THE MOTOR VEHICLE (THIRD PARTY INSURANCE) ACT AMENDMENT ACT, 1966 — A NONPRINCIPLED[1] DEVELOPMENT IN WESTERN AUSTRALIAN LAW

On the 12th December 1966, the Motor Vehicle (Third Party Insurance) Act Amendment Act 1966 was assented to; and on 21st November 1967 some further amendments to the principal Act (as already amended) were assented to.[2] The amendments came into force at two different times. Sections 1, 2, 6, 7, 8, 9, 19 and 21 of the 1966 amendment were proclaimed to come into force on 1st July 1967,[3] and the balance of the 1966 Act, together with the 1967 amendment, on the 4th December 1967.[4] Sections 6 and 8 affected the extent to which the Motor Vehicle Insurance Trust (which is the statutory insurer in respect of all claims for damages consequent upon death or personal injury caused by negligence in the use of a motor vehicle) should be liable in respect of a claim by an injured passenger in an insured vehicle, or the dependants of a dead passenger, against the driver of that vehicle. From the inception of the legislation (1st July 1944) to 30th November 1962 the Trust's liability in respect of each such passenger was limited to £2,000, with a maximum of £20,000 in respect of any one accident;[5] after 30th November 1962 the limits were raised to £6,000 and £60,000 respectively;[6] from 1st July 1967 all such limits have been removed. Section 7 (upon which a consequential amendment in section 19 depends) introduces in a new section, 6A, a reform which has been sought in this State for some years. Despite the fact that a similar reform was introduced in South Australia in 1959[7] and in New South Wales in 1964,[8] the Government had previously refused to consider it, often advancing some pretty

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1 Cf. the use of this word by Donnelly, *Principled and Nonprincipled Development: A Comparison of the Shift from the Fault Principle in American Products Liability in Civil Law*, (1966) 17 SYRACUSE L.R. 419.

2 The Motor Vehicle (Third Party Insurance) Act Amendment Act, No. 37 of 1967.

3 Western Australian Government Gazette, No. 39, 5th May 1967, p. 1119.

4 Id., No. 98, 24th November 1967, p. 3195.

5 ss. 6 (2) (a) and 7 (6) (a) of the principal Act.

6 s. 6, Motor Vehicle (Third Party Insurance) Act Amendment Act (No. 2), No. 72 of 1962.

7 s. 118, Motor Vehicles Act 1959.

8 s. 2, Law Reform (Married Persons) Act 1964, inserting a new section, 16B, into the Married Persons (Property and Torts) Act 1901-1964.

flimsy excuses.[9] Any husband or wife injured in a motor-vehicle accident, occurring after the 1st July 1967, which is caused or contributed to by the other spouse is to have a right of action against that other as if they were not husband and wife, so long as and to the extent that the spouse is an "insured person". If the spouse is not an "insured person", and the accident was contributed to by the negligence of the driver of another motor-vehicle, section 9 (introducing a new section 8A) provides that the Motor Vehicle Insurance Trust is not to be liable in respect of the injury to any greater extent than the proportion of damage attributable to the other driver. Unfortunately, the section does not go on to provide, as does the new section 6A (2) (a), that it is not to impose on any person liability for a claim in respect of which that person is not insured under a third-party policy, and in operation it is likely to work some, presumably unintended, hardships. For example, if a husband who has forgotten to re-license his vehicle is involved in an accident with another motor-vehicle, for which each driver is partly to blame, and his wife is injured, she can bring her action only against the other driver; but she will be entitled to an award of all the damage she has suffered, and under the rule in *Chant v. Read*,[10] which has not been abrogated in Western Australia, the other driver will be unable to claim contribution from the uninsured spouse. Therefore he will have to pay out of his own resources that proportion of the wife's damages attributable to the

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9 The flimsiest perhaps being that a husband who knew that he was in effect insured against any expense to which he might be put as a result of injuring his wife by negligent driving would thereby be encouraged by his carelessness! But it is clear from the speech of the Hon. L. A. Logan in the second reading debate on the Motor Vehicle (Third Party Insurance) Act Amendment Bill 1963, a private member's Bill seeking to introduce this very reform, that the principal objections were, first, the prospect of additional cost of third-party insurance and, second, the prospect that a "guilty" husband whose negligence resulted in the death of his wife might receive the benefit of the lump sum awarded to her. The speech contains ((1963) 165 WESTERN AUSTRALIAN PARL. DEB. 1347) both an anticipation of the legislation now under discussion and an indication why the reform in question has now found favour:

> The position would not be so bad if, instead of the present system whereby judges in their wisdom award large amounts to injured people, a special tribunal was established which could award weekly amounts of compensation and not large lump sum payments, as has been the practice of the courts in recent years. The award by such a tribunal of weekly amounts would be a safeguard against the spouse who was responsible for the accident through his negligence receiving a monetary benefit in a large sum.

10 [1939] 2 K.B. 346.

negligence of her spouse.[11]

The balance of the Act lays down new machinery for the trial and decision of claims for personal injury arising out of the use of a motor vehicle. Section 10 (substituting a new section for section 16 of the principal Act) establishes a Third Party Claims Tribunal, consisting of a Chairman (who must be a judge or, if the appointment of a judge appears impracticable, a legal practitioner of not less than eight years' standing and practice) and two nominee members, who need no special qualifications other than that one must be a person who has not for the seven years prior to his nomination been 'a permanent employee or officer of a company or body engaged in the business of indemnifying for reward persons from liability incurred for negligence in respect of the use of a motor-vehicle'.[12] The Chair-

11 A more complex situation will arise if a driver, *A*, whose vehicle is registered and insured in another State, is involved in an accident for which he and a local driver are each partly to blame, and in which *A's* wife is injured. *A* is not an "insured person", because the policy of insurance which covers his vehicle is not a policy under the Western Australian legislation. His wife will therefore not be able to sue him here, nor will the other driver be able to join him as a defendant. This will be so even if his vehicle is registered either in South Australia or New South Wales, where the husband-wife rule has been partly altered. (At the date of writing it has been announced that legislation to similar effect has been introduced in Victoria.) If she is to have access to his insurance policy in either (or any) of those States she must therefore bring her action there. The question will then be whether the husband's negligent driving in Western Australia is or is not "justified" within the meaning of the rule in Phillips v. Eyre, (1879) L.R. 4 Q.B. 225, (1870) L.R. 6 Q.B. 1. On this see the comments of Harding, *Common Law, Federal and Constitutional Aspects of Choice of Law in Tort*, (1965) 7 WEST. AUST. L.R. 196, 197 et seq.; cf. Li Lian Tan v. Durham, [1966] S.A.S.R. 143, and see also Gerber, *Tort Liability in the Conflict of Laws*, (1966) 40 A.L.J. 44, 51 et seq. In view of the uncertainty surrounding this, the injured wife will no doubt be well advised to rely on her action against the other driver, who will thus be out of pocket to the extent of the proportion of damages attributable to the husband's negligence, unless he has been prudent enough to make sure that he also carries motor-vehicle insurance of the "comprehensive" type which will cover him against liability for accidental loss of life or bodily injury caused to any other person. All in all, the Legislature would do well to have another look at this section.

