## NO FAULT - WAITING FOR PEARSON

by Hugh Cockerell

For British liability insurers 1975 is a year of suspense. The Royal Commission on Civil Liability and Compensation for Personal Injury (the Pearson Commission) is not expected to report before 1976. Its terms of reference were wide - to consider in what circumstances and by what means people should be compensated for accidental bodily injury. It was required to consider the cost and other implications of arrangements for the recovery of compensation "whether by way of compulsory insurance or otherwise". Thus it has a free hand to decide whether to recommend a root-and-branch scheme like New Zealand's, a scheme limited to certain classes of accident and possibly limited to less severe accidents, as in parts of North America, or to confine itself to amendments to the common law so that our present system will continue with minor modifications only.

The membership of the Commission is such that one would not expect a report that favoured the complete dismantlement of our existing arrangements. In Australia, on the other hand, from the moment that Mr Justice Woodhouse was appointed chairman of the Committee of Inquiry on Compensation and Rehabilitation it might have been forecast that a root-and-branch scheme would be recommended, since it was his committee in New Zealand that set on foot the Accident Compensation Act 1972 which, with effect from April 1974, swept away the tort liability system for all classes of accidents. The first volume of the Australian report appeared in July 1974, recommending a New Zealand type of scheme and appending a draft Bill to give effect to its recommendation. A bill very much on the lines of the draft was introduced in the Australian House of Representatives in October 1974, even before the third volume of the Woodhouse Report had been published. Addressing a meeting of the Australian Insurance Association, Mr Frank Crean, the Federal Treasurer, said that the Government would welcome suggestions on the details of the scheme but that its principle was not subject to discussion.

In a reference to the problem of running off claims for accidents occurring before the new law came into force Mr Crean said -

It is perhaps unfortunate that the insurance industry itself did not consider it appropriate to make proposals to the Woodhouse Committee of Inquiry on this and other aspects affecting the insurance industry.

Is it significant that only now, after this particular door to liability insurance has been slammed, the Australian insurance industry is setting up an Insurance Council with a chief executive of status to act as a spokesman for the industry?

In the United Kingdom we have not been told what evidence the British insurance industry is submitting to the Pearson Commission. The BIA has apparently submitted a couple of memoranda and conducted an enquiry for the benefit of the Commission, but these documents have not been released to the public. This may be thought a pity at a time when so many people are proferring their views on what is certainly a matter of potential public interest. The protagonists of radical change have so far made most of the running.

It is easy to criticise the present system, which Ison has called the forensic lottery. Two examples spring to mind. First, if I am walking along the pavement and am struck and killed by a motor vehicle whose driver has had a heart attack I may find myself without compensation because the accident occurred without negligence on the driver's part. Secondly, within the framework of lump sum damages an award for loss of future earnings is left virtually without inflation-proofing. Then, too, the need to award damages in a lump sum to the widow of an accident victim without regard to her remarriage prospects results in an occasional mis-allocation of resources, as witness the recent payment of £65,000 to a young widow who had already married again, to a man with a five-figure income (The Times 15.5.74).

The first criticism could easily be met by the imposition of strict liability, for road accidents at any rate. The second would call for some system of inflation-proofed annuities ceasing, in the case of a widow, on her remarriage. But inflation-proofed annuities give rise to the question of who would pay for the inflation-proofing. This problem is at the moment being faced by France where the Court of Cassation, reversing its earlier view, has now decided that such annuities should be awarded to the victims of road accidents, and the state, by law 74-118 of 27.12.74, has set up machinery to provide for the payment of increases in annuities out of a fund to be managed by the Caisse Centrale de Reassurance, financed by a levy on compulsory motor third party premiums.

But whose premiums? Logically the cost of an inflation-proofed annuity for an injury should be borne by the insurers of the motorist causing the accident and should fall on the year of account in which the accident happened. But this is more or less impracticable in the absence of inflation-proofed securities that would enable the cost of such an annuity to be calculated. It looks as if France will be driven back on a system of répartition whereby the cost of making

the additional payments necessitated by inflation will fall on the policyholders in the year when the additional payments have to be made, so that next year's motorists will find themselves having to pay part of the cost of the accidents of earlier years, an increasing burden. Annuities for accidents at work, it should be added, are already subject to indexation.

Whatever the demerits of a fault system we can be sure that a no-fault system will throw up its own crop of anomalies. The Law Council of Australia, for example, looking at the Australian draft scheme, has pointed out quite a crop of potential ones. For example, people under 18 do not appear to be entitled to any compensation for loss of potential increased earning capacity. Their compensation will be limited to 85% of their average weekly earnings for the past twelve months with a maximum of $ 500. Widows aged under 56 will lose their compensation after twelve months unless they have children or parents to look after. The self-employed will get no compensation for temporary partial incapacity. There will be lump sums only for severe disfigurement. The administration system too comes under fire, because of the large measure of discretion left to the administrators. The injured party seeking compensation will have to bear his own costs in seeking redress when he is aggrieved and will have no right to see the medical evidence on which an assessment of incapacity or compensation has been made. No doubt many of these points are curable but it is unlikely that the process of evolving a system that offers justice to all will be without growing pains.

In the United Kingdom the Law Society has submitted evidence to the Pearson Commission advocating retention of common law damages for road accidents by a modification of the tort system which would make the "keeper" of a motor vehicle strictly liable for damage caused by the vehicle, but the Society considers that proof of negligence on the claimant's part (except in the case of young children) should reduce or extinguish the damages. The London Solicitors Litigation Association, which has also produced a memorandum, makes three points:

(a) Those who through their own fault cause damage or injury should be liable to pay full compensation;

(b) Any system whereby an innocent claimant receives no more than a person who is legally or morally culpable is abhorrent;

(c) No person of goodwill who is disabled by any illness, accident or other cause should fall below a certain standard of income.

The Association recommends the Commission to investigate a system on North American lines whereby victims of accidents on the road or at work should receive compensation up to a moderate threshold and be free, if they choose, to pursue their civil remedy against a wrongdoer above that threshold.

The difficult questions for the Pearson Commission to answer are:

1 (a) Should fault continue to govern the amount of compensation available?

(b) If so, does the law relating to liability and damages need modification and if so, in what respects?

2 (a) Is there a need for a special regime for any class or classes of accident or disablement?

(b) If so, what form should it take and how much will it cost?

3 What will be the effect of any changes proposed on the vigorous development of accident prevention and rehabilitation measures?

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## THE END OF CAVEAT EMPTOR?

by D J Walker

It may have excaped the notice of even the most enthusiastic Europeans that the Council of Europe has produced a draft Convention on Products Liability. The prospects, at the moment, are intriguing, not to say fascinating, for constitutional lawyers and the rest of us alike, since the Commission of the EEC, not to be outdone, has promptly produced a draft directive on the same subject (despite staunch protestations of co-operation and good communications on both sides). Since it is still possible that the results of the forthcoming referendum will take the United Kingdom out of the EEC it is anybody's guess which document, when it has finally evolved, will be adopted in this country.

Indeed, it is even possible that neither document will become the basis of this part of the law of England, since the Conventions of the Council of Europe are not binding upon member states, and our past record of adopting Conventions is to say the least, patchy. This will not, presumably, trouble those who feel, with some justification, that it would be preferable to retain the present law than to adopt a Convention in the form of the present draft.