no-fault scheme but their reasons for doing so are confusing and contradictory.

In the first place, the Commission argued that recommendation of a universal compensation scheme was outside their terms of reference since their terms of reference required them to consider the availability of compensation for death or personal injury arising in five specified circumstances: (a) in the course of employment; (b) through the use of a motor vehicle or other means of transport; (c) through the manufacture, supply or use of goods or services; (d) on premises beloning to or occupied by another; (e) otherwise through the act or omission of another where compensation under the present law is recoverable only on proof of fault or under the rules of strict liability. The Commission reasoned that since single activity accidents (e.g accidents in the home) do not fall within the five prescribed categories, "we were therefore not free to consider recommending a comprehensive compensation scheme covering all injuries, still less a universal scheme covering sickness as well".[5] There are several criticisms to be made of the Commission. Further, as has been pointed out elsewhere: "there is no reason, for example, why *any* injury should not be regarded as coming within category (e), since in practice it is almost always possible to connect it causally to the act or omission of another".[6]

In the second place, it was clearly the intention of the Conservative government which set up the Commission that the Commission should consider a New Zealand type scheme of compensation scheme. Thus, Lord Hailsham, then Lord Chancellor, stated:

> Of course I am familiar with the New Zealand work... obviously the Royal Commission will want to examine both these and other types of possible models, and indeed the *status quo* as a possible model. I should not like to comment upon these various possible models, but it will be precisely that sort of thing which will engage part of the attention of the noble and learned Lord, Lord Pearson....[7]

This passage shows beyond any doubt that the government wished the Pearson Commission to study the New Zealand scheme closely. Thus, the failure of the Commission to report on the New Zealand scheme, far from

[4] See e.g. The Report of the New York Insurance Department, "Automobile Insurance... For Whose Benefit?" (1970) and the Ontario Law Reform Commission Report on Motor Vehicle Accident Compensation (1973).

[5] Para. 239.

[6] Ogus, Corfield and Harris *Loc. cit.*, at p. 144.

[7] 337 H.L.Debs., cols. 974-5 (19 December 1972).

being outside their terms of reference, must be regarded as a serious breach of duty.

Third, after having said that a New Zealand type scheme was outside their terms of reference, the Commission cast a side-long glance at the New Zealand scheme and rejected it for three reasons. The first reason may be described as perceived social differences, the second reason has to do with cost and the third reason has to do with the value of negligence as a moral force and as a deterrent. The first two reasons will be examined in this section; the third needs extended treatment and will be discussed in a subsequent section.

As regards the first reason, the perceived social differences between New Zealand and the United Kingdom, the Commission had this to say:

> In considering the relevance of the New Zealand schemes to our own country, it needs to be remembered that New Zealand has a much smaller population and is predominantly agricultural.[8]

The point here presumably is that New Zealand has a much lower accident rate than the United Kingdom. But instead of relying on bucolic stereotypes, the Commission would have been well advised to have found out whether *in fact* there was any difference in accident rates between the two countries. Professor Marc Franklin found, on investigation, that there was very little difference between accident rates in New Zealand and the United States.[9] It might well be that there is, similarly, no (or little) difference in accident rates between New Zealand and the United Kingdom.

The second reason why the New Zealand type solution may have been rejected is because of cost. In the Commission's words:

> Our terms of reference enjoined us to have regard to cost. This has two aspects. First, there is the total expenditure on compensation in this country. This, in turn, consists partly of a transfer of purchasing power from non-injured to injured, and partly of the usage of real resources in the operation and administration of any such transfer.[10]

This passage suggests that a universal system of compensation costs more than a universal compensation scheme. In fact, the truth might be the reverse. A universal compensation scheme might be cheaper because there are: (a) enormous savings in administrative costs;[11] (b) further savings by

[8] Para. 236.

[9] See his article, "Personal Injury Accidents in New Zealand the the United States: Some Striking Similarities" (1975) 27 *Stanford L. Rev.* 653.

[10] Para. 240.

[11] The cost of administering social security for injured people is about 11 per cent of the value of the benefits paid (para. 121), as against 85 per cent in the case of tort compensation payments (para. 83).

the elimination of damages for non-pecuniary loss;[12] and (c) further savings through the elimination of overlapping coverages. In short, the Pearson Commission should have costed not only its own proposals but it should also have costed a New Zealand type of scheme..If a New Zealand type scheme cost less than the Pearson proposals and yet compensated everyone, this would be a highly significant fact. Unfortunately, the Commission did not attempt this essential task.

