Permanent Law Reform Committee

The establishment under the aegis of the Government of a Permanent Law Reform Committee was noted in the last Gazette as an important advance towards law reform in this state. It has since been announced that the constitution of the committee will be as follows:—

The Chief Justice	Mr. Justice Herron
Mr. Justice McClemens	Mr. Justice Manning
Mr. Justice Walsh	Mr. Justice Brereton
Mr. Justice Else-Mitchell	
Judge Levine	Judge Cross
Mr. A. E. Stonham S.M.	Mr. C. B. J. Riley S.M.
Mr. N. H. Bowen Q.C.	Mr. C. L. D. Meares Q.C.
Mr. J. J. Watling	Dr. B. A. Helmore
Professor D. G. Benjafield	Mr. F. P. McRae

The Chairmanship of the Committee has been committed to Mr. Justice Herron, and Mr. F. P. McRae, formerly Crown Solicitor for New South Wales and now a practising member of the Bar, has been appointed as Executive Secretary of the Committee.

At the first meeting of the full Committee held on 23rd November, 1961, an Executive Committee consisting of Mr. Justice Manning, Judge Cross, Mr. Bowen, Mr. J. J. Watling, and Mr. A. E. Stonham S.M., together with Mr. McRae, was appointed with the function of considering the topics requiring examination by the full committee, suggesting the order in which they should be considered, and suggesting the manner which sub-committees might be constituted.

It has been decided that the first matters to be considered by various sub-committees which have been set up will be as follows:—

1. Fusion of Law and Equity, Adoption of Judicature System and Pre-trial Procedure.
2. Examination of the causes of delay in the various courts.
3. The making of provision for the remission of actions from Supreme Court to District Court.
4. The abolition of defence of contributory negligence and adoption of the principle of modification of damages according to the degree of negligence of the plaintiff.
5. Power of the Full Court to enter subsituted verdict for verdict of jury where the latter is held to be inadequate or excessive.
6. Provision of Court reporters for Magistrates' courts.
7. Powers and procedures of coroners at inquests and of Magistrates at committal proceedings.
8. The situation resulting from the judgment in the High Court in *Genders v. Government Insurance Office* (102 C.L.R. 363) in the light of the judgments of the Full Court in *Turner v. Government Insurance Office* ((1961) S.R. 1) and *Maybury v. Nominal Defendant* ([1961] S.R. 378).
9. Power to grant declaratory relief in equity, and in commercial causes.
10. Enactment of a comprehensive statute of limitations including notice of action.
11. Relief of list congestion in courts of petty sessions.

It has been decided that the item No. 2 in the above list will be dealt with, not by any sub-committee, but, pending further decision, by the full committee.

It is understood that the following persons have been asked to serve upon sub-committees to deal with the matters set out in the list above:—

Item 1. Mr. Justice Manning, Judge Levine, Professor D. G. Benjafield, Mr. C. L. D. Meares Q.C., Mr. J. R. Kerr Q.C., Mr. N. H. Bowen Q.C. and Mr. Francis White.	Item 3. Mr. Justice Walsh, Judge Perrignon, Mr. A. R. Moffit Q.C., Mr. J. J. Watling.
Item 4. Mr. Justice Herron, Judge Levine, Mr. D. S. Hicks Q.C., Professor W. Morrison.	Item 5. Mr. Justice McClemens, Mr. J. R. Kerr Q.C., Dr. B. A. Helmore, Professor D. G. Benjafield.
Item 6. Mr. Justice McClemens, Mr. M. Meagher, C.S.M. Mr. N. Wran.	Item 7. Mr. Justice Brereton, Judge Brennan, Mr. R. Reynolds Q.C., Mr. A. E. Stonham S.M., Mr. J. R. Broadbent.
Item 8. Mr. Justice Walsh, Mr. D. S. Hicks Q.C., Mr. C. R. Dunlop, Mr. F. P. McRae.	Item 9. Mr. Justice R. Else-Mitchell Mr. N. H. Bowen Q.C., Mr. C. I. Lewis.
Item 10. Mr. Justice R. Else-Mitchell, Mr. T. W. Waddell, Mr. L. W. Taylor.	Item 11. Mr. Justice R. L. Taylor, Mr. M. Meagher C.S.M., Mr. C. B. J. Riley S.M., Mr. W. K. Fisher, Mr. F. Newnham.

It is understood that the various committees have already embarked upon the investigation of the matters committed to them. In order to assist the Permanent Law Reform Committee's deliberations, the committees appointed by the Bar Council, and referred to in the last issue of the Bar Gazette, have also continued their investigations into the problems committed to them, and a preliminary report on the abolition of the defence of contributory negligence and the adoption of the Admiralty rule of reducing damages in proportion to the degree of negligence of the plaintiff (a summary of which appears below) has been placed before the appropriate Official Sub-committee.

