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THE ADMINISTRATION OF JUSTICE IN NEW SOUTH WALES

Being an Address Delivered to the Sydney Law Graduates Association

*THE HON. MR. JUSTICE MANNING**

A great deal of material has been published in recent years relating to the administration of justice. Some of it has been controversial. Most of it has been constructive. The ultimate aim of most, if not all, of those who have written on the subject has been to ensure that "the tools of justice are kept bright".

No system of administration can survive if the wheels are permitted to rust. Constant attention to both economic and social considerations is necessary to ensure that the machine is kept well oiled and that working parts which have become obsolete are replaced by others which are modern and effective. It is to this end that much work has been done and, generally speaking, a considerable measure of success has been achieved.

But there is another aspect of the problem which I desire to bring to your notice. From time to time it becomes necessary to make a more comprehensive examination of the basic design of the machine. One must ask not whether improvements can be made to it, but whether it is of a nature and of a type which can continue to satisfy the demands made upon it. The task for which it was constructed may be found to have changed so radically that it is no longer able to answer the requirements of the changed purpose.

My purpose, therefore, is to enquire firstly whether the system by which justice is administered today answers the demands made upon it, in the light of current social and economic trends; secondly, if the system does not answer

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such demands in full measure, whether the time has yet arrived when radical steps should be taken to scrap the present machine, or some parts of it, as obsolete, and to substitute something entirely new.

I wish to make it clear at the outset that I have no desire to enter into a discussion of the merits or lack of merits of the system of trial of civil actions by juries. Much, perhaps too much, has been said already on this subject. At times it has seemed to me that these discussions have lacked the detachment and impartiality which are necessary if any real progress is to be made. Some statements have been made which are best forgotten. I am content to accept the fact that the law requires most civil actions to be tried by jury, and that there is no likelihood of change in the foreseeable future. I am not concerned to discuss the law or the policy of the law. I am concerned solely with its administration.

My first conclusion regarding the present system of the administration of justice is that it is not possible to generalise. Each branch of the system requires separate examination. I have chosen to attempt a broad review firstly of the administration of justice in criminal cases and then to examine the position in relation to civil cases.

I have concerned myself solely with the trial of indictable offences. In recent years there has been an area in which changes have been effected, the desirability of which may well be open to debate. In Australia there has been a tendency in recent legislation to confer criminal jurisdictions upon judges sitting alone without a jury. For example, trials in some of the Territories and summary proceedings under the Bankruptcy Act fall within this category. In the Courts of Petty Sessions there has been a tendency to extend the power of magistrates. Many offences involving punishment by a substantial term of imprisonment may be tried summarily before a magistrate. In other cases the accused person is given an option of summary trial. The extension of the powers of judges or magistrates to try offences summarily may be regarded by some as a retrograde step but it is justified on the score of expediency. By way of contrast, it is well to remember that in many of the States of the United States of America trial by jury has been retained on a much wider scale. In many instances persons accused of offences against traffic laws still have the right of trial by jury.

I refer to these matters to make it clear that the comments I propose to make are concerned solely with trial by jury. Reforms—perhaps changes would be a better word—of the type abovementioned represent changes made pursuant to a policy of the government rather than changes in the administration of justice. Before leaving this subject I would like to add that one reform which has been made recently which commends itself to me is the new procedure whereby a person charged with an indictable offence before a magistrate may offer a plea of guilty.[1] Many hours of time which would otherwise be occupied by magisterial officers as well as judges are saved by this process. To my mind, this illustrates the fact that careful consideration has been given to the reform of criminal administration even at the stage where an administrative inquiry is about to be held.

Putting aside this type of question, I return to the consideration of the administration of the criminal law in the sense which I have indicated above.

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[1] Justices Act, 1902 (N.S.W.) s.51A (added by Act No. 16 of 1955).