The third reason the Commission rejected a universal compensation scheme was because it perceived the tort system as performing valuable social goals. It is now necessary to examine what goals the Commission thought the tort system performs.

The uses of the Negligence System - According to Pearson

According to the Commission, the negligence system achieves two objectives—the first being the enforcement of moral standards, the second objective being that of deterrence.

With regard to the first objective—the moral one—the Commission stated: "There is elementary justice in the principle of the tort action that he who has by his fault injured his neighbour should make reparation".[13] The justice of this proposition is not at all evident. In the first place, it fails to take into account that what the courts have been calling "fault" for decades bears no relation to anything that any reasonable person would describe as fault.[14] Defendants have been held liable despite the fact that they have taken the most elaborate precautions and despite the fact that the court has been unable to given even a hint of what further precautions the defendants might have taken.[15]

The second doubt about the moral force of negligence is that there is no correlation between the degree of fault and the amount of compensation the tortfeasor has to pay. As has been pointed out on countless occasions, a small amount of negligence may cause thousands of pounds of damage whereas negligence that should be accompanied by a prison term may cause only a few pounds damage. A system that produces such results seems to be an immoral, rather than a moral, system. The Commission never asked itself why, with the criminal law available, it is necessary to have a second body of

[12] See Para. 382 of the Report which states: "We were struck by the high cost of compensation for non-pecuniary loss. It accounts for more than half of all tort compensation for personal injury, and for a particularly high proportion of small payments".

[13] Para. 262.

[14] See e.g. *Croke* v. *Willett* [1973] R.T.R. 411, where a court held that a driver was negligent in not giving a hand signal as well as a mechanical one.

[15] The classic example here is, of course, the decision of the Privy Council in *Grant* v. *Australian Knitting Mills*, [1936] A.C. 85, In that case the defendant manufacturer was held liable despite the fact that it had produced 4,737,600 garments without having had a single complaint and despite the fact that it showed that it took elaborate precautions to analyse the chemical contents of the garments produced.

law which reflects moral blame. Incredibly, "criminal law" does not even appear in the index to the Commission's Report!

In addition to its moral role, the Commission also thought that the negligence system will deter negligent behaviour. Thus, the Commission stated:

> The deterrent effect of tort is in many cases blunted by insurance, but may partly be preseved by the insurers' premium rating systems—for example, no claims bonuses.... In addition, a tort action may draw attention to dangerous practices, especially in the industrial sphere.[16]

Elsewhere, the Commission stated:

> In broad terms, however, there remains an important potential impact on the tortfeasor's reputation as, say, a professional or businessman. This is the more significant in that the cases attracting most publicity will tend to be those in which the tortfeasor contests his liability, and in which liability is therefore the least clear cut.[17]

All these assertions should (and could) have been empirically tested if the Commission had seen to it that research was done in these particular fields. Thus, the Commission could have sought research papers on whether the fear of losing a no-claims bonus makes for safer driving.[18] Again, the Report could have commissioned research on whether tort actions impede or help industrial safety.[19] Finally, the Commission could have tried to find out whether a negligence action had ever caused a manufacturer to change its method of production. Professor Whitford, in a study undertaken for the National Commission on Product Safety in the United States, was unable to find a single example of a case where a manufacturer had changed its method of manufacture as a result of litigation.[20]

Second, even if research had shown that merit-rating for employers, drivers and manufacturers had a beneficial effect on the accident rate, there is no reason why merit-rating could not be adopted in a system of universal compensation.[21] Indeed, merit-rating is easier to apply in a system of

[16] Para. 262.

[17] Para. 256.

[18] In fact, in Volume II of its Reports, the Commission concludes: "There is no firm evidence

> that experienced drivers who lose their no-claim bonus are more likely to have an accident than those who do not, or that the system provides a deterrent effect".

[19] The Commission noted at para. 907 that the Robens Committee, in their Report, *Safety and Health at Work* (Cmnd.5034) stated that the negligence action might act as a hindrance to industrial safety because an objective investigation of the circumstances surrounding accidents is impeded, but the matter is not pursued.

[20] See his study, Products Liability in *Supplemental Studies, Vol. 3 Product Safety Law and Administration: Federal, State, Local, and Common Law* 221 (1970).

[21] Thus, the *New Zealand Accident Compensation Act 1972*, has a merit-rating scheme for work and road accidents.

universal compensation since it is more difficult under such a system to give subsidies to activities with poor accident records.[22]

Finally, if the negligence system upholds moral values and deters negligent conduct, it is impossible to see why the Commission wished to see fewer actions brought in the two areas where accidents are the most common—industrial accidents and road accidents. It is in these two areas that the Commission proposed generous no-fault benefits so that fewer tort claims can be brought. But if fewer tort claims are brought, will this not—according to the Commission—have an adverse effect on morality and deterrence? It is all very puzzling.

