# TRIAL BY DOCTOR: ASPECTS OF THE NATIONAL COMPENSATION SCHEME

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The National Compensation Bill 1974 has been passed by the Australian House of Representatives. The Senate however committed its clauses to its Committee on Legal and Constitutional Affairs for study and report. That report has not yet been made.

The National Compensation Bill is a consequence of a report by Mr. Justice Woodhouse of New Zealand and Mr. Justice Meares of the Supreme Court of New South Wales. Volume 1 (which I will refer to as "the Woodhouse Report") contains recommendations for a scheme to replace existing remedies relating to the compensation and payment of benefits to the sick and injured. The present Bill was, in a pre-amended form, included in the Woodhouse Report. Some forty or more amendments on the prototype are in the Bill which is now with the Senate. Broadly speaking the scheme embodied in its one hundred and twenty-one clauses is intended as a blueprint to replace existing damages and compensation rights relating to personal injury and sickness. Overlapping provisions of social services and repatriation legislation are to be repealed.

Nevertheless, the measure under discussion is merely one of a number of unco-ordinated steps taken since December 1972 to restructure our social welfare system. It is aimed at meeting problems relating to compensation and/or maintenance of income of those who involuntarily have been removed from the work force both domestically and industrially through injury or sickness.

Apart from administrative efficiency, fairness and costs, the viability of any such measure naturally depends on the level at which such incomes are to be maintained and for how long. Clearly, there are implicit questions:

(a) What is wrong (physically, mentally or otherwise) with the individual who claims decreased utility from some cause beyond his control?

(b) Will he get better? If so, how long will it take?

(c) What precise remedial action is needed on the part of others to help him on his way?
(d) How better will that individual be when remedial intervention has been exhausted?

The experience of the law has often shown one or more of the above questions to verge on the unanswerable. Nevertheless, orderly society insists on an answer lest people remain indefinitely suspended without income and it insists that the answer come from members of the medical profession.

In a significant number of cases the medium of answerability has been the Courts through the judicial process. In those cases, the opinions of medical experts have been weighed together with all the evidence. Whilst no one can say absolutely that this process at times produces inaccurate results the probabilities are that it does. The boast of the law, however, is not that the judicial process gives scientifically accurate results but that it ends disputes by peaceful means and after as much rational ventilation of issues as sophisticated man can devise. The limits of accuracy are set as much by the nature of human knowledge and character as they are by the system.

Nevertheless, the fashion today is to lower sights on *systems,* viewing them as active devils in themselves directing the destinies of their human participants. I do not deny a transcending need of man to look critically at his systems. But this requires some insight into himself, a degree of cynicism, a persistent cautiousness and an appreciation of the interrelationship between systems and the human characters that they serve. There is little doubt that in recent years, especially with the intensification of resort to the Courts, weaknesses in the operation of the law have become more and more manifest. This is certainly so in the area of law which applies to the injured and the sick: here the law, viewed as a whole, appears to do uneven justice, is too costly and moves at too slow a pace. In seeking reform, however, there is a need to be vigilant lest serious inroads on individual rights and unnecessary sacrifices of basic principles are made.

In my view, the road to progress in the area we are discussing has been, to an extent, obfuscated by some desire to pay off scores against the legal profession. Unfortunately the Woodhouse Report is not free from this atmosphere.

### *The Post-1972 Approach*

In its issue of September 1972 the Reader's Digest carried an article under the name of the then Leader of the Opposition, Mr. E. G. Whitlam, Q.C. There, the present Prime Minister spoke of the real

beneficiaries of third party insurance being "not traffic injury victims but their legal advisers". He spoke of an "insurance litigation complex" which was "nothing short of rapacious". He spoke of "the prodigality of maladministration in car accident insurance" as "cause for outrage". However, despite the depth of his condemnation, his proposition for reform, at that stage, was for a system of maintenance of income for the injured leaving them their right to sue negligent drivers in the Courts for pain, shock and suffering.

In January 1973, the Prime Minister met Mr. Justice Woodhouse—at a sporting fixture in New Zealand. He there engaged him (without reference to Cabinet) to head an enquiry for a national compensation scheme for Australia. The views of Mr. Justice Woodhouse had already been made clearly known in a report in 1967. The terms of reference for the Australian enquiry were settled in consultation with Mr. Justice Woodhouse and the Committee came to consist of three persons whose pre-set views were not secret. The Committee deliberations which preceded the Woodhouse Report have been described as an enquiry. However, we do not know what, if any, those deliberations were. There were public hearings in each State, but these consisted mainly of the Committee listening to statements by or on behalf of interested persons who were not given any information about the deliberations of the Committee (by this time comprising only the two Judges above mentioned). Neither from the body of the Woodhouse report itself or from the way in which the so-called enquiry was conducted can one accept the report as containing any synthesis of conflicting views or deep consideration of viable alternatives. The report argued for the abolition of the common law system and the judicial process in relation to all cases of personal injury. It is my contention that the obsessive hostility of the Committee to the judicial process and the common law system in relation to personal injury claims has resulted in the scheme proposed being virtually subordinated to it. Whatever the defects in existing systems or schemes, they are more than offset by new anomalies, inadequacies, impracticalities, and to an extent, are repeated in the proposals embodied in the National Compensation Bill 1974. Amongst other things, the scheme involves:

1. Abolition of the right to sue for damages arising from negligence or otherwise in respect of injury or sickness.
2. Replacement of the existing remedies by the provision of benefits—without proof of fault—for the sick and injured up to eighty-five per cent of pre-accident earnings. I say "up to" eighty-five per cent because the full percentage is only paid

where "total incapacity" is established within the meaning of the legislation. Under the new legislation it is not clear what amounts to "total incapacity" and on one view it may apply only in a very restricted number of cases.