I cannot read many of the "Notable British Trials", criminal cases of the nineteenth century, without an uneasy feeling. I have, on occasions, been startled to realise how modern was the development which permitted an accused person to give evidence on his own behalf, while many other reforms which are taken for granted today are of comparatively recent origin. If one goes back to the days of Coke, the picture is frightening. This great champion of the common law and of liberty lacked, in some ways, an appreciation of what we would regard as elementary fair play. The part he played in the trial of Sir Walter Raleigh was little short of disgraceful judged by today's standards. You will remember that, in his capacity as Attorney General he conducted the prosecution of Raleigh on a charge of high treason.[2] When confined in the Tower of London, Raleigh was "examined", probably under torture. He was not allowed to know the charge. The first he knew of it was when the indictment was read at the beginning of the trial. He was not allowed counsel nor was he permitted to call witnesses. The witnesses for the Crown, with one exception, were not called to give evidence in person. Their examinations were simply read out in court. There were virtually no rules as to the admissibility of evidence. Coke's conduct showed a complete lack of impartiality and of restraint. When asked to give Raleigh an opportunity to speak he turned upon the court and is reported to have said: "If I may not be patiently heard, you will encourage Traitors, and discourage us. . . ."[3] and then sat down and, for a time, refused to continue his conduct of the trial. When Raleigh interrupted to protest at a later stage, Coke turned upon him and said: "Thou art the most vile and execrable Traitor that ever lived."[4]

Thus was one of the most momentous trials in history conducted only about 350 years ago. The reforms which have been effected in the administration of the criminal law in the last century or so have been great indeed. I have referred to the trial of Raleigh to remind you of the background against which the present day system may be examined.

The laws of evidence have been developed although they are still far from perfect. Procedures have in many ways been reversed. Not only may an accused person give evidence on oath on his own behalf. He now enjoys the singular privilege of being permitted to do what no witness for the prosecution may do, namely, to make a statement not on oath.[5]

I do not wish to weary you with the history of the changes made. It will suffice for me to say that some learned writers have expressed the view, and not without some basis, that the pendulum has swung too far. We have pursued with great enthusiasm the idea that it is better that ten guilty men should go free, rather than that one innocent man should be convicted. This has been the subject of some research, particularly by English scholars and there are many instances in modern times where criticism has been directed towards what has been said to be an unduly tender attitude of those who are charged with the administration of the criminal law towards accused persons.

However that may be, there are few of us who would wish to quarrel with the present position. Every time I preside at a criminal trial I am struck most forcefully with the majesty of the law and with the fairness and the excellence of the system by which it is administered. The prosecutor must

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[2] (1603) 2 St. Tr. 1. [3] *Id.* at 26. [4] *Id.*
[5] Crimes Act, 1900 (as amended) (N.S.W.) s.405.

conceal nothing from the accused and his counsel. If fresh evidence has been found since the conclusion of the magisterial enquiry, then the defence must be fully informed. In conducting the case for the Crown, anything which tells in favour of the accused must be disclosed. The prosecutor owes a duty to the court to be candid and open. The scales are, to a degree, weighed down in favour of the accused, but how better can we ensure that truly only those whose guilt is certain shall be convicted.

I am quite convinced that the system by which the criminal law is administered, when viewed in the broad way to which I have referred, is of a nature and type to satisfy the demands made upon it, and to be in no need of radical alteration. I wish it to be understood that I do not for one moment suggest that the administration of our criminal law is perfect. It is doubtless possible to effect further improvements.

My main purpose in discussing this aspect of the matter, even in this comparatively sketchy fashion, is to permit a comparison to be made of the progress and the advances made in the administration of our criminal law as compared to the administration of our civil law.

The picture on the civil side is rather different. I do not think that the procedures in all civil cases should be treated upon the same footing. Social and economic trends have created problems in insurance cases which are far more acute than in others.

It seems to me that the basic objection to the present system under which our civil law is administered lies in the retention of the adversary system. Mr. Justice Wallace has referred to it in most apt terms when he called it "trial by ambush".[6] Each party seeks to obtain an advantage as against the other. The courtroom resembles a sporting arena. The protagonists joust with each other. It is regarded as good tactics to keep the other side in the dark so far as that is possible and if one party can spring a surprise on the other, then an advantage has been obtained by which such party may profit. The parties call no evidence except that which they believe to be the most favourable in the interests of the clients which they respectively represent. It is not regarded as in the slightest degree improper to refrain from calling evidence which does not favour the party concerned in its entirety, even though the result may be that the whole of the material which would enable the court to ascertain the whole of the truth is withheld from the tribunal. The legal representatives of the parties inevitably play at tactics. As Sir Frederick Pollock once said, it is not the duty of the judge to speak except when his judgment is demanded. It is not his business if one of the two adversaries throws away chances. The analogy of field manoeuvres is appropriate. The commander may push forward an unsupported battery into a crushing fire at short range from the opposition's unbroken infantry. Nobody will stop him. He will learn his mistake when his guns are put out of action.

