> judgment and sense of justice, doing his best to understand comprehensively the whole circumstances of the case, attributing to each of them the significance which its merits deserve. If he does this, he has good prospects of arriving at a just result, and his decision will not be open to successful challenge in any appellate court. (p. 32)

- Another essay by an English judge which has just come to hand and which deserves noting is the presidential address of Sir Roger Ormrod, a Lord Justice of Appeal, to the Holdsworth Club 1980. Titled 'Judges and the Processes of Judging', the address analyses the changes that have occurred in the last fifty years or so in the role of the judge and in the processes of judging. Both, according to the author, have 'radically changed: a change which has attracted astonishing little attention'. Sir Roger suggests that a chief contributor to the change is the elimination of the civil jury. Another is the extension of the judge's discretionary powers, just noted, 'which has been particularly marked in the last decade' and which is now involving the judge in an ever wider range of value judgments and in pushing him further and further into unmapped territory which, on its predecessors' maps, was marked: "here lie dangers" '. The freer the judge's discretion, says the author, 'the closer it comes to resemble an administrative discretion'. However, he acknowledges that in some branches of the law uncertain justice is preferable to certain injustice. And he then makes a bold claim for the judiciary that 'our combined experience is much wider than that of any other group in the country. We are of course, also husbands, wives, mothers or fathers, drivers, gardeners, farmers and so on'.

popular targets? In his maiden speech to the House of Lords, the Lord Chief Justice, Lord Lane also criticised the public stereotype of the judiciary as a 'monoculture'. Judges, he says, are a 'popular target for all sorts of people'.

> They are a . . . target because they make good copy and seldom had an opportunity to answer back. Within the past few days, judges had been heavily and almost hysterically criticised for passing too lenient sentences and also for passing too severe sentences. It was impossible for judges to be right . . . There was a limit to what judges could do.

Defining that limit and clarifying the proper respective roles of judges, Parliament and the bureaucracy was the subject of a recent address by the former head of the Federal Attorney-General's Department in Canberra, Sir Clarrie Harders. Speaking to a seminar at the Australian National University on 'Doing business with Canberra' (23 April 1982) Sir Clarrie offered his observations on the growth of the new administrative law with its tribunals and other officers who, unlike the public service are 'not subject to ministerial control or direction'. The fact that the Administrative Appeals Tribunal can apply its own view of policy has produced, according to Sir Clarrie, 'troublesome questions'. It was, he said, 'detracting from the authority and responsibility of Ministers and also of Senators and Members as a whole'. One little vignette in his address was a reference to a warning delivered by the former Federal Solicitor-General, Sir Kenneth Bailey, before the growth of the modern review of administrative action. Sir Kenneth suggested that the call for new procedures to check the bureaucracy:

> 'reflects a declining belief in the process of Parliamentary Government as a whole . . . removing from the elected representatives of the people the direct responsibility for the administrative process'.

These reservations must not be read out of context. Even in the AAT, the area of policy determination is small. The power is conferred on the AAT by Parliament itself. Attention is carefully paid to established Government policy. But, clearly, this new area of 'judicial power' continues to evoke many comments.

accident compensation

> Five years in the lives of Lord Pearson and his colleagues [reporting on Civil Liability and Compensation for Personal Injury] have been spent in vain. Scurvy treatment by an ungrateful Government.
>
> Lord Denning MR

what next? In his latest book, now withdrawn, *What Next in the Law,* Lord Denning took a

parting shot at successive United Kingdom Governments for not implementing the no fault system to compensate road accident victims as recommended by the Pearson Report in England in 1978. Anxiety about the inadequacies of the common law system for compensating victims of accident (supplemented by special provisions concerning workers compensation and motor vehicle liability) have lately increased. The concern is not confined to Britain. On 25 May 1982, a former Federal Attorney-General and now judge of the Supreme Court of New South Wales, Mr. Justice Enderby said that the law and existing attitudes to occupation health legislation were relics of the 19th century. Mr. Justice Enderby was speaking at a seminar organised to study occupational health and safety at the University of Sydney. Mr. Justice Enderby said that there were very strong arguments for a uniform workers compensation system across Australia 'to replace the irrational hotch potch'. He pointed out that the number of days lost in Australia due to industrial accidents was three times the number lost through strike action. The victim of an industrial accident had 'as much hope of getting compensation as he did of winning a lottery'.