3. Exclusion of lump sum payments save small ones in a limited number of cases.

4. Replacement of the judicial process by public service administration entrusted with a vast number of ill-defined discretions, many of which would involve public service assessment of medical certificates. (N.B. S.36(1).) I do not have time here for detailed examination of the scheme. I merely record one or two of my basic contentions:
   (a) There is a very great uncertainty as to what a beneficiary under the scheme may expect to receive. This is not only because the payment of benefits will depend on the exercise of a multitude of ill-defined discretions by members of the Commonwealth public service but the scheme's criteria of eligibility are themselves fraught with uncertainty and complexity.
   (b) Despite that uncertainty and complexity it is clear that no beneficiary will be entitled to benefits in accordance with the concept of "full compensation" embraced by the common law for actions based on negligence or failure to take reasonable care.
   (c) Dissatisfaction is already being expressed, understandably, by workers who see their State Workers Compensation Schemes providing better benefits especially when availed of with other benefits (such as are provided by the common law, the social services and repatriation sickness schemes) which they are presently entitled in some measure to add.
   (d) Widows and injured children are, generally speaking, treated with a degree of capriciousness and in most cases inadequately.
   (e) Some information provided by its promoters has been misleading. The scheme is said to be "earnings related" but the earnings to which the scheme relates are past earnings. In the cases of some long term disabilities this is likely to produce unsatisfactory results if inflation were to persist. Further, the scheme is said to provide benefits for adult non-earners including housewives. Only where disabilities are long-term will this category of persons be

able to benefit but even then the benefits are in fact little more than present social service benefits.

(f) Despite my emphasis on the areas in which the scheme is inadequate I should also say that in some areas the scheme may be over-generous providing benefits when unnecessary and at a level which will negative incentive. The scheme is capricious in its distinction between classes of beneficiary. Any capriciousness in the present system is well paralleled. However, the very greatly increased class of beneficiaries to which the scheme purports to apply makes the costs a very relevant consideration.

At the University of Sydney on the 21st November, 1974, R. I. Downing, the Chairman of the Australian Broadcasting Commission and Ritchie Professor of Research in Economics at the University of Melbourne, delivered the George Judah Cohen Memorial Lecture on social welfare reconstruction. He is no enemy of Government policy in this area. He said, however, that the three major proposals relating to superannuation health and national compensation would cost just on $4,900,000,000.00 or about ten per cent of gross domestic product. On these figures he estimated that they would involve a 25 per cent increase in tax revenue to provide the finance. He also said that the inflation of money incomes for which the schemes provide would set off a vicious inflationary spiral

Ironically, however, Professor Downing was underestimating the cost. The figures which he used are now well out of date and failed to take into account amendments to the new scheme which qualitatively will escalate the costs involved. This is not to mention the steep rise in average weekly earnings which has occurred since the original report and which has the effect of greatly increasing the benefits to be paid under the scheme. Further, Professor Downing's estimate of costs and the percentage of gross domestic product involved failed to take into consideration other social welfare programmes which also have to be financed out of tax revenue and which relate to education, housing, new population centres, the improvement of the environment and all the other elements of social reconstruction which are part of present government policy.

*Role of the Medical Profession*

In recommending the removal of the judicial process from the area we are discussing the Committee was disdainful of the lawyer's role in the evaluation *(inter alia)* of medical testimony. It argued that the assessment of claimants ought not to be a matter of contention. By

implication it favoured the peremptory disposal of claims by the discretionary weapon in the hands of public servants. It follows that the role of the medical profession is to be paramount.

It should be remembered that the Woodhouse scheme is founded on notions of "impairment of capacity". It imports concepts of "partial" and "total" incapacity, notions of temporary and permanent partial incapacity, and notions of total incapacity that are both temporary and permanent. These concepts which tend to be somewhat elusive of accurate application in practice are to be reflected in certificates from medical practitioners who are to have regard, in their assessments of "impairment", to a table devised by the American Medical Association. This table is related purely to "impairment" as a scientifically ascertainable fact and bears no relation to the reaction of the individual to his injury or sickness.

The rule ascribed by the legislation to the medical profession, although it may be to public servants who happen to be medical practitioners, is fundamental to benefit entitlement and requires the designation of degrees of incapacity for work, if any, and the extent of permanence. Where certificates from medical practitioners conflict the legislation charges a public servant to act on the certificate he deems appropriate (whatever that means).

All this involves a number of assumptions—

(a) that work capacity is a matter of scientifically ascertainable fact;
(b) that medical practitioners are satisfactorily equipped to make that finding;
(c) that any conflict between findings of that nature among medical practitioners can satisfactorily be resolved by a member of the public service;
(d) that evaluation of medical testimony does not call for sworn evidence and/or cross-examination;
(e) that medical knowledge is more or less static, comprising a universally accepted body of knowledge capable of relatively simple application to individual circumstance.