12 The first two nominee members are Mr C. Metcalf and Mr J. K. Usher. Mr Metcalf was Insurance Manager for Dalgety & Co., Ltd. in Melbourne from 1958 to 1966; he is said to have had considerable experience in the field of accident insurance, and was the author of the first study text on Motor Vehicle Insurance for a Perth Technical College correspondence course in that subject. At the time of his appointment he was on the staff of the Commonwealth Electoral Office in Perth. Mr Usher is a retired country businessman and accountant; he established a drapery business in Wagin in 1952, from which he retired not long before his appointment. He

man receives the same remuneration as a puisne judge; the nominee members are at present paid $8,000 each. Two-thirds of the cost of establishing the Tribunal and of its running costs are to be paid by the Motor Vehicle Insurance Trust (and so ultimately by the motorist through his compulsory third-party insurance premiums); the other third is a charge upon general revenue. As a result of this arrangement it has been possible to provide that no fees are to be charged for filing any documents in the Registry of the Tribunal. Section 15 of the amending Act of 1966 adds a new section, 16E, to the principal Act, conferring on the Tribunal exclusive jurisdiction to hear and determine all actions and proceedings brought against an owner or driver of a motor vehicle, or against the Trust, claiming damages in respect of the death of or bodily injury to any person caused by or arising out of the use of a motor vehicle; this exclusive jurisdiction is subject to the qualification that any party to an action who was not the driver, person in charge or owner of a motor vehicle involved in the occurrence (e.g. an injured passenger, or an injured pedestrian, cyclist or bystander) may apply to a judge for an order that such issues in the action as he may direct shall be heard and determined by a court instead of by the Tribunal, and to the power of the Tribunal to delegate its powers of determination to a magistrate of a Local Court (section 16F (1), inserted by section 16 of the amending Act).[13] Subsection 5 of the new section 16E confers on the Tribunal all the powers a judge of the Supreme Court would have had in similar proceedings before that Court, and in addition the power to award by way of general damages either a lump sum, or periodical payments

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has been a Justice of the Peace since 1956. The Chairman is Mr A. C. Gibson, a legal practitioner of eighteen years' standing and wide experience in motor-vehicle claims litigation.

13 The conferment of this power has been the subject of criticism, on the ground that invocation on any scale of the jurisdiction of Local Court Magistrates would introduce into the scheme new tribunals which might have different standards by which to assess damages; this despite the provision of an appeal from the decision of a Magistrate to the Tribunal (s. 16 F (3) of the principal Act, as amended). The Rules of the Third Party Claims Tribunal (Western Australian Government Gazette, No. 101, 30th November 1967, pp. 3261-3300) provide that the Chairman of the Tribunal may of his own motion direct the hearing of an action, at some place other than Perth, by a Magistrate, but that a party applying for such a hearing must show that the amount of damages in issue does not exceed $1000. It is not clear whether the Chairman's discretion may be exercised in cases where the damages in issue exceed this amount (which is the limit of the jurisdiction of the Local Court—s. 30 of the Local Courts Act 1904) or whether section 16F (1) (a) (which confers the power of delegation) is to be read subject to that limitation.

for such period and upon such terms as the Tribunal should determine, or both, and the further power at any time, either of its own motion or on application by any party, to review any periodical payment, to order payment of a further lump sum, or to order that periodical payments be redeemed by a lump sum.

At any hearing before the Tribunal, the Chairman alone is to determine questions of law, but questions of fact are to be determined by a majority of members, so that the two lay members may override the Chairman on the assessment of damages. If only one of the lay members is present at any meeting of the Tribunal, and he and the Chairman do not agree on a question of fact, the hearing is to be adjourned to a sitting of the Tribunal constituted by all three members.[14] The Tribunal may appoint to sit with it in an advisory capacity any person who in its opinion possesses any specialized knowledge or skill relating to the subject matter of the proceedings, or may submit to any such person for report any matter material to any question arising out of the proceedings. If such a report is called for it is to be read at a public sitting of the Tribunal, and the person reporting may at the request of any party be examined on the report. An appeal lies from the Tribunal to the Full Court of the Supreme Court in respect of any decision, determination or judgment.

The Bill which ultimately became the 1966 amending Act was read for the first and second times on the 24th November 1965;[15] but the mover then disclosed that[16] it was not the Government's intention to proceed with the Bill in the 1965 session, but, having introduced it, to allow it to be discussed by all sections of the community. This first Bill contained certain provisions which were severely criticised by spokesmen for the legal profession, which as a whole was strongly

14 Section 16 (19) originally provided that the determination of the matter should be adjourned to a meeting of the Tribunal at which all the members were present. This would have meant that the third member would be required to take part in the determination of the matter without having heard any of the evidence or arguments on either side; so section 3 of the Motor Vehicle (Third Party Insurance) Act Amendment Act, No. 37 of 1967, repealed this subsection and replaced it by one providing as stated in the text. It is not clear whether in such a case a complete rehearing will be mandatory, or in the discretion of the Tribunal if asked for. But in the course of discussion on his paper at the Law Summer School, the Chairman stated that it was most unlikely that the Tribunal would ever sit with only two members; in the event of the absence of a member, he envisaged that the provision of s. 16 (14) would be invoked and a substitute appointed to act in his place.

15 (1966) 172 WESTERN AUSTRALIAN PARL. DEB. 2851.

16 Id. at 2852.

opposed to the creation of a separate tribunal and the withdrawal of litigation in respect of death or personal injury involving the use of a motor vehicle from the ordinary courts. The original proposal was that the two lay members of the Tribunal be 'possessed of experience in the procedure of determining claims between disputing parties and the assessment of damages';[17] this was regarded (rightly or wrongly) as a broad hint that the two members in question would be drawn from the ranks of insurance assessors, if not from the Motor Vehicle Insurance Trust itself. Clause 8 of the Bill proposed what one is tempted to call the "politicians mistrust lawyers" formula—that the Tribunal was to act in any matter according to equity and good conscience and the substantial merits of the case without regard to technicalities or legal forms, that it was not to be bound by any legal precedents or its own decisions and rulings in any other matter, but was to inform its mind in such a manner as it regarded just.[18] How, in the light of this, the Tribunal was to achieve uniformity in the award of damages, which was one of the stated objectives of the proposed legislation, was never explained; nor was it explained how the prohibition against having regard to legal precedents was to be squared with the fact that, though originally there was no appeal from the Tribunal, it was required, if requested by any party, to state a case on a question of law arising in any proceedings for decision by the Full Court of the Supreme Court, notwithstanding that a decision had already been given by the Tribunal.[19] Fortunately these provisions did not survive into the final version of the Bill. In spite of this, the legislation in its final version has not been generally welcomed by the legal profession in the State; and this was evident in the tone of several of the papers presented to the 8th Summer School of the Law Society of Western Australia. True, the general attitude of the speakers was that the legislation was now on the books, the Tribunal was in existence and operation, and the profession's task was to work with it harmoniously. The paper on principles and policy presented by the Chairman, Mr Athol Gibson, showed that this would not be difficult, and showed, too, that the Tribunal was anxious to conduct its proceedings with decorum but with the minimum of traditional formality. But grave doubts were expressed whether the provision for periodical

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17 Clause 7 of the 1965 Bill.