Removing the lottery element in accident compensation is the theme of the latest Issues Paper distributed by the New South Wales Law Reform Commission on 27 May 1982. Titled *Accident Compensation,* it invites comments by 30th September 1982. The paper examines the scope of the enquiry (see [1982] *Reform* 7), collects the criticisms of the present system, sums up the strength and weaknesses of that system and canvasses 'the models for change'. These models include:

- patchwork reforms of the present compensation systems;
- introduction of special no fault accident compensation, for example confined to road accidents, as a supplement to the present system;
- introduction of such no fault schemes to replace entirely the common law negligence action; and
- establishment of a comprehensive no fault scheme, akin to that proposed by Sir Owen Woodhouse's Committee in 1974.

The NSWLRC Issues Paper has been produced with remarkable speed. It does not seek to offer immediate solutions to the problems identified. Instead, it asks a series of pertinent questions, many of them directed at a scheme for accident compensation without the necessity of proof of negligence but without going so far as the ill-fated Woodhouse scheme. Copies of the Paper can be obtained from the New South Wales Commission.

Writing in the *Australian* (28 May 1982) John Moses outlines the main points of the Paper and describes the course charted by NSWLRC Chairman Professor Ronald Sackville as 'a safe course through a very dangerous legal minefield'. Moses points out that grim as the statistics of the current compensation system are, any reform will have to get through the political process:

> Any decisions to be made about changes to road accident and workers compensation laws in NSW will have to be made at a political level inevitably in the face of fierce opposition from the legal establishment which earns so much from things as they are. The outcome is totally unpredictable. But it may be of some interest that, as more than one commentator has pointed out [named lawyer politicians] have made a certain reputation and not a little money in the years past from their involvement with unions in workers compensation cases.

some action. At the stage of an Issues Paper, it is still premature to judge whether legislative reform will follow any recommendation that the NSWLRC ultimately puts forward. But in advance of the NSW Report a few changes have appeared on the horizon.

- In early June 1982 NSW Attorney-General Frank Walker QC announced a restructuring of the NSW Workers Compensation Commission which deals with no fault employment compensation cases in that State. Mr. Walker said that the Commission would be replaced by a court which would perform judicial functions and a separate body which would deal with administrative and insurance matters. At present the judges of the Commission perform both functions.
- According to *The Insurance Broker* (vol. 5 no. 2, March 1982) the concept of a

national compensation scheme noted in the Woodhouse enquiry in 1974 is now being revived at a federal level by the Australian Labor Party. *The Insurance Broker* quotes the Leader of the Federal Opposition, Mr. W.G. Hayden, as saying:

> I don't think the conventional system of worker's compensation insurance has much life left in it. . . . It is my firm commitment, and I stress it's a personal commitment, to a system of fair compensation integrated with a national rehabilitation program for victims of work-related accidents and injuries. The aim would be, in fact, to provide not only cover for work-caused and work-related injuries and disabilities but for non-work ones too. In the context of recent court decisions . . . the cost of premium and subscription to worker's compensation will escalate substantially. In many respects the economics of worker's compensation must be questioned.

Interestingly enough, *The Insurance Broker* refers to the strenuous and successful resistance to the Woodhouse report in 1974 by the private sector of the insurance industry. But it adds:

> Ironically some underwriters are not nearly as convinced of the merits of keeping the current worker's system as once they were. Some now regard occupational compensation as less insurance than social service, and therefore a function more appropriate to the State than to the private sector. In view of the losses sustained in worker's compensation in recent years, some insurers would be happy to give it away.

judicial reforms. Meantime, the system of compensation stumbles on. Occasionally, decisions of the highest courts in Australia clarify the position, or obscure it, according to one's point of view.

- At the start of 1982 the decision of the High Court of Australia in *Todorovic* v. *Waller* (1981) 37 ALR 481; 56 ALJR 59 became available. In that case, reversing an earlier view expressed in *Pennant Hills Restaurants Pty. Ltd.* v. *Barrell Insurances Pty. Ltd.,* 34 ALR 162; 55 ALJR 258, a majority of the High Court (Justices Stephen and Murphy dissenting) held that a discount of three percent should be allowed against assessments of damages for loss of earning capacity and future amenities, to offset future inflation and as a component of liability to taxation on monies earned.

- On 7 April 1982 came the report of the High Court in *Fitch* v. *Hyde-Cates* in which the High Court ruled that compensation can be recovered by the estate of a person who died because of a wrongful act and that it could include earnings in the deceased person's 'lost years'. The Court pointed to the possibilities of double compensation where claims are brought by the deceased's estate as well as dependants. See *Fitch* v. *Hyde-Cates* (1982) 56 ALJR 270.

