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.

The committee was of opinion that the reform would tend to give more public confidence in the fairness of the law, in that, in a proper case, a jury publicly recognizes carelessness of each party concerned by pronouncing upon it, and determining its verdict according to the percentage of fault of each. This would be particularly so in the case of the few uninsured defendants now remaining who at present may feel that no account is taken of the injured party's fault.

There is some uncertainty whether the reform proposed might lengthen trials or increase litigation, and upon this matter, the following comments are made:—

(a) At present the presence of possible contributory negligence does not deter commencement and prosecution of litigation.

(b) There is probably a small percentage of cases which are not commenced now but which would be initiated if the reform took place. Examples are cases of comparatively minor injury when there is strong evidence of contributory negligence and cases where proof of the plaintiff's case necessarily involves contributory negligence on the *Packham v. Railway Commissioner* (41 S.R. 146) principle. If some extra litigation results from the reform, this is not a valid argument against it, since the proper conclusion to be drawn is that persons who are not in the present state of the law entitled to damages because the law is unjust, would be put in the position of being able to bring an action.

(c) It is possible that some defendants would contest liability with a view to raising the conduct of the plaintiff, whereas now they admit liability or settle. It is difficult to be sure about this, for so much depends on the particular approach adopted by the particular legal adviser or the particular insurer involved. However, over all, it is unlikely to make much difference. At the present time, even if the plaintiff is at fault to some degree, liability is not fought if the negligence of the defendant is gross. Generally speaking, it is felt that the position eventually under the reform, would be much the same, but that there could be a settling down period.

(d) Assuming liability be contested, whether now or under the reform, then there should be no appreciable difference in the length of the case. If the last opportunity rule is expressly abolished at the same time (as in Western Australia) in some cases, time will be saved.

In the last few paragraphs the position which arises in cases of trial by jury has been dealt with. In cases of trial by a judge, whether by consent or as in the District Court, as a matter of course, the present rule is most unsatisfactory. To say the least, the Judge is placed in the most distasteful position of being obliged to give nothing to a plaintiff who, in fairness, ought to receive some compensation. The harshness of the law may tend to produce judicial precedents which come within the old saying "hard cases make bad law".

There is one further consequence of the matters referred to in the last paragraph. Because of the difficulties facing a judge, at present plaintiffs when properly advised will not dispense with a jury in the Supreme Court or fail to ask for a jury in the District Court, in any case where there is the slightest suggestion of contributory negligence. With the reform, the plaintiff's disinclination to dispense with a jury might well be expected to lessen. One would, therefore, expect that there would be more trials by judges without juries under the reform, and to this extent litigation might well be speeded up. This would, no doubt, be particularly so in the District Court where a positive step is to be taken if a jury is required.

The opinions and recommendations expressed by the sub-committee were not the result of any survey from the profession but members of the committee informed their own minds, not only from their own experience, but by deliberate though casual discussion with members of the profession, both counsel and solicitors, whose practice is principally for plaintiffs, as well as counsel and solicitors whose practice is principally for defendants. Without exception, the proposed reform was favoured. Some, while expressing doubts, felt there could be a slight increase in the number of cases where liability was contested, but most thought it would make no real difference.

Genders v. Government Insurance Office

As has been mentioned above, the Attorney-General (The Hon. R. R. Downing), in 1961, sought the views of the Bar Council upon the amendment of the law arising out of the decision in *Gender's Case*. In his letter to the Council, he set out in summary form the results of the joint judgment of the judges of the High Court and mentioned various *obiter dicta* contained in the judgment which may be summarized as follows:—

(1) The operation of s. 15(2) of the Motor Vehicles (Third Party Insurance) Act is spent insofar as it relates to cases in which the insured person is dead.

(2) The insurance required to be effected by the above-mentioned Act, and, in fact, embodied in the third party policy, covers all indebtedness arising as a result of an accident.

(3) Section 2 of the Law Reform (Miscellaneous Provisions) Act 1944, and s. 5 of the Law Reform (Miscellaneous Provisions) 1946, are procedural in effect, and are operative with respect to the indemnity under a third party policy.

(4) The right of contribution under the Act of 1946 is enforceable against the estate of a deceased joint tortfeasor by reason of the Act of 1944, and the authorized insurer of that joint tortfeasor is liable under the third party policy to indemnify that estate with respect to the contributions.

The Attorney-General pointed out that various difficulties arise as a result of holding that the operation of s. 15(2) is spent where the insured person is dead. He also indicated that representations had been made to him suggesting amendment to the law and said "The earlier representations favoured amendment of the Motor Vehicles (Third Party Insurance) Act, which would have the effect of reviving the right of action against the authorized insurer. Later representations concerned the effect of a third party policy and suggested, in effect, the inclusion of amendments which would codify the dicta of the High Court in relation to the effect of such a policy. These later representations, would necessarily involve accepting the position in *Genders' Case*