compensation for incapacity

A Study of Law and Social Change in New Zealand and Australia

Geoffrey Palmer

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The research has been supported financially by the University of Iowa, College of Law, the University of Virginia, and the Internal Research Committee of the Victoria University of Wellington. I am grateful to them all. I am also grateful to the President and Fellows of Wolfson College, Oxford, for electing me to a Visiting Fellowship and providing me with facilities for uninterrupted writing in the Hilary Term of 1978.

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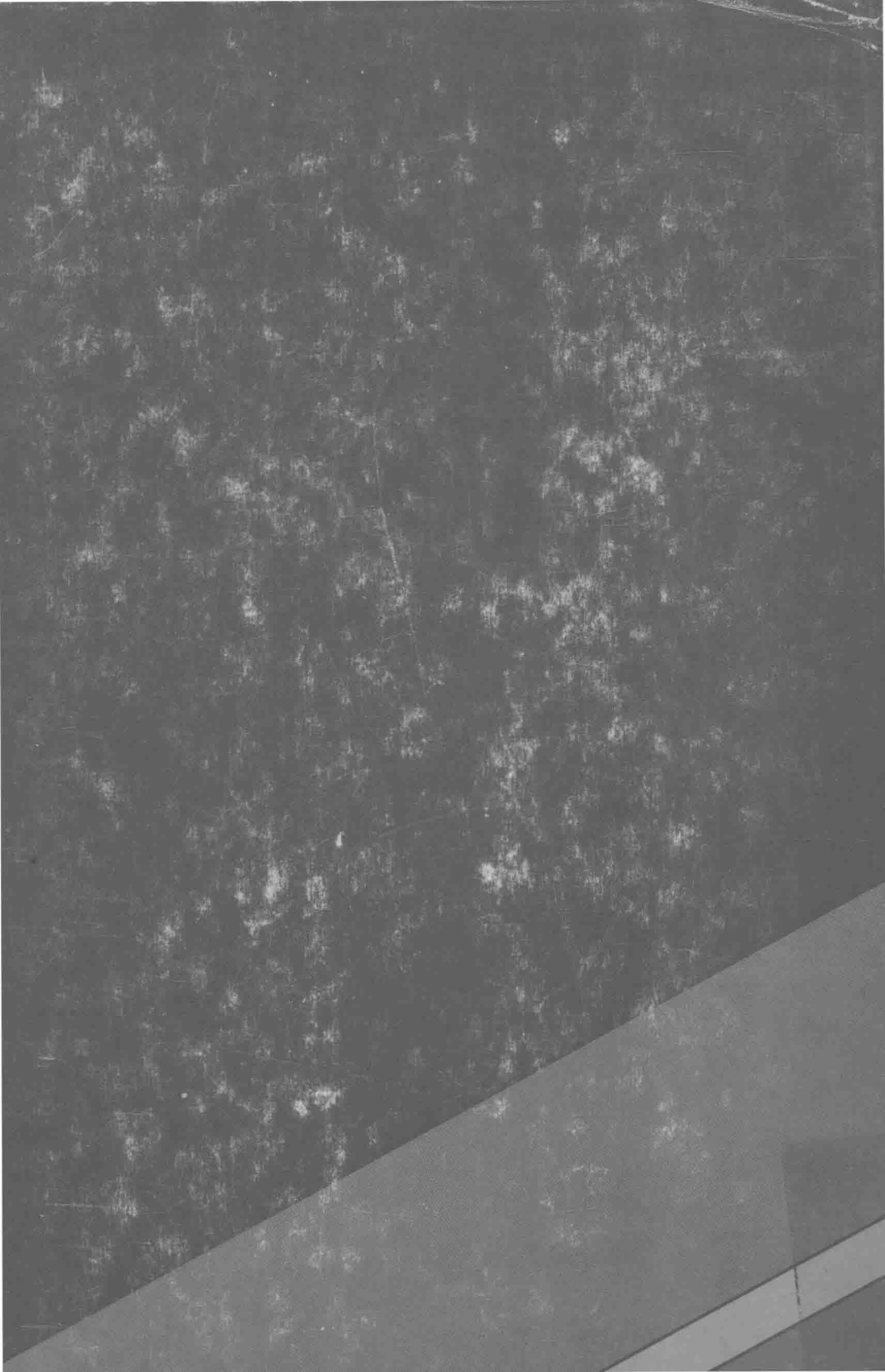