Other illustrations have been given in criticism of the adversary system. Some have likened it to a game of poker where bluff is an important factor.

Professor David Kilgour in his paper entitled "Procedure and Judicial Administration in Canada" expressed the view that trial under this system is still a crude and expensive instrument for settling disputes.[7]

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[6] In "Speedier Justice", a paper presented to the Twelfth Legal Convention of the Law Council of Australia, and reprinted in (1961-62) 35 *A.L.J.* 124.

[7] "Procedure and Judicial Administration in Canada" reprinted in *Canadian Jurisprudence* (ed. McWhinney) (1959).

The fact that the adversary system has become outmoded in actions to recover damages for personal injuries at common law is, in my view, illustrated by doubts that have been expressed as to the desirability of maintaining what seems to me to be of the very essence of the old system. The adversary system requires that the whole of the material upon which the case is to be determined shall be offered by the adversaries and, generally speaking, the judge who presides at the trial should not interfere in any way. But the skill and experience of advocates (or the lack of it) sometimes leads to injustice. It is basic to the system that the adversaries shall be represented by advocates of equal skill and ability, each conforming to the same strict set of ethical rules governing advocacy. We are all familiar with the following words of Lord Greene, M.R., in *Youill* v. *Youill*:[8]

> A judge who observes the demeanour of the witnesses while they are being examined by counsel has from his detached position a much more favourable opportunity of forming a just appreciation than a judge who himself conducts the examination. If he takes the latter course he, so to speak, descends into the arena and is liable to have his vision clouded by the dust of the conflict. Unconsciously he deprives himself of the advantage of calm and dispassionate observation.

The notion has been that the judge is, so to speak, an umpire who must take no part whatever in the proceedings even though it should appear that an injustice may result.

Sir Frederick Pollock in *The Expansion of the Common Law* said:

> The parties before the court are wholly answerable for the conduct of their own cases. Litigation is a game in which the court is umpire. . . . It is for the parties to learn the rules and play the game at their peril. . . . The umpire will speak when his judgment is demanded; it is not his business if the players throw away chances.[9]

In modern times the trend has been towards modification of this rule. In an address in Hobart in 1958 Sir Garfield Barwick, who then occupied the position of Commonwealth Attorney-General, said: "I think the court can no longer remain passive relying merely on the self interest of the parties."[10]

Whilst much may be said for the retention of the old rule in cases where a plaintiff seeks to recover damages from the defendant pursuant to the defendant's wrongful act causing damage, and the situation is such that in fact one of the parties will succeed and recover and the other will lose and suffer, it seems to me most difficult to justify its retention particularly in insurance cases in the form in which they are at present conducted. I think it quite unreal to suppose that any tribunal whether a judge sitting alone or a judge sitting with a jury can put out of his or its mind the social aspects of claims for damages for personal injuries and the knowledge that insurance funds have been established for the very purpose of compensating those who have suffered injury. I have heard it said, "this is an age of compensation", and this is the approach which in my experience is commonly made both by juries and judges in claims of this type.

Professor Parsons in his paper entitled "Death and Injury on the Roads"[11]

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[8] (1945) 1 All E.R. 183 at 189.
[9] *The Expansion of the Common Law* (1904) at 32.
[10] "Courts, Lawyers and the Administration of Justice", reprinted in (1958) 1 *Univ. of Tas. L.R.* 1 at 10.
[11] (1955) 3 *Univ. of W.A. Annual L.R.* 201.

points out that, at the turn of the century the law of tort was governed by the following principles:

1. Where loss is caused to one person by the fault of another, the loss should be shifted to the person at fault. Implicit is an expression of the moral sentiment of retribution and the purpose of deterring conduct dangerous to others.
2. Where loss is caused to a person by his own fault, the loss should lie where it falls. Implicit is a moral sentiment of retribution and the purpose of deterring conduct dangerous to one's self and to others.
3. Where loss arises without fault, it should lie where it falls.

Professor Parsons goes on to point out that these rules were concerned only with determining the incidence of loss as between individuals. At this stage, the common law judges had barely begun to think of the possibility of legal rules directed to loss distribution.