The Bar Council's report on the modification of the law to overcome the difficulties raised in *Gender's Case,* which was furnished to the Attorney-General for New South Wales, at his invitation, during last year has been placed before Mr. Justice Walsh's Committee. A summary of this report also is set out below.

Perhaps the most interesting and possibly most potentially valuable of the subjects being investigated by the Permanent Law Reform Committee is the investigation into pre-trial procedure which has been utilized so widely in recent times in the United States. The Acting Chief Justice, Mr. Justice Herron, the State Attorney-General (The Hon. R. R. Downing) and Mr. Justice Wallace (when he was at the Bar) as well as the Commonwealth Attorney-General (The Hon. Sir Garfield Barwick) have all carried out some personal investigation into the operation of pre-trial procedure in various States of the United States, and their experience will no doubt be extremely valuable. The Bar Council considers that this topic is one which requires careful consideration before any form of pre-trial is introduced in this State and a Committee has almost completed a preliminary report on the subject which the Council will place before the Bar, so that members may examine its details and offer suggestions and criticisms and modifications. These will be considered in the preparation of a final report which will be presented to the appropriate official sub-committee as indicative of the views of the Bar.

Contributory Negligence and the Admiralty Rule

The members of a sub-committee the main points of whose report are set out below were Moffit Q.C. (Chairman), Hicks Q.C., Needham, K. G. Gee and G. H. Smith.

The sub-committee came to the conclusion that the present law relating to the defence of contributory negligence is unjust and unsatisfactory, and should be modified by a law reform based on the principle of reduction of damages according to fault. The committee was of opinion that the reform was necessary and desirable in jury trials, but would be even more necessary in cases where a judge sat alone. There appeared to be no ground for debate as to the necessity for reform, but there were a number of matters requiring consideration before the precise form of amending legislation could be determined. Some of these matters are:—

(a) Whether the last opportunity doctrine should be abolished as has been done by the Western Australian Act or left alive as in the legislation of the other States of the Commonwealth.
(b) Whether the amending statute should expressly apply the reduction of plaintiff's damages to cases of "negligence", as in the Western Australian amendment, or to cases of "fault" (as e.g. in the Victorian Act), so as in the former case, to make it clear that it does not alter the present law in cases of statutory causes of action that fault on the part of the plaintiff is irrelevant.
(c) Whether the Victorian pattern of making express provision to cover the District Court, so that the £3,000 jurisdictional limit would apply not to the plaintiff's loss as originally found but to the amount finally awarded, should be followed.
(d) Whether the same principles should be applied to Compensation to Relatives cases.
(e) Whether special provision should be made to cover cases where damages found in the case of a worker are reduced below the amount of the workers' compensation to which he would be entitled.
(f) Whether any problems special to this State arise because of our method of pleading, and whether special rules to cover these matters, particulars, taking of jury's verdicts and the like, should be framed.

On these matters the sub-committee has not yet come to any final conclusion so as to be able to make a recommendation.

The committee noted that the reform which commenced as the Admiralty rule in England has been progressively adopted in negligence cases in Canada, England, New Zealand, all States of the Commonwealth of Australia other than New South Wales, and also in the Federal Capital Territory. The reform, therefore, applies both in places where trial is by judge, and in jurisdictions where trial is by jury. Wherever the reform has been introduced, there has been no apparent attempt whether by legislation or otherwise to repeal or cut down the reform, and available legal literature does not oppose the reform. There are some problems which follow the introduction of the reform (see, for example, 13 Canadian Bar Review (1935) 553 to 563).

It seems clear that the law as it stands at present in New South Wales, is out of keeping with the modern social approach to compensation for personal injuries, and it seems unnecessary to elaborate upon, and give examples to establish, the injustice of giving a plaintiff nothing because he is guilty, say, of a minor act of contributory negligence whereas the true and principal blame lies on the defendant.

The committee considered that it is not a valid argument to suggest that the reform is not necessary under the New South Wales jury system because juries sometimes appear to apply the apportionment rule themselves. The committee made the following comments upon this:—

(a) To have to rely upon the tribunal to disregard the law to achieve justice is bad in principle.
(b) Some juries will undoubtedly apply the law as directed, and there will, therefore, be inconsistency from case to case.
(c) If juries do make some apportionment themselves, their approach is uninformed, and without assistance from either bench or counsel.
(d) In such cases, defendants in any case may suffer, since a small verdict brought in on a compromise or apportionment basis, will frequently result in a new trial limited to damages being ordered because of the inadequacy of damages. (See *Pateman v. Higgins* 97 C.L.R. 521, Cf. *Blake v. Morton* 75 W.N. 196.)

It is clear that the present law may, in some circumstances, be unfair to a defendant, because, in addition to what has been said in the last preceding paragraph, it appears that some juries disregard a plaintiff's negligence because of the catastrophe it causes, and when they have no direction which enables them to reduce damages. Under a reform of this branch of the law, defendants are more likely to get the reduced verdict where they are entitled to it, and are in a better position to compromise on that basis.