18 The local model for this is, of course, section 69 (1) of the Industrial Arbitration Act 1912-1966. But while the procedure contemplated by the formula is not inappropriate to that jurisdiction, it would be ludicrous in a jurisdiction purporting to administer the common law.

19 Clause 8 of the 1965 Bill, proposing a new clause, 16H.

payments and for review both of these and of lump sum awards might not create unexpected difficulties, particularly in claims by dependants arising from the death of the breadwinner. Mr P. Sharp asked, very pertinently, whether a widow in receipt of periodic payments might not prefer to enter into a de facto relationship with another man, rather than venture on matrimony and lose an assured income, and went on to speculate whether proof that a widow was in fact being supported by another man might not be grounds for varying or terminating periodic payments being made to her.[20] Again, the incidence of income tax, which is not payable on a lump-sum award but is payable on periodic payments, might create difficulties in arriving at the proper periodic payment to be made, and also mean that in the long run the expense to the Motor Vehicle Insurance Trust might be greater than under the present system. Further, the view was expressed by Mr Sharp and by others that the volume of work arising from motor-vehicle accident litigation at the present rate (which, it was said, already occupied more than the time of one judge, taking into account interlocutory matters) would be greatly increased by frequent applications for review of both lump sum and periodic payments; if this were so it would soon become necessary to set up another tribunal, and the expected advantages of a single point of adjudication would immediately be lost. It is clear, however, that the advocates of the scheme believe that, with the new Tribunal in full operation, litigation will not only be speedier but also less frequent, and that one Tribunal will for the forseeable future be well able to handle all the work. As to this, the "wait-and-see" principle must clearly apply.

Another criticism advanced, in the paper presented by Mr Howard Smith, was that, although in many instances the exclusive jurisdiction of the Tribunal is clear, there are likely to be peripheral cases in which solicitors will have to decide whether their actions should be begun in the Tribunal or before the Supreme Court, or even (in certain situations) before both,[21] and that, if the wrong choice were initially made, both the cost of the litigation and the delay involved would be far greater than under the present system.

In addition to the immediate practical problems posed by the new legislation, and the burning question whether it will in the long run

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20 Mr Sharp also conjured up the picture of the Motor Vehicle Insurance Trust employing inquiry agents to pry into the private lives of widows receiving periodic payments, to ascertain whether they were remaining *solae et castae*.

21 Or, if the motor-vehicle or one of the motor-vehicles involved in the accident giving rise to a claim were from another State, before the High Court of Australia under section 75 of the Australian Constitution.

achieve the objects aimed at by its proponents, the setting-up of the new Tribunal was seen by many of its critics during the early stages of discussion of the legislation as presenting a threat to the integrity of the whole judicial system of Western Australia; and the paper presented to the Summer School by the present writer (an edited version of which follows) sought to examine whether this aspect of the new legislation could be justified on any recognized principle.

There is no doubt that the new scheme presents some unusual features to a student of the history of judicial organization (using these words in their broadest sense). Specialization of function within the judicial system is no new thing. Specialization by setting up new tribunals outside the framework of the judicial system is also no new thing. In the first case specific judicial officers, or specific courts, are charged with the administration of particular and well-defined areas of law, or, less often, with the handling of a large variety of legal matters involving a specified class of persons. Instances are to be found, within our parent legal system, in the historically-founded division of the system of royal courts into Exchequer, King's Bench and Common Pleas—though the jurisdictional dividing lines became blurred as a result of that struggle to acquire parts of each others' jurisdiction which engages the reluctant attention year by year of classes in Legal History; in the existence side by side with these common law courts of the Court of Chancery; in the existence, too, of special courts for Ecclesiastical affairs (including jurisdiction over matrimonial and testamentary questions) and a special jurisdiction in Admiralty. After the reforms of the Judicature Acts 1873-1875, the retention of the three divisions of the High Court of Justice maintained a degree of specialization within the judicial system of the first type; and the setting up of the Commercial Court within the Queen's Bench Division in 1895[22] involved rather specialization within the judicial system of the second type. Here in Western Australia the Supreme Court at its inception was clothed with comprehensive jurisdiction, as now appears from sections 16-18 of the Supreme Court Act 1935, and it has continued as an unspecialized court; but specialization is to be seen in the organization of inferior courts, at least within the Perth area, where we have a Local Court, a Police Court

22 For a brief account of this, see ABEL-SMITH and STEVENS, LAWYERS AND THE COURTS 87-88 (London, 1967).

in addition to a Court of Petty Sessions and Traffic Court, a Married Persons' Summary Relief Court and a Children's Court. Good reasons can be assigned for this division of labour and consequent specialization; but none of these courts can be regarded as a model, or a justificatory precedent, for the existence of the Third Party Tribunal.

Turning again to the English legal system, early instances of special, extra-judicial tribunals supplementing the "regular" courts, often because of real or imagined defects in their operation, are to be found in the prerogative courts of the Tudors, notably in that most unpopular of all, the Court of Star Chamber. Some of the odium which has attached itself to that name has in future generations rubbed off onto any Tribunal or system of tribunals set up outside the regular court system. Nevertheless, there are powerful justifications for setting up some categories of such tribunals. Orr, in his report on administrative tribunals in New Zealand, lists four reasons for the development of administrative tribunals alongside the ordinary courts as law-making adjudicatory bodies:

> First, the problems they dealt with were foreign to the regular courts and could better be handled by persons with special qualifications. Secondly, the ordinary courts were said to be slow and cumbersome and governed by over-stringent rules of evidence and procedure. Thirdly, the courts were too expensive for the citizen whose dispute with the state may be over a matter of little monetary value but of considerable personal importance to the litigant. Fourthly, the ordinary courts would become seriously overburdened or, if sufficient judges were appointed, the high quality of Supreme Court personnel would be in danger of dilution.[23]

The Franks Committee said:

> We agree with the Donoughmore Committee that tribunals have certain characteristics which often given them advantages over the courts. These are cheapness, accessibility, freedom from technicality, expedition and expert knowledge of their particular subject.[24]

And Lord Denning has spoken in defence of extra-judicial tribunals. In "Freedom under the Law"[25] he states that there is no need for ordinary courts to be jealous of the new tribunals; they are a separate set of courts, dealing with a separate set of rights and duties, and he

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23 ORR, ADMINISTRATIVE JUSTICE IN NEW ZEALAND 4 (Wellington, 1964).

24 Report of the Committee on Administrative Tribunals and Enquiries, (Cmnd. 218, 1957) p. 9, para. 38.

25 Stevens (London, 1949).

compares them with the pre-1875 Ecclesiastical courts, which dealt with matrimonial disputes and estates, and the pre-1875 Chancery, which dealt with the enforcement and administration of trusts. (One is tempted to wonder whether Lord Denning disapproves of the reforms of 1873-1875; but that is another matter).