The general rule is and has been for many years that there is no liability without proof of fault. This rule was established by the courts in the second half of the nineteenth century, and at the turn of the century it was applauded by most leading writers on the law of torts. Wigmore described the earlier concept of strict liability as "primitive, superstitious and irrational". Professor Ames thought it a matter for congratulation that the ethical standard of reasonable conduct had replaced the unmoral standard of acting at one's peril. Although absolute liability still results from the rule in *Rylands* v. *Fletcher* and in other branches of the law, the underlying philosophy of modern English tort law is to base liability on fault where possible.

The basic factors underlying this philosophy are the two mentioned by Professor Parsons, namely, the moral sentiment of retribution and the purpose of deterring dangerous conduct.

According to some eminent writers the reasons underlying the philosophy of fault liability are, to a degree, in the course of being replaced. Professor Fleming expresses the view that the law of torts is concerned with the allocation of losses incident to man's activities in modern society.[12] He says that arising out of the various and ever-increasing clashes of the activities of persons living in a common society, carrying on business in competition with fellow members of that society, owning property which may in any one of a thousand ways affect the person or property of others—in short, doing all the things that constitute modern living—there must of necessity be losses or injuries of many kinds sustained as the result of the activities of others. He adds that the purpose of the law of torts is to adjust these losses and afford compensation for injuries sustained by one person as a result of the conduct of another. After referring to the fault rule, Professor Fleming says that today, we are in process of revising this approach and reverting once more to the earlier emphasis on the compensatory function of tort remedies.

Professor Fleming is not alone in the view he has expressed. Professor Friedman in *Law and Social Change* advances the view that the modern trend is towards the welfare of the individual rather than punishment of the wrongdoer.[13]

Modern legislation has also made inroads upon the concept to which

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[12] *The Law of Torts* (2 ed.) 4 *et seq.*
[13] *Law and Social Change in Contemporary Britain* (1951).

Professor Parsons has referred. The Law Reform Act[14] introduced a new concept, namely, that wrongdoers should share any damage which their acts have caused. The court is given the power to apportion verdicts as between wrongdoers. Each may recover contribution from another. Even then the contribution is not fixed by any precise rules. The court may order such contribution as may be found to be just and equitable having regard to the extent of each person's responsibility for the damage, and the further power is given to the court to exempt any person from liability to make contribution or to direct that the contribution to be recovered from any other person shall amount to a complete indemnity.

This seems to me to be following a policy which has developed during this century which has also been adopted in such legislation as the Testators Family Maintenance Act and the Frustrated Contracts Act.

In speaking of the English Law Reform Acts, Lord Justice Devlin, as he then was, said in *Ingram* v. *Little*:

> These statutes (that is, the Law Reform Acts) which I believe to have worked satisfactorily, show a modern inclination towards a decision based on a just apportionment rather than one given in black or in white according to the logic of the law.[15]

Thus the rules which Professor Parsons pointed out governed tort liability at the beginning of the century no longer exist in their entirety and the inroads which have been made upon those rules are becoming more and more significant.

Whatever be the extent to which the philosophy of the law of tort may be undergoing a change, it can hardly be denied that compulsory insurance in road accident cases and virtually universal insurance in industrial accident cases have rendered the original basis for the fault rule a dead letter. The factor of retribution, whether ethical or moral, does not exist in these cases today. The insurance company bears the burden and its funds are contributed by either those who use the roads or by those who employ labour as the case may be. Nor is there any longer any purpose of deterring dangerous conduct in others. Even if insurance is voluntary, its very object is to ensure that the person at fault is not exposed to any deterrent.

When these factors are superimposed upon the adversary system of conducting trials, the problem becomes most acute. Not only is there trial by ambush. The trial is conducted behind a veil of secrecy. The real parties never appear; the fact that the defendant is insured must not be mentioned. In some cases the named defendant may even wish to assist the plaintiff to obtain an award of damages which will be paid by the insurer. The system of pleading, particularly in motor accident cases, is obsolete. It is impossible to ascertain the real issues from the pleadings.

We have retained a system of pleading, the purpose of which was, nearly 80 years ago, said by Lord Justice Cotton in *Spedding* v. *Fitzpatrick*, to be "to conceal as much as possible what was going to be proved at the trial".[16]

I think it only fair to say that the courts have done their best to keep pace with modern thinking. It may not be out of place to cite Lord Atkin's classic remark in *United Australia Limited* v. *Barclay's Bank Limited*, where

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[14] The Law Reform (Miscellaneous Provisions) Act, 1946 (N.S.W.) which adopted the English Statute of 1935. Similar legislation is now in force in all States and the A.C.T.