But in the operation of the scheme we must remember that the medical role not only relates to assessment for the purpose of benefit categorization but also to the care of beneficiaries. Thus, it is necessary to scrutinize carefully the above assumptions. To what extent, the cynic might ask, does the scheme take us one step further in the enshrinement of a black art? Or is it true, as Mr. Justice Woodhouse would have us accept, that the doctor knows best?

In our society, the doctor occupies a special position. He knows more than we do about that possession we all prize so greatly—our

body. Not only are the secrets of our inner mechanisms unavailable to us but we do not know what secrets are truly known to him. The fact that the doctor knows more than we do on so vital a question has led us to submit to his direction in many special ways. In turn we are inclined to attribute to him knowledge and healing powers in excess of reality. The Woodhouse proposals will remove him further from our chances of true evaluation.

Without any provocative intent I would like to discuss some of the considerations tending to suggest greater rather than less need for lay vigilance over the medical world.

Whilst no one can deny the invaluable services provided by members of the medical profession, there is, looking at the total scene, at least some cloud over it today.

In a book recently published and entitled *Medical Nemesis*, Ivan Illich, who calls himself a philosopher and historian, has written:

> "Within the last decade medical professional practice has become a major threat to health".

Excerpts in advance from Illich's book were published in *The Lancet*, 11th May, 1974. Illich is not a doctor but he has been described by R. A. Joske, Professor of Medicine at the University of Western Australia, as "one of the outstanding figures of our time" and "a creative thinker of rare originality". (In an address given to the Faculty of Engineering, University of Western Australia, 4th June, 1974).

*Medical Nemesis* is a 1975 publication now available in Australia. Nemesis was the Greek Goddess who personified divine retribution. Illich's thesis holds that man has lost his sense of reliance largely as a result of medical technological advances and has become hopelessly dependent on the medical profession to protect him from all manner and form of pain and anguish which otherwise he may well be able to bear on his own. He says this is the pay-off or retribution to medicine for its progress. He says further that there is, connected with this, a new epidemic of doctor-made disease—*Iatrogenesis*—a disease comprising only illness which would not have come about unless sound and professionally recommended treatment had been applied. He says (at p. 165):

> "Iatrogenesis is *clinical* when pain, sickness and death result from medical care; it is *social* when health policies reinforce an industrial organization which generates ill health, it is *structural* when medically sponsored behaviour and delusions restrict the vital autonomy of people by undermining their confidence in growing up, caring for each other and aging, or when medical intervention disables

personal responses to pain, disability, impairment, anguish and death".

He adds:

> "Most of the remedies now proposed by the social engineers and economists to reduce Iatrogenesis include a further increase of medical control. *These so-called remedies generate second order Iatrogenetic ills on each of the three critical levels".*

Illich points out that medicines have always been potentially poisonous but their unwanted side-effects have increased with their effectiveness and widespread use. Every twenty-four to thirty-six hours from fifty to eighty per cent of adults in the U.S. and the U.K. swallow a medically prescribed chemical. He says:

> "Some take a wrong drug, others get a contaminated or old batch, others are counterfeit, others take several drugs which are dangerous or take them in dangerous combinations, others receive injections with improperly sterilised syringes or brittle needles. Some drugs are addictive, others mutilating, other mutagenic . . . unnecessary surgery is a standard procedure. Disabling non-diseases result from the medical treatment of nonexistent diseases and are on the increase: the number of children disabled in Massachusetts from cardiac non-disease exceeds the number of children under effective treatment for cardiac disease".

He points out that in 1971 between 12,000 and 15,000 malpractice suits were lodged in U.S. Courts but *that doctors are* only vulnerable *within the limits of the medical code.* He claims *that most of the damage inflicted by the modern doctor does not fall into any of these categories.* He says it occurs in the ordinary practice of well trained men who have learned to bow to prevailing professional judgment and procedure.

The U.S. Department of Health has calculated that seven per cent of all patients suffer compensable injuries while hospitalised. A National survey indicated that accidents were the major cause of death in U.S. children and that these accidents occurred more often in hospitals than in any other kind of place.

Ivan Illich concludes:

> "The main source of pain, disability and death is now an engineered albeit non-intentional harassment. *The prevailing ailments, helplessness and injustice, are now the side-effects of strategies for progress".*

But apart from Professor Joske there is other prestigious support for Illich's thesis.

In an article entitled "Medical Education, Medical Research and Human Needs" published in *Current Affairs Bulletin* of 1st October, 1974 Nobel Prize Winner Sir MacFarlane Burnet wrote:

> " . . . the word is in the air that medicine, which I define as the prevention and handling of human disease, is approaching a crisis . . . ".

He claimed:

> "Despite everything that has been done by medical science in this century the demand for medical care has steadily increased, while the consumption of drugs prescribed by doctors shows a steady per capita increase each year".

In his book on the Implications of Medical Progress entitled *The Biocrats*, Dr. Gerald Leach emphasises the special role of the doctor to which I have referred. He says:

> "From dealing with sickness and disability, medicine is being pushed by modern biology into a control of the human machinery so intimate and pervasive that it has profound consequences for the basic aspects of life, sex, procreation, birth, the relationship between parents and offspring, the nature of the individual, his role in society and the nature of society itself. Perhaps more than any other science or technology, biology and medicine threaten to make the changes which will alter man and societies most".