Characteristic tribunals in Western Australia which we have learnt to live with, and which may be justified under some if not all of the criteria set out above, are the Licensing Court, the Industrial Commission and the many special industrial appeal tribunals,[26] and the Workers' Compensation Board. This last has been in existence only since 1948; prior to that date claims were dealt with by the Local Courts. The recommendation on this point of the Royal Commission on Workers' Compensation 1948[27] stated that at the date of writing the report each insurer was responsible to its own clients, and went to court only when dealing with minors and with the registration of lump sum agreements, and for the settlement of disputes. The Commission, it said, felt that, if a board were set up, decisions would be consistent, statistics and returns from insurers would be on a uniform basis, minors could be dealt with more expertly, lump sums paid on a basis more beneficial to all parties, and disputes settled with the minimum of delay and cost; in addition, the Local Courts would be relieved of a large volume of work. There are certain parallels with the Tribunal presently being discussed, but some significant differences. Nevertheless, it is of interest to note that one or two of the justifying arguments are the same.

What is common to the three tribunals noted above, however, is that their existence outside the regular court system may be justified by the special nature of the subject-matter with which they deal. The Licensing Court works within the confines of a single piece of legislation and the policies laid down in it, though it has itself a not inconsiderable role as policy-maker. (Incidentally, it is significant that offences against the licensing laws are still dealt with in the ordinary courts). Industrial arbitration is again a highly specialised field; and the procedure has been characterized almost since its inception by an insistence that legal technicalities shall be kept at bay, a desideratum thought to be guaranteed by the exclusion of legal practitioners from

26 A selection of these was analysed in the appendix to Wickham, *Power Without Discipline: The 'Rule of No-Law' in Western Australia 1964*, (1965) 7 WEST. AUST. L. REV. 71, 107-110.

27 11 MINUTES AND VOTES OF PROCEEDINGS OF THE 2ND SESSION OF THE 19TH PARLIAMENT OF WESTERN AUSTRALIA, 1948, p. 14.

the proceedings in general, unless with the consent of all parties.[28] The Workers' Compensation Board operates within the confines of a statutory entitlement to compensation, irrespective of common-law rules, and statutory maxima for various types of injury and disability. But the only thing marking out the jurisdiction of the new tribunal as special is the fact that it deals only with claims which are to be paid (in the first instance, at any rate) out of a particular insurance fund. The questions whether the fund is to be liable, and to what extent it is to be liable, are to be determined according to ordinary common-law rules. Exactly the same rules will determine whether a person who is injured by negligence of another otherwise than in the course of the operation of a motor-vehicle on a road is to have a claim against the other, though the one claim will be determined by the Tribunal, the other by the ordinary courts. Herein lies the uniqueness of the new Tribunal.

If the new Tribunal cannot be justified as a special tribunal dealing with special subject matter outside the purview of the ordinary courts, on what other grounds might it be justified? The ground most stressed by supporters of the proposal during the debates in the House was that the existence of a single tribunal would promote uniformity of decision, at any rate so far as concerned quantum of awards, and perhaps also so far as concerned apportionment of responsibility.[29] Uniformity of awards is certainly to be desired from the point of view of the injured party. If victim *A* receives a thousand dollars or two more than victim *B* for what appears to be substantially the same injury, *B* will obviously feel disgruntled; and so will the defendant to *A's* claim if he has to pay out of his own pocket. Even the guardians of an insurance fund may be pardoned for feeling disquiet if awards appear to vary for no other reason than that different judges adopt

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28 See n. 16, above. It would appear that the desideratum was not always achieved in the early history of Industrial Conciliation and Arbitration in Western Australia. When what is now section 69 (1) of the Industrial Arbitration Act 1912-1966 was being discussed in committee in the Legislative Assembly in 1912, Mr Underwood, the Member for Pilbara, complained that it seemed impossible for a judge of the Supreme Court, or anybody trained in law, to deal in accordance with equity and good conscience and without regard to technicalities of forms; and he moved that there be added to the clause in question the words: "This clause is inserted with a view to its being acted upon, and not as a joke.": (1912) 43 WESTERN AUSTRALIAN PARL. DEB. 1308-1309.

29 See, e.g., the speech of the Hon. C. D. Nalder, (1966) 175 WESTERN AUSTRALIAN PARL. DEB. 2237; that of Mr H. N. Guthrie, id. at 2798; that of the Hon. L. A. Logan in the Committee stage in the Legislative Council, id. at 2887.

different standards of valuation; and it is a commonplace in most jurisdictions that this may happen. For example, I have been told on very good authority that in the operation of Workers' Compensation in New South Wales, where there are five judges members of the Commission, settlements are very often not concluded until it is known to which judge a case is assigned.[30] So there would appear to be some force in the argument directed to uniformity.

But a by-product of the new scheme may well be that a new lack of uniformity becomes apparent between personal injury awards handed down by the Tribunal and personal injury awards in non-motor-vehicle cases handed down by the courts—unless the existence of the appeal to the Full Court and beyond it to the High Court exercises the influence which those who advocated it hoped it might have.[31] It might be argued that the concession which the Government made in this respect weakened the force of the "uniformity argument", since those whose business it is to predict awards of damages will need to look beyond the Tribunal to its appellate controllers; but we may forecast that only the novel or difficult cases, or those clearly out of line, will go further, at any rate once the Tribunal has settled down. If so, the channelling of all cases to a single body for valuation may well reduce the margin of variation and make for greater certainty of prediction, perhaps a greater disposition to settlement of cases, and more general consumer satisfaction with the working of this particular area of the legal system. Nevertheless, it is pertinent to

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30 Lord Goddard said in 1954 (Woodruff v. National Coal Board, [1954] C.A. No. 58, cited KEMP and KEMP, THE QUANTUM OF DAMAGES IN PERSONAL INJURY CLAIMS 414): "Some judges notoriously—I am not using the word in any way offensively—do give higher damages in these cases [i.e. Fatal Accidents claims] than other judges do."

31 In assessing this it must be remembered that the general rule is that an appellate tribunal will not interfere unless it can be said that the damages awarded amount to an entirely erroneous estimate of the damage the plaintiff has suffered—see, e.g., Greer L.J. in Flint v. Lovell, [1935] 1 K.B. 354, 360; Lord Wright in Davies v. Powell Duffryn Associated Collieries Ltd., [1942] A.C. 601, 616-617; Viscount Simon in Nance v. British Columbia Electric Railway Co. Ltd., [1951] A.C. 601, 613. All the above statements were adopted by Dixon C.J. and Kitto J. in Miller v. Jennings, (1954) 92 C.L.R. 190, 194-196, in which the High Court refused to disturb an award of damages although it was conceded that in comparison with many awards that had been made in parallel cases it might appear very low. Perhaps this rule itself should be looked at again, in the light of the reasons advanced for setting up the new Tribunal. It might be, however, that the acceptance of a freer policy of review of awards by an appellate tribunal would encourage appeals, and thus increase delay in reaching finality, and expense.

ask whether these values might not have been achieved within the framework of the existing court structure. This point is taken up again later on.