[15] (1961) 1 Q.B. 31 at 74.

[16] (1888) 38 Ch. D. 410 at 414.

(although dealing with a different question) he said: "When these ghosts of the past stand in the path of justice clanging their medieval chains the proper course for the judge is to pass through them undeterred."[17]

But the best efforts that can be made in the cases of which I am speaking are frequently doomed to failure. The strategic manoeuvres of advocates appearing for the parties cannot be appreciated in many cases even by a judge, let alone a jury. On the other hand, it is apparent to judge and jury in these accident cases that the conduct of the action conceals the real facts and that the hearing is being conducted behind a false front. It is quite unrealistic to imagine that any jury does not know, for example, that there is a system of compulsory insurance in motor car accident cases, and I think it beyond doubt that the concealment from the tribunal of the realities assists to confuse and to cause miscarriages of justice.

Not only are these procedures difficult enough but one finds the substantive law is still out of touch with modern thinking. The laws of evidence provide a good example of this. We still depend for some of our basic rules of evidence upon nineteenth century notions. Such reforms as have been effected are quite inadequate. An example of this is to be found in the Evidence Amendment Act, 1954. I should have thought in this day and age a contemporaneous record made by a witness as to the happening of an event at the time it happened for the purpose of correctly recording such event and without thought of any litigious proceedings would frequently provide the most cogent evidence of the fact. Under the old rules such a contemporaneous record was inadmissible. When the Act was amended in 1954 it was provided that any statement made by a person in a document tending to establish a fact of which direct oral evidence would be admissible, is admissible subject to the conditions contained in s.14B. However, the section provides that such a statement shall be admissible only in any civil proceedings without a jury. The proposal that such a valuable record should be made admissible is, of course, to be warmly commended. But why it should be admissible before any tribunal other than that of which a jury forms part is completely beyond my comprehension. I am content to say that this is by no means the only omission on the part of the legislature to give serious and informed thought to reforming the law in this regard.

There is one further matter which I think is worth remembering. Both legal and moral sanctions are of some considerable value in assisting to elicit the truth. But my experience is that these sanctions are of far less weight when a proceeding is conducted as between two individual parties and when everybody concerned knows that the insurance company will pay if the plaintiff succeeds. I do not think that human nature changes and I think that a substantial proportion of the community regard cheating an insurance company as quite different to cheating a fellow citizen. I am reminded of the approach of many members of our community towards their obligations during the war when some commodities could be purchased only with coupons. Obtaining coupons unlawfully was frequently regarded as an achievement rather than a moral wrongdoing.

It is in this background that it is necessary to view the over-all position so that we may examine the present system by which justice is administered

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[17] (1941) A.C. 1 at 29.

and to endeavour to answer the first question which I propounded, namely, whether this system today, answers the demands made upon it in the light of current social and economic trends.

It will be of some value to examine the efforts made in the direction of the reform of the system in recent years.

In his paper entitled "The Wind of Change in the Administration of Justice", Sir Stanley Burbury, Chief Justice of Tasmania, examines some of these questions.[18] I commend this thoughtful and excellent discussion to your consideration. The Chief Justice states that in Tasmania some of the recommendations of the Evershed Committee have been adopted and others have been added.[19] The principal reforms to which he refers are as follows:

(1) A judge may upon application of a party order that all or any of the evidence at a trial may be given by affidavit.

(2) A judge may upon application of a party order that the evidence of a particular fact be given by a statement on oath based on information and belief, production of documents or books or copies, or (in the case of a fact of common knowledge) by production of a newspaper.

(3) Exchange within a reasonable time before trial of plans, photographs, models, and proofs of all expert witnesses (including lists of comparable sales in valuation cases).

(4) All claims may be specially endorsed or included in a statement of claims may be specially endorsed or included in a statement of of claim served with the writ. A plaintiff who does not do so will be deprived of the additional costs involved unless good reason is shown.

It will be noted that paragraphs (1) and (2) are directed towards reforms of the law of evidence and the manner of proof of facts at a trial. Paragraph (3), requiring proofs of expert witnesses and photographs, etc., to be exchanged before the trial is obviously designed to eliminate the element of surprise, whilst paragraph (4) is obviously designed to overcome deficiencies in pleading and the expenditure of unnecessary costs.