Ivan Illich says:

> "As a lawyer, the doctor exempts the patient from his normal duties and enables him to cash in on the insurance fund he was forced to build . . . social life becomes a give and take of therapy: medical, psychiatric, pedagogic or geriatric . . . claiming access to treatment becomes a political duty, and medical certification a powerful device for social control".

But there is another aspect of the doctor's role which is too little observed in our society. It is his influence on both personal and social morality and the extent to which those matters themselves intrude upon diagnosis. In his contribution entitled *The Rehabilitation of the Low-back Cripple* to an international seminar on rehabilitation in Canada in March, 1969 a doctor, Ian MacNab, Chief of the Division of Orthopaedic Surgery at the Wellesley Hospital, Toronto, quoted from the following letters to the Workmens Compensation Board about a particular patient.

> "Dear Sirs,
>
> I saw this very pleasant claimant, George Smith, today and the poor fellow has not responded to conservative therapy at all. He is

totally unable to work, his x-rays show marked disc degeneration and I plan to bring him into hospital for a local fusion".

"Dear Sirs,
I operated on George today, and I am sure that he will do well".

"Dear Sirs,
I saw George Smith today and I am a little disappointed with his progress to date".

"Dear Sirs,
Smith's x-rays showed a solid fusion, but he shows surprisingly little motivation to return to work".

"Dear Sirs,
This dreadful fellow Smith".

"Dear Sirs, Smith obviously needs psychiatric help".

It seems to me that the author of these letters shows how the objective and subjective in medical practice can conspire to produce a physical and mental cripple with only the psychiatric crutch for terminal support. The treatment of a doctor was on trial but in fact the patient was convicted.

It is easier to show from the past that medical diagnoses and treatments are frequently without sound bases, that they stem at times from ancient practices, private rationalizations or even moral standpoints. Even today, it is said that medicine is an art and not a science. Doctors in private say so. But the public has no idea.

No better example of the unscientific being passed off for the scientific can be found than in the postulates of doctors on the sexual and excretory functions of the body. Man's pre-occupation with himself in these areas has not failed to leave its mark on members of the medical profession, themselves at times ensnared by the difficulty in distinguishing fact from fiction so as to become involved in the promotion of culturally determined anxieties.

For a well documented thesis on this subject I refer to Alex Comfort (he is a doctor and thus credible)— *The Anxiety Makers.*

As recently as the mid-nineteenth century, a venereologist of repute by the name of William Acton published his treatise on the *Functions and Disorders of the Reproductive Organs in Youth, in Physiological, Social and Moral Relations.*

Unashamedly assuming questions of morality to be within his sphere of expertise, he asserted as a medical fact that normal women have no sexual feelings. As to the sexual feelings of the male he warned of their dire consequences (again as medical fact):

"In many instances, either from hereditary predisposition, bad companionship or other evil influences, sexual feelings become developed at a very early age, and this abnormal excitement is always attended with injurious, often with the most deplorable consequences".

On another aspect of sexual feeling he says:

" . . . let us now glance at the reverse of the picture hereafter more fully considered, and notice the symptoms when a body has been incontinent, especially in that most vicious of all ways, masturbation. In extreme cases the outward signs of debasement are only too obvious. The frame is stunted and weak, the muscles undeveloped, the eye is sunken and heavy, the complexion is sallow, pasty, or covered with spots of acne, the hands are damp and cold, and the skin moist . . . his intellect becomes sluggish and enfeebled . . .".

Unlike William Acton, however, another doctor, Isaac Baker Brown, later President of the Medical Society of London, discovered that females do on occasions have feelings that might be described as sexual although he called it "peripheral excitement" and found the offending source in the clitoris. As a consequence he introduced the operation of clitoridectomy to remove "the consequences of the excitement" which he said included "epilepsy, hysteria and convulsive disorders generally". A large number of cases, adults as well as children were operated on in his specially instituted London surgical home. In 1866 he published a series of forty-eight such cases.

The evils of sexual activity, however, if not understood in clear and precise terms from the writings of the doctors I have mentioned had been given in detail in mid-eighteenth century by Tissot—physician and hygienist, and adviser to the Pope. He told his audiences that all sexual activity was dangerous by reason of the rush of blood to the brain which it produces "starving the nerves, making them more susceptible to damage and thereby inducing insanity". But solitary orgasm was the most deadly of all—it could be indulged in so conveniently and at such a tender age that excess was inevitable and, moreover, a crime of such enormity that the guilt of having committed it was itself dangerous to the system. Perpetually exhausted, he said, the masturbator is liable to "melancholy, fits, blindness, catalepsy, impotence, indigestion, idiocy and paralysis . . .".

Tissot's treatise became persuasive precedent. In his first American text book of psychiatry in 1812 Rush described masturbation as "fixing upon mind and body seminal weakness, impotence, dysury, tables dorsalis, pulmonary consumption, dyspepsia, dimness

of sight, vertigo, epilepsy, hypochondriasis, loss of memory, manalgia, fatuity and death".