Both Orr and the Franks Committee see as a reason justifying the setting up of special tribunals the fact that persons with special qualifications or special expertise may the more readily be employed. As indicated above, the first draft of the amending Bill, introduced into the Legislative Assembly on 25th November 1965, provided that the two members of the Tribunal other than the Chairman should be persons with experience in assessing damages for personal injury claims. Fortunately, or unfortunately, (as already indicated) this was seen by many opponents of the new Tribunal as advertising an intention on the part of the Government to "pack" the Tribunal with representatives of insurers, and the relevant clause (now section 16(b) of the Act) was altered so as to provide that only one of the two members in question could be drawn from the ranks of persons with recent insurance experience, if this were desired.[32] But quite apart from this one may question whether any persons in the State, other than the judges, can be said to have any experience—any *direct* experience, that is,—in assessing damages. Surely the experience which insurance assessors and members of the legal profession have is rather a secondary experience, a capacity to predict, on their knowledge of what the courts have done in the past, what is likely to be a court's assessment in the present case? Had the original clause been left in, and what many of us suspected was the original plan carried out, so that two insurance assessors were appointed, it is submitted that no true expert knowledge would have been brought to the tribunal (except, perhaps, a certain degree of familiarity with medical reports and their meaning).[33] As it is, the Tribunal does not appear as an expert tribunal, or even (apart from the legal qualifications of the chairman) as one with special qualifications, and cannot be justified on the second ground. What will happen is that in the course of its operations the members of the Tribunal will acquire a great deal of experience. This, I submit, is not the same as expertise.

There are, however, certain areas of expertise—which I define as

32 See n. 10, above, where it is indicated that one such person was in fact appointed.

33 And perhaps the attitude of mind described by Gresson J. in Low v. Earthquake and War Damage Commission, [1959] N.Z.L.R. 1198, 1206:

> In my view, there is a risk that over a period of years the guardian of a compulsory insurance fund, notwithstanding that it has no pecuniary interest therein, may tend to develop a defensive prima facie resistance to claims.

the possession of special knowledge or skill acquired as a result of training and not generally available—which might prove relevant to the work of the Tribunal. One of them, of course, is the expertise of our own profession—knowledge of the law, and an ability to analyse evidence, including conflicting evidence, so as to reach a true or probably true conclusion as to the material facts. This, which may itself more properly be regarded as a blend of expertise and experience is represented on the Tribunal; but one does not need to set up special tribunals in order to have the benefit of this expertise. Another important one is expertise in what may compendiously be called traffic engineering, including not only an expert knowledge of road conditions and the mechanical factors involved in accidents, but also of driver behaviour (regarding the driver for this purpose as in some respects a machine). Yet a third is medical expertise. No provision for either of these last is made in the structure of the Tribunal, though section 16D (2) (b) of the Motor Vehicle (Third Party Insurance) Act 1943-1967 allows the Tribunal to appoint to sit with it in an advisory capacity any person who in its opinion possesses any special knowledge or skill relating to the subject-matter of the proceedings, and paragraph (c) of the same subsection allows it to submit to any such person for report any matter which seems material. A person submitting a report must be available for cross-examination on the contents of the report, but there is no requirement that the expert sitting with the Tribunal disclose his advice in such a manner as to allow cross-examination or rebuttal;[34] for these purposes he would appear to be a member of the Tribunal itself, though it is not in any way bound to take his advice. Only if extensive use were made of

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34 Cf. ORR, REPORT ON ADMINISTRATIVE JUSTICE IN NEW ZEALAND 71:

> Administrative tribunals in the course of their work develop, if they do not originally possess, an expert knowledge of their particular field. Over a period of time they accumulate a knowledge of many facts, general, technical or scientific, as the case may be, and of some of these, parties appearing before them in a given case, may well be ignorant. It is most desirable that tribunals should be free to utilise their specialised knowledge to the full, but it is equally undesirable that in doing so they should take notice of facts not within the knowledge of the parties. The Federal Administrative Procedure Act 1946, the Model State Administrative Procedure Act, and the Massachusetts Act each contain a provision to regulate this situation. The Massachusetts Act (s. 11 (5)) provides:
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> > Agencies may take notice of any fact which may be judicially noticed by the courts, and in addition may take notice of general, technical or scientific facts within their specialised knowledge. Parties shall be notified of the material so noticed, and that shall be afforded an opportunity to contest the facts so noticed. Agencies may utilise their experience, technical competence and specialised knowledge in the evaluation of the evidence presented to them.

the power in section 16D (2) (b), therefore, could the tribunal be in any way justified as an expert one. Such a practice might have interesting effects in some cases if the expert were a traffic engineer—I will return to this later.

The third justificatory ground for setting up the Tribunal was that of freedom from excessive formality and technicality. Introducing the first draft Bill in 1965, the Minister for Agriculture (The Hon. C. D. Nalder) had this to say:

> The next point in favour of such a tribunal is the desire to provide some means of easy access to injured persons desirous of having claims determined with a minimum of legal procedure, documents, etc. The present cumbersome legal procedure necessary to bring an action to hearing is considered not only outdated for this type of action but costly to litigants. It is not felt the legal profession will suffer with the introduction of the proposed system, as claims will be finalised more expeditiously, thus allowing the acceptance of other work. Proceedings will be shortened by a system of pre-trial discussion between representatives of litigants allowing for admission of agreed facts and any other facts which could save the time of the tribunal.
>
> Doubt has often been expressed as to whether a court is the appropriate place to hear claims of this nature. The persons involved are, in the majority of cases, only seeking an independent opinion on a fair award of damages for injuries received. They are in no way criminals and, probably, the majority have had no experience whatsoever of the legal formality and somewhat awe-inspiring atmosphere of a courtroom, and in many cases must openly discuss intimate personal details. With this background it is felt the true facts may not be as readily forthcoming as in an informal atmosphere in which it is proposed the tribunal should conduct its hearings.[35]

It would not be to the point to examine all the confusions and weaknesses in these two paragraphs. To the extent that they purport to express public criticism of court procedure and excessive court formality, with the hint that the present atmosphere of proceedings at nisi prius is too readily confused in the public mind with the atmosphere of a criminal court, they deserve serious consideration by the profession. I am by age and disposition a strong believer in dignity and ceremony; but at the same time I am aware of the dangers of excessive conservatism. The attitude of the legal profession of our parent country to procedural reform in another age was satirized by George Hayes, a barrister who became a judge of the Court of Queen's Bench in 1868, in the course of a famous Dialogue concerning

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35 (1965) 172 WESTERN AUSTRALIAN PARL. DEB. 2854.

Crogate's case.[36] The speakers were Crogate himself and one Baron Surrebutter, said to stand for Baron Parke, afterwards Lord Wensleydale. At one point in the dialogue, in which the Baron is explaining to Crogate the effect of the new pleading rules of the Hilary Term 1834, which have greatly increased the number of cases whose decisions turn on technical points of pleading, Crogate asks how the litigants like the new development. The Baron's answer is to the effect that the convenience of litigants matters not at all compared with the orderly development of the techniques of the law.[37] This has not been an uncommon attitude in times past, it would seem; it is one which we cannot afford to take today.

Nevertheless, certain passages in this explanatory speech (or that part of it I have quoted) deserve some attention. The present legal procedure, it says, is considered outdated for this type of action. Doubt has often been expressed, it says, whether a court is the appropriate place to hear claims of this nature. In the majority of cases, it says, persons involved are only seeking independent opinion on a fair award of damages. The Minister concerned, or his advisers, obviously see a distinction not only between actions for damages for personal injury and other actions for damages arising in tort, but also a distinction between actions for damages for personal injury arising out of the use of a motor vehicle on a road and actions for damages for personal injury arising out of other forms of negligent conduct, a distinction sufficient to justify in the mind of the Government the handling of such actions in a different manner. On principle, conceding for a moment the validity of this distinction, the Govern-

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36 (1609) 8 Co. Rep. 66b.