Chief Justice Burbury expresses the view that the sporting theory of litigation is a complete obstacle to the attainment of the main objectives, that is to say, to adopt procedures which will ascertain the real issues before the trial and to reform the rules of evidence. He also expresses the view that litigation today is a game of tactics in which one must never disclose one's hand to his opponent till the last possible moment, but this he condemns because in truth "surprise is the enemy of justice" and it must be eliminated.

Apart from the reforms effected in Tasmania, the Law Reform Committee has been active in this State and we have, in recent years, instituted the system of calling over cases before trial in an endeavour to limit the issues and to avoid waste of time and expense.

In the address mentioned above which he gave in Hobart in 1958, the present Chief Justice of the High Court of Australia, Sir Garfield Barwick, suggested an alternative set of rules which might be adopted in lieu of those which are now current.[20] His proposal was that before a case is set down

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[18] (1963) 6 *Univ. of W.A. L.R.* 163.
[19] Final Report (1953) Cmd. 8878.
[20] (1958) 1 *Univ. of Tas. L.R.* 1 at 11-12.

for trial there should be an affidavit from a principal in the legal firm retained in the case that the following steps had been taken:

(i) That particulars had been obtained from and given to the opponent. Rules might make the seeking and giving of particulars obligatory.

(ii) That discovery and inspection had been given and had; and that further discovery and inspection had been sought if the proffered discovery was considered inadequate. Again the seeking and giving of discovery and inspection might both be made automatic without any court order.

(iii) That notice to inspect and admit documents and to admit facts had been given and answered. Here again the giving and the answering might be made obligatory.

(iv) That in appropriate cases the advisability of administering interrogatories had been considered, and, if thought advisable, the appropriate interrogatories administered.

(v) That all physical examination of parties where appropriate or of physical objects had been had. Here again, there should be no need for court orders in the general run of cases.

(vi) That all reports of experts had been exchanged.

(vii) That statements are in hand from all witnesses known to be available.

Reforms such as mentioned above, either actual or proposed, are undoubtedly the most effective of their type that can be devised, but their very nature indicates that it is assumed that the existing machine is to be preserved, and the task in hand is to make it as effective as the main structure permits.

If those concerned had given consideration to the broader question, I feel that they would have taken into account many factors which are material only in relation to the suitability of the machine, rather than to its repair. The fact that the best repairs possible still do not remedy some vital defects seem to me to justify the conclusion which I have reached, namely, that an entirely new machine is necessary.

Having said that radical changes are necessary, it seems desirable to give some consideration to what might be done if the present procedure should be scrapped and replaced by something entirely new.

It is not for me to lay down in precise terms what system might be adopted in lieu of that which now exists. The formulation of a substitute system will involve questions of governmental policy and I have no desire to enter this field. I am content to indicate what seems to me to be one possibility which may be worthy of consideration. Doubtless there are many others.

Where a person has sustained a personal injury in a road accident or an industrial accident it does seem to me that it would not be unreasonable that an investigation should be conducted in the first instance by some administrative officer or tribunal. This would permit the facts to be ascertained both in regard to the liability of the defendant and as to the damage suffered by the plaintiff. If the administrative officer or tribunal were required to make a report setting out his or its conclusions on both questions, the element of surprise could be largely eliminated. If the report contained a recommendation as to liability and as to damages, there could be preserved to either party if they desired an opportunity to appeal to a court. Doubtless the preliminary

report could be treated as *prima facie* evidence but the parties would be at liberty each to call evidence to add to or contradict or vary the findings contained in the report. This would permit the whole of the circumstances to be fully disclosed to the court. The existence of the insurance and the interest of the real parties would be available from the outset.

Most claims for relief under our present social systems are dealt with on such a basis as this although it may well be that the finding of the officer or tribunal concerned will be final. This is not necessarily so, for example, in the case of applications for pension under the Repatriation Act, where the Commissioner makes a determination and an appeal may be had from this determination to one or perhaps two tribunals.[21] The notion that claims for social benefits are best determined by an administrative tribunal is quite common. Apart from the Repatriation Act, two other examples come to mind, namely, claims for Workers Compensation under the Workers Compensation Acts of this State and claims under the Commonwealth Employees Compensation Scheme. In each case an award is made by way of what is in fact an administrative determination, though in the former case it is made by judicial personnel and in the other by administrative personnel.

The administrative process is one which has been commonly accepted as being capable of meeting the requirements of modern society in the determination of claims for compensation and other social benefits.