- On 4 May 1982 the Court held for the first time that an Australian serviceman in peacetime could sue another serviceman for personal injuries sustained as a result of a careless act or omission in the performance of his duties. Chief Justice Gibbs pointed out that the case arose 'in time of peace' and in circumstances which 'have no characteristic peculiar to the armed forces'. The joint judgment of Justices Stephen, Mason, Aickin and Wilson specifically reserves the case of the position of a serviceman engaged in combatant activities in time of war or in training for such activities.

> Public policy may require that, at some point in the continuum from civilian-like duties performed by servicemen in peacetime to active service in wartime, what would otherwise involve actionable negligence should not give rise to a cause of action. If so, the definition of liability would seem to be pre-eminently a case for legislation, preceded by evaluation and report by law reform agencies.
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> *Groves* v. *The Commonwealth of Australia,* unrptd., 4 May 1982.

This is another reference by the High Court to the proper respective roles of the curial process and the work of institutional law reform bodies. Now, one of the agencies, the NSWLRC, is turning its attention to some aspects of the 'public policy' governing compensation to victims of accidents.

Time will tell whether this institutional effort at reform will be more successful than the 1974 Woodhouse inquiry.

still scurvy? Meanwhile, in Britain, general action on the Pearson report still seems a long way off. However, in March 1982, the Lord Chancellor, Lord Hailsham introduced into Parliament provisions in the Administration of Justice Bill 1982 designed to reform at least one part of the law dealing with the assessment of damages for pain and suffering. The Bill provides that in assessing damages for pain and suffering caused by injuries, courts should take into account any suffering caused by the awareness that a plaintiff's life had been reduced. Lord Hailsham pointed out that 'broadly speaking' the Bill implemented 'certain recommendations' of the Pearson Commission which had endorsed the report of the English Law Commission on the assessment of damages published in 1973. The Bill would also abolish the so-called 'conventional award' for loss of expectation of life which was 'regarded as being of little financial significance' and which 'had often been criticised as derisory in respect of the death of a wife, husband or children'. The Bill also sought to abolish a number of 'arcane actions' for loss of services. For example, if enacted it will no longer be possible for an action to be brought on behalf of the husband for being deprived of the loss of services or society of a living wife as a result of injuries sustained by her. Likewise the employer's right of action, to be brought in respect of loss of services by a menial servant or of seduction of the family servant or enticement or harbouring of servants, would be abolished as 'anachronistic'. A fixed sum of damages for bereavement is proposed: the amount is fixed in the Bill at 3500 pounds. Lord Hailsham said that no sum of money could compensate for bereavement. But he acknowledged that in expressing this view 'I am not expressing the view of the majority'.

drink and drugs

I drink to make other people interesting.

George Jean Nathan

national epidemic. The Life Insurance Federation of Australia has published a sobering booklet *Road Trauma: The National Epidemic.* It points out that the 'road toll' is killing more than 3000 men, women and children every year in Australia and seriously injuring at least ten times as many more. The grim statistics and patterns of death and injury are listed:

- total cost to the Australian community of road accidents is estimated at more than 3000 million dollars annually;
- two thirds of persons killed and injured were drivers of motor vehicles and their passengers;
- three quarters of those killed and two thirds injured were male;
- forty percent of pedestrians killed were aged 60 or more, yet this age group comprises only 13% of the population. Old pedestrians are vulnerable.
- the 17-25 age group accounts for 62% of all deaths occurring in the midnight hours.

Most sobering statistic of all is the one which shows that one in every two drivers killed on the road had a blood alcohol level of more than .05 at the time. The booklet acknowledges the road trauma cannot be eliminated. However, it urges against complacency and says that public condemnation of the road user who puts himself and others at risk is the most important element in a community fight back.

The figures of alcohol involvement in road trauma are not new. It is pointed out that, of the drivers and riders exceeding .05 alcohol who are killed, more than 50% in fact had blood alcohol levels exceeding .15. At that level 'their driving skills were so grossly impaired that they were unfit to drive or ride at the time of the crash'. They 'constitute a menace to society'. The majority 'in fact have severe alcohol problems and are in urgent need of treatment'. Various solutions are offered by the booklet. They include:

- indefinite disqualification from holding a licence of people with proved alcohol problems;
- costly and sustained educational and rehabilitation programs;
- introduction of a national road traffic code to replace the 'utter confusion' in many areas because of differing State and Territory laws;