37 *Crogate.* Oh! You've been making new rules about special pleading have you; then, I suppose, as a matter of course, that you've pretty nearly done away with the whole thing?

Sur. B. Done away with special pleading? Heaven forbid! On the contrary, we adopted it (subject to the relaxation introduced by the Statute of Anne), in even more than its original integrity; for we have enforced the necessity of special pleas in many actions in which the whole case was previously left at large, on the merits under the general issue. And we framed a series of rules on the subject, which have given a truly magnificent development to this admirable system; so much so, indeed, that nearly half the cases coming recently before the Court, have been decided upon points of pleading.

Crogate. You astonish me. But pray how do the suitors like this sort of justice?

Sur. B. Mr. Crogate, that consideration has never occurred to me, nor do I conceive that laws ought to be adapted to suit the tastes and capacities of the ignorant. . . . :

Crogate's Case: A Dialogue in ye Shades on Special Pleading Reform, HOLDSWORTH, 9 HISTORY OF ENGLISH LAW 417, 427 (London, 1926).

ment's solution does not go far enough. The distinction referred to should in strict logic (as the lawyer uses that phrase in argument) have led to one or other of two conclusions—either that all assessment of damages for personal injury, perhaps even all assessment of damages, should be put in the hands of a special "damages valuation" tribunal, or that damages for personal injury arising out of the use of a motor-vehicle should be awarded for reasons other than those for which damages in other tort cases are awarded, and perhaps on a different basis. Neither of them was reached—and we are left wondering whether further steps might not be taken in one or other of these directions, whether indeed, we ought not to press for such steps to be taken.

The first idea has been canvassed in the United Kingdom. Kemp and Kemp[38] have advanced proposals for the establishment of a Personal Injuries Tribunal, buttressing them with reference to the constant advocacy of such a tribunal by Singleton L.J. A number of the arguments might well have been appropriated by supporters of the Third Party Tribunal. They are most persuasive. But the idea involves fragmentation of the conduct and presentation of a case, and fragmentation of the work of the courts; and one may well wonder where the latter might stop. We could imagine one judge or tribunal assigned to determine the facts, another to hear and decide arguments of law, another perhaps to hear and assess medical evidence, and a fourth to quantify the damages. A better course might well be to seek other means of mitigating the difficulties mentioned by Kemp and Kemp. For instance they say:

> It is rare for a judge to be assisted in his task of assessing damages by having cited to him awards made by other courts in comparable cases. The tendency is to give the trial judge all possible assistance on liability, but to leave him to assess the damages as best he can without any assistance and sometimes upon inadequate evidence.[39]

They appear to think that such assistance would be more readily given to the proposed tribunal; but there appears to be no reason why it should not be made available to the single judge. More difficult to overcome is their suggestion[40] that the single judge who has to assess damages has no one with whom to discuss the matter—a difficulty for which again they quote Singleton L.J. No doubt informal

38 KEMP and KEMP, THE QUANTUM OF DAMAGES IN PERSONAL INJURY CLAIMS, Appendix A, 411.
39 Id. at 413.
40 Id. at 414.

consultation between judges is a possibility—though there are arguable reasons of principle against this.[41] One hesitates to suggest that questions of quantum should be argued before a full Bench. It might be better that a Judge should be able to invoke the assistance of assessors for that part of the case—though in practice this might involve taking two bites of the cherry, as it might be undesirable to call in assessors until questions of liability had been finally decided.

If however, we are to reject as unpractical the idea of a special "damages valuation" tribunal, we are left with the alternative to consider—that, in principle, if plaintiffs in personal injury cases arising out of road accidents are to be treated differently from other plaintiffs, damages should be awarded to them for reasons other than that a tort has been committed against them. The removal of their actions from the jurisdiction of the ordinary courts (except for their right of appeal) is already a recognition that they are a class apart; but the only intelligible differentiating mark they bear is that such damages as they succeed in recovering will come out of a common insurance fund. The Tribunal is a result of the impact of compulsory third-party insurance on litigious procedures in the law of torts; we may ask whether the presence of such insurance ought not to be recognised as having an impact on the law itself.

In his speech, passages of which were quoted above, the Hon. Mr Nalder suggested that the majority of cases coming before the Tribunal will come for assessment of damages only; that therefore negligence and perhaps the apportionment of responsibility will already have been admitted or agreed upon. This suggests that fault (or, to use a neutral term, driver error) is very readily detected (or perhaps infered) and accepted. Some reinforcement of this view was provided

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41 It could appear, or be made to appear, that the other judge or judges were in effect taking part in the decision without having heard the whole of the evidence and the arguments based on it. It is suggested in n. 12, above, that it was the undesirability of something like this occurring if the Chairman and one member of the Tribunal disagreed, and the determination of the matter was adjourned to a full meeting of the Tribunal, that led to the amendment of the relevant section (new section 16 (19)) in 1967. But one of the commentators at the Summer School suggested that a good deal of informal consultation between judges takes place at the moment, without obviously harmful effects. It could, of course, also be argued that once all the facts of the case, such as the nature of the injuries, the degree of disability, the degree of loss of earnings, or of dependence, have been established, assessment of damages is a matter of valuation to which the adversary procedure and the maxim audi alteram partem are not really appropriate. Perhaps, indeed, the process of valuation should ideally involve an element of bargaining between the claimant and the valuer!

by the speech of Mr H. N. Guthrie, in the 1966 debates, in support of the revised Bill:

> There have been many cases where, had I been compelled to take court action, my client would not have recovered one penny, because he did not possess any evidence at all which would have proved negligence, yet the Trust examined the facts of the case as they came forward and said it would agree to accept responsibility for one-third apportionment, two-thirds apportionment, fifty per cent apportionment, or something of that nature.[42]

Res ipsa loquitur, one presumes. But does it? It speaks of human error, certainly—the proportion of accidents attributed to vehicle defects over the whole of this State for 1966 was approximately 3.6%. But does it necessarily speak of human fault, in the sense in which "fault" (or "negligence") is defined in our law of torts? Let me quote a passage from Mr J. B. Boulton's opening paper for the Symposium on Traffic Hazards and the Community held at this University in October last year:

> Let us take, for example, an intersection collision—at a location where there is an open view and no signs and signals. Several factors could be involved. The view might be clear except for a small shrub or a lamp post, positioned where it could just obscure the driver's vision for that fraction of a second coinciding with his glance. Vision might be obscured momentarily by the blind spot behind the windscreen pillar—or by a useless toy dangling from the mirror. The driver could be momentarily distracted by a passenger—or something on the seat beside him. He could be tired, affected by carbon monoxide fumes or drink —or drugs. His visual acuity may be poor—he may be wearing the wrong glasses. He may be in a hurry and hope to get through the intersection before the other vehicle—he may misjudge speed or distance. He may be in the right—but the other fellow may not know the law. . . .[43]

One might go on. A driver may approach an intersection at which, unrecognized by him, (and it may be by the majority of drivers) the line of sight is so obstructed by trees, hedges or buildings that the speed at which he normally approaches intersections may be just too great to allow him to pull up in time if he sees another vehicle coming. Or he may be quite unaware—as I suspect most of us are unaware—of the complexity of the task set before him if he is to drive so as to avoid a collision. Let us consider the conduct of the average prudent

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42 (1966) 175 WESTERN AUSTRALIAN PARL. DEB. 2793.