Another prestigious French authority, Esquirol (1816), wrote that masturbation was recognised in all countries as a common cause of insanity and by 1838 he added suicide, melancholia and epilepsy.

In 1839 the Superintendent of Hanwell Asylum in England, Sir William Ellis, wrote that "by far the most frequent cause of fatuity is debility of the brain . . . in consequence of the pernicious habit of masturbation".

As recently as August 1963 we find the Assistant Secretary of the British Medical Association, Doctor Ernest Claxton, declaring:

> "As a doctor I can tell you that extra- and pre-marital intercourse is medically dangerous, morally degrading and nationally destructive".

But not all medical men have found the fountainhead of so much bodily malady in the genitalia. William Arbuthnot Lane was a surgeon who had invented the repair of fractures by open operation using steel screws. He introduced the use of sterile caps, gowns, and masks. However, he himself had been plagued by constipation. He studied the problem. He came up with "chronic intestinal stasis" as due to the upright posture and improper feeding in early life resulting in infection of the gastro-intestinal contents. Lane saw degeneration of the heart, lungs, and kidneys, uterine disorder, thyrotoxicosis, high blood pressure, insanity and tuberculosis, as resulting from the accumulation of faecal matter.

His remedy was excision of the colon—colectomy. He removed colons in all kinds of cases where the cause of disease was obscure, from rheumatic fever in children to thyroid disease in adults. Cancer, gall bladder disease and bags under the eyes were added to the list of pathologies incident on stasis.

In Guy's Hospital, where Lane was surgeon, drums of liquid paraffin were imported to assist in the elimination of the evil waste products of the bodies of Lane's patients. Lane died in 1938 having lived to see his theory entirely discredited but, in the meantime, the colons of literally hundreds of human beings had been removed.

But Lane had been influenced by the Russian pathologist Ilya Metchnikov. He was the discoverer of phagocytosis. He found the source of innumerable bodily evils in the phagocytes.

We have seen other fashions come and go. In 1953 Robert W. Davis M.D. published *Health Saboteurs* in which he claimed that his forty years of medical practice had been studded with cases of deformities, diseases and death which could have been avoided by early

tonsillectomies. He described streptococci as arch-criminals who attack the infant in his cradle. Their beachhead for invasion was the tonsils.

Remember Walpole, in Shaw's *The Doctor's Dilemma*:

> "Ninety-five per cent of the human race suffer from chronic blood poisoning and die of it. It's as simple as ABC. Your nuciform sac is full of decaying matter—undigested food and waste products. Rank ptomaines. Now you take my advice, Ridgeon. Let me cut it out for you. You will be another man".

Walpole claimed to be one of the 5 per cent to have never had his own colon removed.

*Conclusion*

It is true that we do not have today the nuciform sac, intestinal stasis, excessive sexual activity, masturbation, phagocytosis. But we do have the degenerated disc, soft tissue injury, cervical spondylitis, muscle strain, tenosynovitis, adhesions, migraine, post-traumatic anxiety neurosis, gall stones, cholesterol and compensation neurosis.

We do not have clitoridectomies or colectomies but we do have spinal inter-body fusions, electro-convulsive therapy, tractions and manipulations. We have in our lifetime witnessed the rise and decline of leucotomies and lobotomies.

Liquid paraffin has passed into antiquity but we have Valium, Largactyl, Tryptonol, the amphetamines and barbiturates, and let us not forget the greatest medical conveyor of all—the diagnostic laboratory.

But today there is a difference. All these remedies and treatments bear the imprimatur of the National Health Scheme and in due course the Woodhouse scheme.

The wisdom of expelling lawyers from the medico-legal area can hardly be conceded by lawyers themselves and is not.

For myself, I think that the approach to blemishes in the law must be as Sir MacFarlane Burnet lays claim for the medical field. I quote from his article to which I have referred above:

> "To the practical problem of improving the quality and availability of medical care, we can reject immediately any pretension to provide a Utopian guide to some universally healthy and co-operative human community. Whatever is attempted must have the quality of Popper's Piecemeal Social Engineering where rectification of faults as they threaten to become intolerable is a basic social philosophy".

*Discussion*

DR. BURTON: Mr. Chairman, Mr. Marks has certainly given us a stimulating and informative address; he has certainly been provocative. I was most interested, as we all were, in his comments on some of the dubious aspects of the National Compensation Bill. This legislation will profoundly affect us all and from the point of view of the medical profession, I am grateful to Mr. Marks for the light he has shed on the ways in which doctors will be involved in the assessment of disabilities and of incapacity.

I thought there were times when Mr. Marks made his subject not so much "Trial by Doctor" but "Trial of Doctors" and I am not at all clear that either topic was involved in his diversion on sex education—but a welcome diversion it was!

It is true that it has become a very popular pastime these days to get stuck into the doctors; everybody is doing it and Mr. Marks has every right to join the club. I do think that this is really what he wants to do; I think he regards this as consistent with the objectivity and impartiality of Her Majesty's Counsel. It is a fact, however, that another well-known Queen's Counsel, namely, the Prime Minister of Australia, in addressing a meeting of unionists some weeks ago, saw fit to remark that health was too serious a subject to be left to the doctors, thereby reinforcing the already strong bonds of affection and esteem that exist between his Government and the majority of the medical profession in this country!