The Withering Away of the Negligence Action?

In the areas of road and work accidents, the Commission wished to see the tort action restricted to serious cases and cases of fatal accidents. The Commission would achieve this by not awarding non-pecuniary damages in the first three months after injury and by deducting social security benefits in full.

It is possible that these recommendations would diminish the number of tort actions that were brought and the expense of the negligence system might be reduced.[23] But it seems that the Commission ignored a number of factors which might keep the number of tort claims at the same level.

In the first place, so far as industrial accident victims are concerned, there is likely to be very little change. In most cases, the cost of the action will be borne by the trade union, and the three month no-pecuniary loss hurdle is not a difficult one to surmount. Insofar as road accident victims are concerned, the no-fault benefits might result in fewer claims being brought, but it is equally likely that more claims will be brought than before. One deterrent to litigation that existed before the introduction of no-fault benefits—the impecuniosity of the victim—has now been substantially affected and it may be that road accident victims will be more ready to press their claims in the post-Pearson era than before.

But even if there is some saving through fewer tort cases being brought, it seems that the savings the Commission hoped for in the running of the negligence system might not occur. This is because the Commission recommended that index-related periodic payments should be paid in cases of death or serious injury. The Commission did not seem to appreciate how expensive an index-related payments scheme would be within a negligence system.

The Commission noted that the Law Commission in their Working Paper No. 41 reached the conclusion: "that the introduction of a system of periodic

[22] Thus, it has been alleged that certain insurers sell employers' liability insurance as a "loss leader" in order to attract more lucrative kinds of insurance; see e.g. Hanna, *The Sunday Times*, 8 February 1970.

[23] Tort compensation at the levels proposed by the Commission would still cost £25 million per annum for work injuries and £90 million for road injuries (Table 19).

payments would meet with vehement opposition from almost every person or organization actually concerned with personal injury litigation".[24] The Commission, however, remarked: "But the Law Commission were working within, and consulting on the basis of narrower terms of reference than our own".[25] In a sense, the Commission was right; it did have wider terms of reference than the Law Commission in that it (the Pearson Commission) was free to consider a universal compensation scheme. But, having rejected a universal compensation scheme, the Pearson Commission found itself in the same difficulty as the Law Commission. The insurance companies are as strongly opposed to a system of periodic payments and to inflation-proof periodic payments as they ever were.[26]

If a system of index-related periodic payments is introduced, insurance companies will be forced to increase substantially their offers of payment in order to avoid having to make periodic payments. This means longer, harder bargaining than occurred before and substantially higher settlements. Further, index-related payments will be payable (apart from fatal cases) in cases of "serious" injury. Since insurance companies have a very strong interest in not paying index-related payments, the question of what constitutes a "serious" injury may be the subject of frequent litigation. Since it is impossible to define "serious injury", the courts will not be able to give any guidelines and a great deal of money will be spent on fighting this issue. In short, an index-related periodic payment scheme within a negligence system may prove to be prohibitively expensive.

From the above, it is felt that there will be no savings if the Pearson Commission proposals were to be implemented in the areas of road and industrial accidents. The effect of the recommendations would be to provide generous no-fault benefits and a very expensive tort system for a limited class of accident victims. This seems incomprehensible and indefensible.

Conclusions

It may seem heartless to reject the Pearson proposals when there are recommendations in the Report which would benefit some victims of misfortune but it is important to reject a complex and unwieldy scheme which makes little sense from the point of view of either cost or justice.

Ultimately, the Pearson Commission is a failure because it misperceived the role of a Royal Commission. In my view, the role of a Royal Commission is to set out a coherent philosophy of what it thinks should be done in a given field of public policy. In setting out its philosophy, the Commission, must obviously take into account the views of various groups but a Commission loses its *raison d'être* when it abandons the search for statements of principle

[24] Quoted in para. 572.

[25] *Ibid.*

[26] The British Insurance Association, while maintaining that they were opposed to a system of periodic payments and to inflation proofing stated that "the commercial insurance market could if necessary service a system of periodic payments"; *ibid.*

and tries to act as a broker between various competing groups. The task of making political compromises is best left to politicians. When a Royal Commission sees its role as making political compromises, it has no value because those political compromises would have been made through the political process anyway.

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