43 PROCEEDINGS OF THE SYMPOSIUM ON TRAFFIC HAZARDS AND THE COMMUNITY, October 1967, p. 10 (Perth, 1967).

motorist approaching an intersection, as laid down by the Full Court and upheld by the High Court in *Sibley v. Kais.*[44] He must:

> (a) satisfy himself whether there is a vehicle approaching from his right to which he must give way. This requires him to judge the distance of the approaching vehicle, and the speed at which it is travelling, and whether if it continued at that speed, and he too continued at his present speed, a collision or dangerous situation would ensue.

Obviously he cannot do this with a mere glance. But at the same time he must also:

> (b) satisfy himself whether there is a vehicle approaching from his left, judge the distance, its speed, determine whether if he and it continued on their respective courses there would be a collision, and judge whether the driver has seen him and will give way to him.

In order to do this he may have to pay more attention to the left than to the right, because he has to make a judgment as to the intention of the driver on the left. This clearly imposes a complex set of tasks upon the driver—in fact, one wonders how many drivers there are who could perform them accurately, except at very low speeds. Now, it is true that Mr Sibley said he was travelling twenty to twenty-five miles an hour; and the Full Court thought that this was too fast. But it may be that no speed above five or ten miles an hour would be safe in these circumstances—and there may be many more intersections in the metropolitan area which demand this degree of "slow-down".[45] What should be the conduct of the reasonably careful man—or the average reasonable man? Long ago it was said, in an action against a railway company for negligence, that it was easy to conceive a precaution, for example, a slower rate of speed, which would add a small degree of security while it would entail a very great degree of inconvenience.[46] The dictum does not precisely apply to the instant problem; but the thrust of it invites a re-examination of the conduct which we too readily ascribe to the fictitious "reasonably prudent man" in charge of a motor car in order to measure against it the conduct of the average motorist. If the reasonably

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44 (1967) 41 A.L.J.R. 220.

45 Cf. now Minshull v. Pecocari (unreported; No. M 113 of 1966) in which the Full Court (Jackson S.P.J., Nevile J.; Wolff C.J. dissenting) absolved from any negligence a motorist travelling at 30-35 m.p.h. along Wanneroo Rd. (a main road) who collided with a person coming in from his left who failed to give way to him.

46 per Erle C.J., Ford v. L. & S.W. Railway Co., (1862) 2 F. & F. 730, 733.

prudent man is never distracted, never affected by blind spots in his vision and consequent misjudgments, never subject to those inexplicable moments of blankness which all motorists must know (during which they run through red lights and overlook stop signs) and is always conscious of the complexity of the tasks he is required to perform and always driving within the limits of his capacity to perform them, he is indeed a fiction;[47] and it must therefore be in many cases quite fictitious to ascribe fault to the motorist involved in an accident on the footing of the comparison of his conduct with that of a fiction. The fact that the allegedly negligent defendant is insured may well have assisted in the attribution to the reasonably prudent man qualifies of skill and foresight which he would not be expected to possess in other situations. In short, I believe it is arguable that claims for personal injury arising out of the use of a motor vehicle on a highway, payable out of an insurance fund, are not like claims for personal injury arising out of negligence in the traditional sense; although "ordinary negligence" may be a factor in many of them it is not I submit a factor in all those which are compensated. It is to be hoped that the taking of them out of the purview of the ordinary courts of the land will be followed by taking them out of the scope of the ordinary law of torts.

It will no doubt be said that this will inevitably increase the drain on any insurance fund, and therefore increase premiums. If a reduction of payout and premiums is what is desired, then, if the arguments I have advanced above are correct, a closer analysis of accident claims, based on a realistic view of the driving conduct of a reasonably prudent man, might well achieve this by exonerating many defendants of anything except excusable human error. The addition to the Tribunal of an expert falling within the broad category of "traffic engineer", as I described it earlier, could conceivably have just this effect. What a howl there would be from disappointed litigants! It would soon be apparent that consistency with the law of torts could be bought at too high a price; and if this came about it would create considerable pressure to put motor-vehicle third-party claims on a more comprehensive footing than that of the defendant's fault.

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47 Seavey has said: 'Since even careful men are human, they are sometimes "careless". They sometimes "unreasonably' permit their attention to wander from the task at hand. But the standard man is always standard. He is the careful man being careful. To that extent he is dehumanized': *Negligence—Subjective or Objective?*, (1927) 41 HARV. L. REV. 1, 11.

I am also not overlooking the fact that the arguments I advance would also mean the end of a great deal of the apportionment which at present goes on, and that it would be this, perhaps more than the inclusion of claims in respect of some accidents at present excluded, which would increase payouts and therefore premiums. I am going to suggest further, however, that now that the Government has openly recognized that the principal business of any tribunal dealing with third-party claims is to determine the amount that shall be paid out of a compulsory insurance fund, we can look at the insurance fund itself to see whether it is wholly consistent in its operation.

The root idea of insurance is that persons belonging to a certain class agree by payment into a common fund to spread over the whole class the risk of loss or misfortune occurring to one or more members. The amount each contributes to the fund (the premium) is calculated on an actuarial assessment of the risk of such losses in the given period. The losses are therefore seen as statistically highly probable, if not statistically inevitable. Some of the victims of motor-vehicle accidents have taken out direct accident insurance against the loss. If liability insurance were not widespread, this would be a prudent thing for every man to do, for the chance of being injured by a solvent negligent defendant might well be small, although the chance of being injured in a motor-vehicle accident is considerable. Perhaps because not enough people in fact took out personal accident insurance, and the incidence of uncompensated injury was relatively high, so-called "third-party" insurance[48] became compulsory, in order to provide an insurance fund available to the victims of negligently-caused accidents to compensate them for their injuries and losses, they not having set up such a fund from their own resources.[49] But

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48 "So-called" because, as emphasized in the text, the "third-party"—i.e. to the contract between the insurer and the insurance company—is *not* the person insured, though he is the person getting the direct benefit of the insurance, according to the intent of the framers of the schemes.

49 The first such scheme in common law countries was that introduced in New Zealand in 1928—the Bill which became Motor-Vehicles Insurance (Third Party Risks) Act 1928. In moving that the Bill be read a second time the Attorney-General, the Hon. F. J. Rolleston, said:

> The rapid development of motor transport in the last few years has brought with it an increasing number of accidents, and that has brought in its train a demand for some scheme of insurance for the purpose of protecting those who through no fault of their own may suffer injury through these accidents.