Mr. Marks quite properly, I thought, took some exception to comments in a similar vein made by our great Leader about the legal profession. But he cannot have it both ways. I thought it was a bit unfair of him to dredge up what was said in the 18th century and the 19th century. We all recall a person named Charles Dickens, and many of the remarks he made in his day about lawyers. These days, no reasonable person would regard Dicken's strictures as applicable to the practising members of the legal profession of our time—I hope!

As Hamlet may have said about circumcision—

> "There's a divinity that shapes our ends,
> Rough-hew them how we will."

This is still true. There are many people in modern times who seem to delight in making startling statements about the terrible things that doctors are doing to patients with their modern methods of treatment.

Mr. Marks mentioned Ivan Illich. I suppose we could start with the basic fact that the modern therapeutic armamentarian saves the lives of people by the millions and has lifted from mankind an incalculable burden of misery and suffering. And the price paid for this is iatrogenic

disease. That is not to say this should be regarded with complacency and that there should not be a continual critical scrutiny of the use of all drugs. Despite the constant clamour to the contrary, I am one of those who believes that this is well controlled and that the average doctor, in fact, uses drugs competently, carefully and conscientiously.

It is always misleading to quote figures. If I remember correctly, Mr. Marks quotes Illich as saying that 50 per cent of the adults in the United Kingdom and in the United States of America take something prescribed by a doctor in every 24 hours. So what? I could not care if every man, woman and child in this country took pills a dozen times a day, if, in the long term, this was of real benefit to them.

In practice, that is the job of the doctor. However, he must be sure to balance the benefits of any form of treatment against the disadvantages—in the case of drugs, against their side effects. The doctor is trained to make this kind of judgment. He has to do it himself; nobody else can. This involves the consideration of a variety of factors, few of which can be quantified, and that is why medicine is still an art.

On the matter of the proposed national compensation legislation, doctors, after all, are trained to diagnose and to evaluate disabilities. At the very least they can play a useful role in the assessment of incapacity. There is no doubt that doctors are now very greatly hampered in doing so by the present processes of the law, by the operation of the adversary system and by the concept of fault liability.

A doctor who appears as an expert witness could be and should be encouraged by every possible means to be impartial. What happens is that, all the time, he is under pressure to take sides. He has sworn to tell the whole truth and often enough he is prevented by counsel from doing anything of the sort. In these circumstances, most medical witnesses are in a strange arena and for many of them, it is an intimidating one. No wonder there is conflicting medical testimony; no wonder in the long term that less than justice is done.

I believe that doctors are trained to assess disability. They would do far better if they were left alone to do just that and not be interfered with by the legal profession or anybody else. If it is thought that doctors are not fitted to do this job, who can? I say it with great respect to a learned profession—certainly now the law.

SIR GEOFFREY NEWMAN-MORRIS: Mr. Chairman, I am honoured to follow that distinguished member of the legal profession, Dr. Arthur Burton, Bachelor of Laws, University of Melbourne! I am quite certain that he has presented a most excellent bilateral case that we could hope to hear tonight. I should also like to congratulate Mr. Marks on

his speech but, at the time, perhaps I may have been a little confused.

I should like to congratulate Mr. Marks, especially on his choice of the use of the English language. I thought it was superb. How he did this so well with, I hope, his tongue in his cheek half the time, I do not know. I was particularly taken with his use and development of the term "Iatrogenics" which, if my rather rare classical education could be brought forward some fifty years, I understand the first part to come from the Greek language and the second part to come from the Latin language.

I am sure, and I have had a fairly large experience, that the series of interesting letters that he read from a doctor in Canada, must have been listened to with delight by members of the legal profession here; it is the sort of thing from which they earn their living. He told us in some cases, even in 40 per cent of cases, that the doctors were wrong. I do not accept that figure. I have always believed and my belief has never been contradicted, that the legal profession, by the very nature of its practice, is wrong in 50 per cent of cases.

If I may get back to my confusion, I listened to Mr. Marks commenting on assessment. I have been concerned for some time on this aspect. Quite a lot of my professional income is concerned in this field of disability and assessment of the future. They are imponderable questions. Every letter I receive from a legal firm states in part—

"The plaintiff has complained of pain and shock".

My comment is that if I had an injury like that, I would have had pain at the time, but by its very definition, shock is a momentary condition and I have not seen a patient with it a year after. These are questions posed by the legal profession to the medical profession and I doubt really whether the legal profession expect the medical profession to answer them.

Mr. Marks referred to the subject of masturbation. The only reason I can see for bringing this subject into the discussion tonight is that I firmly believe now, as the result of this national compensation legislation being passed by the House of Representatives, that compensation will be provided for all those unfortunate people who have to rely on what I regard as an unusual method of obtaining sexual satisfaction!

I listened with interest to a description of complaints ascribed to masturbation in the 18th and 19th centuries. The only one that seemed to me to be omitted was a description of a condition usually believed in my school days when it was common for someone to come up to one of their fellows and say, "Do you know that people who masturbate have hair on the palms of their hands?", and I would have a

quick look. I realize that all the symptoms ascribed to this dire disease in those days were those which in recent medical journals have been ascribed to the habitual use of marijuana—except the growth of hair on the palms of the hands.