From an economic point of view it should only be cases that are either insoluble or cases where a genuine effort has been made to solve the dispute, without success, that should be litigated. The judicial process is availed of today in only about 10 per cent of the cases set down for hearing. It is unwholesome and a shocking waste of community time and effort to go through the costly and expensive processes of preparing a case for trial primarily for the purpose of bringing the parties together so that negotiations for settlement may be entered into.

Furthermore, modern trends have indicated clearly that in insurance cases there are two quite different questions, namely:

(1) What sum will fairly compensate the plaintiff regardless of who has to pay?

(2) By whom is the loss to be borne?

In this regard one finds an example of the type of case referred to when a Pioneer Tour 'bus ran over the side of the road on its way to Jenolan Caves about two or three years ago. The whole of the passenger complement was injured and a large number of individual actions were brought. Questions arose as to whether the driver of the 'bus was at fault, whether the real cause of the accident was the fault of the Main Roads Board who had imperfectly constructed the road or the road safety fence at the point in question. Apart from the fact that each of the injured parties who will not agree to a compromise will presumably be required to litigate his claim, the first case took over two weeks and this period was occupied before the Court in hearing four separate parties. The only real question for determination was which one or more of the parties concerned should pay the verdict which it was conceded the plaintiff was entitled to recover. This may serve as an example of what Professor Fleming has referred to as loss distribution.

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[21] Repatriation Act, 1920 (as amended) (Commonwealth) Part II Divisions 1-4.

In broad outline I cannot see why a scheme on these lines would not meet the requirements of the present day. It could be no disadvantage to a plaintiff if his full right of appeal to a judge and jury should be preserved to him; indeed it would be to the advantage of both parties, unless either of them had anything to conceal, to know what was alleged by the other side.

As indicated, I do not mean to suggest that there are not other alternatives. In addition, I do not think this is the time or place for any discussion as to compulsory insurance with the introduction of liability without fault. Schemes of that type may well be regarded as too radical and, in any case, involve questions of governmental policy. My only purpose is to say why I regard the existing system as obsolete and why I have come to the conclusion that the time has arrived for a complete review of the whole of this part of the tree of justice, root and branch.

I would add one final comment on this aspect of the matter. Today many of the problems whioh courts are required to determine as matters of causation are, in truth, social problems. It seems to me to be quite absurd to ask a tribunal to determine as a question of cause and effect whether, for example, the psychiatric consequences to an injured man of a simple accident are or are not caused by such accident. In my view this involves entering into the realms of the philosophy of cause and effect. The true position is that the answer to this question should be determined as a social problem by the promulgation of some law prescribing whether consequences of the type I mentioned are compensable. It may well be better, in the interests of the whole community, that those who do suffer from psychiatric illness following an injury should be compensated for all disabilities suffered. The example I have given is only one of many. But determining whether the varied and many results said to flow from an accident should be compensable is to enter into a philosophical field. It seems to me that the problem is quite unsuitable for determination in a court of law. In other words, it is in my view for the government to determine the general principles by which damages should be assessed having regard to current social and economic factors.

If I am right in thinking that claims for personal injuries should be dealt with upon an entirely new basis, what then is to happen in respect of claims other than those for personal injuries? I believe that the present system has worked and has worked reasonably well in relation to claims, for example, for defamation, fraud and other causes of action involving malice and bad faith. Possibly claims of other types are in a similar position.

I am content to say that I do not believe that there is the same need for reform in the case of claims for damages other than for personal injuries or claims for debt. The extent to which reforms could be effective to make a major change in the system for the better may be doubted. In these cases there is not the same air of mystery and confusion as there is in personal injury cases. The parties concerned, generally speaking, are those directly and genuinely concerned. Real and live issues between the parties are generally presented for determination.

I do not desire for one moment to be taken to assert that there is not room for reform. But my purpose is not to give consideration to detailed reforms within the existing framework; it is to consider whether the framework should be dismantled and an entirely new one built in its place.

I would advocate a policy of "wait and see" as regards claims other than claims for personal injuries. It is not possible to propound a system which will

meet all requirements. I would propose that attention be given to devising an entirely new system to deal with cases of personal injury but I would be happy to defer any further consideration of basic changes in respect of other causes of action until such time as the impact of any new system in personal injury cases can fairly be assessed and an objective evaluation made of its results.