After detailing statistics in relation to motor-vehicle accidents over the past two years, he went on to say that 'the most effective way of dealing with the motors is to provide something for the payment of compensation to those who are injured'. ((1928) 219 NEW ZEALAND PARL. DEB. 589). But the long

the fund in question does not according to the principles of insurance law insure the victims against their misfortune; instead in effect it insures owners of motor-vehicles against the misfortune—the inevitable misfortune, statistically speaking—of being held liable in an action for damages. It seems clear that the purpose of the new Tribunal is seen by its advocates as being in part to facilitate the access of victims to the fund, and to simplify the assessment of their claims against it. The interest of the persons insured takes second, perhaps third, place. Would not the rational step have been to give accident victims direct access to the fund, recognizing that, even though not all the accidents which befall them can be attributed to human negligence in driving a motor car, most if not all of them are the products of human error, whether in driving performance or in "engineering"—including in that term car design, car manufacture, car repair, and road design.[50] Is it not a little odd that the State provides (by compulsion) the facilities whereby a motorist may insure himself against the secondary or indirect misfortune of having his assets depleted by a judgment

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title of the Bill put a different complexion on the proposals: "An Act to require the Owners of Motor-vehicles to insure against their Liability to pay damages on account of Deaths or Bodily injuries caused by the Use of such Motor-vehicles": (id. at 590). And the Attorney-General went on to say that, though a large number of cars on the road were in fact covered by insurance, about 25% of licensed vehicles then on the roads, for a variety of reasons, carried no insurance at all. (Ibid.) Nevertheless, the original scheme, like all its successors, extended the insurance beyond the liability of the insured owner, as imposed by tort law, to enable victims to have access to the fund when the insured car was driven by an unauthorised driver, for whose acts the owner would not at common law be liable.

[50] It is true that not all accidents are accidents to owners of motor-vehicles, who are the persons who have provided the fund: passengers, pedestrians, cyclists, even persons not using the road at all, may be victims of the motor-car. It may be argued that they too, should contribute something to a fund which is insuring them against accident, otherwise drivers will be contributing to accident funds for pedestrians. This point is put strongly by Blum and Kalven, *Public Law Perspectives on a Private Law Problem—Auto Compensation Plans,* (1964) 31 U. OF CHICAGO L. REV. 641, 681-682. They reject the suggestion that the overlap between drivers and victims is in general such that it would be possible to persuade the driver that he is in effect insuring himself in his role as pedestrian (or cyclist, or bystander, or passenger). But Blum and Kalven overlook the equally valid argument that non-motorists are likely to be contributing in a number of indirect ways to the accident fund, as motorists' contributions to the fund will put up the cost of the many benefits non-motorists receive from the prevalence of motor transport. Even so, the burden of contribution to the fund may fall unequally; but the major part may fall on those who receive the major benefit from the motor-car.

against him for negligent driving causing injury, rather than providing facilities for insuring against the primary or direct misfortune of suffering loss through injury to himself? Does it not look even odder when we see that, as a result of the 1966 amendment to the Motor Vehicle (Third Party Insurance) Act, he is now insured against the more direct misfortune of having to pay his wife's hospital and medical bills if she is injured by his negligence? Is it not a little irrational that in a two-car collision, in which both drivers are negligent, each driver is insured against the misfortune of having to compensate the other for such proportion of the value of the injuries suffered by that other as is attributable to his "negligence," but not against the misfortune of himself suffering injuries atributable in the same proportion to that same "negligence"? Finally, is there not something inconsistent in the spectacle of the State, which through the medium of its traffic code enjoins careful driving on every citizen, on pain of criminal or quasi-criminal penalties, requiring every citizen at the same time to insure against having his assets depleted by having to pay a judgment arising from what is almost always a breach of the traffic law?[51]

What I have tried to do, in this rather discursive paper, has been to examine the new Tribunal and the reasons for its establishment in the light of certain principles—those governing and justifying the

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51 KIMBALL, INSURANCE AND PUBLIC POLICY 36 (Madison, 1960), a study of the history of insurance in Wisconsin, discloses that 'in 1929 the Attorney-General ruled that in a malpractice suit (i.e. one for professional negligence) insurance against liability for intentional tort or crimes was illegal because it was against public policy'. He goes on to say that the same doctrine would probably not be applied to automobile insurance, though the rationalization of the difference would give trouble. The real reason was the crucial importance of automobile insurance as compared with the peripheral importance of malpractice coverage. In England the point has arisen in two cases at first instance, Tinline v. White Cross Insurance Co., [1921] 3 K.B. 327, and James v. British General Insurance, [1927] 2 K.B. 311. In each case it was held that a motorist could recover under his policy where he had incurred expense through negligent driving in circumstances involving the commission of a crime. Tinline was convicted of manslaughter; he had been driving too fast. James had been driving while drunk, and he too was convicted of manslaughter; the insurance company was held liable under the policy to pay the cost of his defence. In Tinline's case Bailhache J. said that third party insurance was treated as valid and effective, but did not say why. The two cases were distinguished by the Court of Appeal in Haseldine v. Hosken, [1933] 1 K.B. 822, in which a solicitor who had, by what was described as negligence, entered into a champertous agreement to accept a contingent fee of 40% was held not entitled to recover from his insurance company; but both Scrutton and Greer L.JJ. reserved their opinion as to the correctness of the earlier cases.

setting up of administrative and other tribunals outside the structure of the ordinary courts of the land, those governing the award of damages to persons injured by the negligence of others in their activities, and those upon which insurance is founded. Looked at in the light of these principles, the setting up of the Tribunal appears as an act of expediency rather than of principle—though I would not wish these words to be taken in any pejorative sense. Expediency is not always to be sneered at; and one can be too rigid in adhering to principle. Nevertheless, if principle were to govern, one of two things would seem to be desirable; either that the Tribunal should become a tribunal for the assessment of damages for personal injury in all cases, the question of liablity according to principles of common law being first dealt with by the common-law courts, or else that the award of damages to victims of motor-vehicle accidents (which is the sole concern of the Tribunal) should be made on principles other than those of the common law of torts.[52] If neither of these things happens, the Tribunal will remain as a precedent for, and an invitation to, the further fragmentation of the jurisdiction of the ordinary courts whenever there is sufficiently strong pressure from persons or bodies interested in a particular class of case to have its adjudication entrusted to a single Tribunal with the alleged advantages of uniformity of decision, and cheapness and informality of procedure.[53]

E. K. BRAYBROOKE

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52 A sustained argument for this is to be found in the thorough and comprehensive paper by Parsons, *Death and Injury on the Roads: The Compensation of Victims in Western Australia,* (1955) 2 U. WEST. AUST. ANN L. REV. 201. What I have to say in the last part of the present paper is really little more than a footnote to this.

53 Students of legal history will remember that in the struggle by the Courts of Exchequer and King's Bench to take over jurisdiction in personal actions originally vested exclusively in the Court of Common Pleas, major arguments in favour of the first two courts were cheapness, greater efficiency and less formality in procedure. The end result of this plus the separate existence of Chancery was a horrible mess. This had to be cleaned up piece by piece by the reforms of the 19th century, which gave England a unified court structure and a reformed single procedure. Let us hope that we are not again headed for the Serbonian bog of divided and conflicting jurisdictions and procedure.

(In case readers are mystified by the last reference, as the hearers were, I give the source:

"A gulf profound as that Serbonian bog
betwixt Damiata and Mount Casius old
Where armies whole have sunk: . . . . "

Milton, PARADISE LOST, Bk 1, 11. 592-4)