Much of the talk we have listened to tonight has been fascinating medical history. Probably the most interesting aspect to me is that Mr. Marks has produced a most magnificent argument why the bloody politicians should not become involved in health. Health is too serious a matter for politicians to handle.

DR. SPRINGTHORPE: I should like to congratulate Mr. Marks; he has made one the funniest addresses I have heard and I use that word "funniest" in all its categories. It was meant to be funny and sometimes it was not meant to be funny, but it was still funny.

I should like to make two comments on the general proposition that Mr. Marks has adumbrated. One is, how does he explain the continuing increase in the life expectancy of the population of Australia and of other civilized countries? Is this just a fluke; or is it because of the activities of the medical profession?

The second point I make is that while the medical profession is constantly changing, the legal profession remains the same.

MR. MARKS: It is interesting that the question was asked about the continuing expectancy of life. I am not a doctor and I do not know whether Illich is mad or whether he is very clever. But a lot of mad doctors say that he is very clever. Illich says that the doctors have not really been responsible for the continuing increase in the expectancy of life; he says that it is due to the changing environment.

In many areas the expectancy of life has not changed. It has been pointed out that in the past ten or twenty years—in the recent past—there has been no change in the expectancy of life. Sir MacFarlane Burnet's thesis, as I understand it, is that there is a lot of money wasted in research in endeavouring to save people from dying. Sir MacFarlane Burnet says that resources should not be put into research trying to stop a normal process, that is birth and death. I understand his thesis is for the medical profession to cease helping to increase the expectancy of life. So far as the legal profession is concerned, I am prepared to agree to anything to save further argument.

MR. JUSTICE SMITHERS: I imagine tonight that what Mr. Marks was doing should have been prefaced by a statement of the tremendous task that the medical profession is going to be asked to perform if this compensation scheme is ever introduced, because if I am correct—I have not had the benefit of interpretation of senior counsel in the

benefits of this proposed Act—it becomes the duty of a medical practitioner to give a certificate as to the extent, in terms of percentage, of partial or partial temporary incapacity. He will be expected to do that by reference to this cranky code which some American college or someone else has given of the definition of the "whole man".

There is no provision that the doctor has to be trained for this work. There are no guidelines to tell him to enquire what were the general activities of the particular person, what were the demands of his job and the thousand and one questions which are necessary in relation to anybody in finding out what in the particular case is the degree of incapacity caused by the injury. So when a person goes to the doctor and the doctor gives him a prescription and tells the patient to go home and bathe the injury three times a day in hot water etc. etc., the patient may say, "Can you please give me a certificate under the Compensation Act". The doctor may say, "Oh, yes, well, I suppose 20 per cent, is that reasonable?" Doctors will not get paid for this.

Fortunately under the proposed Act, doctors will be under no responsibility and they can go as wrong as they like and can never be sued, because it is fundamental to this particular Act that nobody can be sued for any wrongful act, deliberate or careless, whatever the breach of duty, for any personal injury caused to any person. That will comfort doctors.

I was struck by some of the peculiar consequences of this Act. There might be a situation in which a person would go to the doctor with some leg trouble and the doctor, in accordance with good medical practice, removed the leg. A fortnight later the patient gets a letter from the doctor in which he states: "Dear Sir, I am sorry to advise you, but due to an oversight on my part, I removed the wrong leg. If you will come into my rooms on Monday week, I will remove the other leg. Because of Medibank this, of course, will be free of charge to you. So far as I am concerned, because of the National Compensation Act, I have been relieved of all responsibility". The fact is that under the National Compensation Act nothing will be paid for pain and suffering, the general disabilities of getting around in a wheel chair and having to hobble to the toilet with the aid of some mechanical device. One can understand Mr. Whitlam's concern that lawyers should make nothing out of compensation cases!

The great thing that is wrong with the National Compensation Bill is, of course, that it destroys the duty of care, it abolishes it legally. If a child fell into a hole left by a contractor because no warning lights or a protective fence were provided, and that child suffered brain damage, the parents would not be able to sue the contractor. If the child was

under 18 years of age, as Mr. Marks said, under this gloriously capricious Act, that child would get nothing in respect of the years between when he fell into the hole until he reached 18 years of age. When he reached that age, he would get 85 per cent based on some idiotic computer scheme, according to some business about average weekly earnings. The fact that the child might have shown some capacity to be a great leader would be irrelevant.

These are matters which should be remembered when we are talking about this proposed National Compensation Act. Nobody would think it improper—if so indeed for myself I would fight it with every bone in my body—that adequate compensation should be paid to such persons and that the best that could be done should be done by way of social services for persons who suffer injury in circumstances in which they have no rights to recover.

We have reached the stage when we have now and have had for some hundreds of years, the general notion of justice that if a railway company, a tramway company or an electricity commission causes injuries by what is regarded as a failure to use reasonable care, one will receive not too much compensation but compensation measured by the standard of the law which is never allowed to be—the High Court is very firm about it—more than what is fair and reasonable in the circumstances.

It has always seemed to me that it is a mark of our civilization that when people are injured not through sheer accident but through a failure of others to take reasonable care such as not to protect the hole by lights or not to obey railway signals so that people are shattered as the result, that these people should get compensation which is fair and reasonable in the circumstances. That, according to Mr. Whitlam, is to be taken away because, for example, Mr. John Kearney sitting on my right, is likely to receive a fee for establishing that the railways were guilty of negligence in a particular case. I am staggered and believe we should all be staggered now.

The point so far about this argument between doctors and ourselves is quite wrong, if I may say so to Dr. Burton; because he should not imagine that a medical witness is any different from an engineer or a carpenter. Everyone present knows the great respect that I have for the medical profession, every member of it, but it does not mean that I do not want to ask them questions when they say something. I can cite three instances. I will not mention the names, although I could do so in each case.

I refer to a gentleman who is now dead and whom we all respected. He was well known for being critical of people who said they were sick. I recall a case in which he would not believe a par-

ticular person because he said that the man insisted that as the result of an accident, when he was on the road he had swallowed his false teeth. This doctor said it was impossible for him to have swallowed his teeth and then he regarded everything else that this person said as unreliable, not to be believed.

Personally, I thought it was a bit funny that the chap should have swallowed his teeth. However, he was my client and I was not prepared to say that it could not be done. It was by one of those curious accidents in which the way of litigation sometimes turns, that while this doctor was out in the passage of the court, a witness about whom I knew nothing, took the stand in the witness box and said in evidence that he came across the chap on the road and he was choking to death because he had swallowed his false teeth, so he put his fingers down his throat, got the teeth out, and the chap was then all right. The doctor duly got into the witness box and my junior, Mr. Kevin Anderson, later came into the court and heard me barracking the doctor a bit in terms of, "Of course, it couldn't be done; it was a silly thing; obviously the man couldn't be believed, etc., etc.,!" He wondered what I was doing because he had not heard what the previous witness had said.

Another doctor whom we all know—unfortunately he does not come to these meetings—he is a well-respected nerve physician and he gave evidence one day in a case in which I was,concerned. I met him in the club about six months ago and he said to me, "I remember you cross-examining me. You said to me 'you didn't like this particular patient, did you; somehow or other you had developed an antipathy towards him, hadn't you? And out of this antipathy, hadn't you rather been inclined to disbelieve what he had said to you?' " He reminded me of this; he did not mind telling me because I am now out of the business. He said to me, "I thought about that afterwards and it was probably quite correct; perhaps I had not given that chap a fair go." It is our job as lawyers to find those things out.

Only five months ago, I was sitting in Mr. Justice Connor's court. A well-respected surgeon came in and gave evidence. We all know him, and we all agree that he is a top class man in every respect. The person concerned in the case had a Colles' fracture. In this case, the doctor had not developed an antipathy towards the person but he had developed a sympathy towards him. I am no expert, but with this fracture a person can get along fairly well—at any rate after two years! That was the situation. But this doctor said that the man would not be able to use this hand again for any serious work. It was necessary to ask him a question. He was asked, "Well, doctor, do you think he could use his hand for driving a motor car and for changing

gears?" The reply was: "Oh, no, I don't think he could at all." Then a further question was asked: "Well, doctor, would you be surprised to know that he has been doing that for the past six months?" The doctor then replied, "Oh, well, that makes a bit of difference, doesn't it?"

This is the kind of situation for which lawyers are trained; it is their duty to investigate. Doctors are not investigators of facts of that kind; they are concerned with health and that is what we want them to be concerned with. Of course, fashions change with the medical profession. It is a pity they do not change a little more amongst the legal profession. We are open to persuasion about this. Remember, when members of the medical profession are in the witness box being asked questions, although this is the operation of the adversary system, we of the legal profession do not hate them. We merely wish to discover whether they have done the kind of mental research, which they have very little time to do, which is necessary to support the view and opinion which they have given.

So far as this proposed National Compensation Act is concerned, it strikes me as a bit revolutionary and the difficulty is this: Complaints are made about the adversary system. Lots of people complain that litigation in motor car accident cases does not come on until four years after the events and the witnesses have forgotten about them. It may be that there are ways of amending the system in some way, but not all of the cases take four years to resolve, some are dealt with much more expeditiously. Some cases take four years to resolve only that justice can be done.

Those who are supporting the abolition of the present system resent the fact that lawyers receive considerable fees in working out these cases. I have no doubt that the stories told are exaggerated. It is a difficult job. These people have to remember that for every case that is fought in the courts, fifty cases are settled on the basis of the one that is fought. We have to be on our guard at the moment, we are frustrated with this horrible legal profession which battens on the poor and takes such a great share of their compensation!

With this shallow view we destroy the processes of the law which have served us so well over several hundreds of years and which have, above all, continued to create those conditions of safety by reference to which we travel on trains, in motor cars, on trams, and can walk into buildings. Under this proposed Act if workmen climb scaffolding, the builders are relieved from any duty of care towards their workmen; the factory owners are relieved of any duty of care to their employees although it is hoped that they may be protected by some regulation.

MR. MARKS: At any time in history clever men have got together and they have always thought—they will always think—that they were cleverer than the people who have gone before them, that they have got all the answers. The great problem of today is that we believe that because we are here and that we know so much more than people did years ago, that we know what the answers are today. Yet one cannot get away from the fact that doctors do not know; they do what we all do. They take a set of facts and say that A causes B and everything about the situation makes it look as though it is so. The fact is, of course, that it may not be so.