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PART ONE

The Problem in Context

I. PROLOGUE

This book is about the reform of the law for compensating incapacitated people, a topic that would make the title 'Accident Compensation' a misnomer on two counts. It is not accidents that are compensated but the people who are injured by them. And the topic is not confined to incapacity caused by accidental injury but extends to that which results from sickness and disease. The choice of title was dictated by New Zealand's Accident Compensation Act 1972, the most notable achievement of the reform movement analysed here. The Act provides for earnings-related compensation and other benefits for all victims of personal injury by accident. It removes the right to sue in the courts in respect of such injuries. The passage of the Act was described by the Editors of the *American Journal of Comparative Law* as 'an unparalleled event in our cultural history, the first casualty among the core legal institutions of the civilised world'.[1]

The topic requires detailed treatment of twin themes. First came the vision and determination of a few politicians who believed there was a better way to look after the victims of misfortune and who wanted to see that policies to that end were developed. Then came the practical and technical task of devising the policies and having them implemented. The interaction of politics and policy makes a colourful if somewhat blurred picture, the painting of which occupies the bulk of this book. The aim is to analyse how and why the changes occurred and to appraise the final result.

The father of the reform movement is the Rt. Hon. Sir Owen Woodhouse, a judge of the New Zealand Court of Appeal. He developed a theme already touched on by his friend Sir Richard Wild, who had dissented in a 1963 report on absolute liability. Sir Owen chaired the 1967 Royal Commission in New Zealand[2] which produced the Report leading to an Act of Parliament five years later.[3] It was also Sir Owen who chaired an Australian Inquiry which reported in July of 1974.[4] The Australian Report took the matter beyond personal injury by accident to deal with incapacity arising from sickness and congenital defect as well. Nothing less than a welfare revolution was proposed. It is not surprising, perhaps, that the Australians found the proposals a little difficult to digest and at the time of writing there is no immediate prospect that the Australian recommendations will be enacted. Some might say that discussion of what occurred in Australia could be omitted because no legislation reached the statute book. But the obstacles encountered in Australia, the changes in policy, and the attempt to deal with incapacity arising from sickness as well as accident, make the Australian story an

essential part of the Woodhouse saga. Failure to enact a policy can be as instructive as success.

The countries of Australia and New Zealand, which were the loci of the Woodhouse reform, have many similarities. Both were settled by the British and inherited English law. On the subject matter of the reform – the law of tort, workers' compensation, and social security – the patterns between the two countries had striking parallels. Many common values and attitudes can be found, but there are also vitally important differences between the two countries, particularly in the climate for reform.

The political and constitutional systems of Australia and New Zealand differ fundamentally. Since 1901 Australia has had a complex federal system with a written constitution. The powers given to the Parliament at Canberra are narrowly circumscribed. The bicameral legislature is organized to give state interests a heavy weighting. Each state has ten senators, although the populations they represent are by no means equal. The population of New South Wales is almost 5 million, but that of Tasmania is just over 400,000. New Zealand, on the other hand, has a unicameral legislature with almost no constitutional limitations upon its power. The contrast in political styles, at least at the times the reforms were being considered in each country, seemed dramatic. In New Zealand events moved slowly with subtlety, even delicacy. To borrow an analogy from literature, it was reform in the style of Jane Austen. The anatomy of the Australian reform was different. There, bold steps were taken at great speed in confusing circumstances. In Australia it was reform with the range and passion of the Dickens style.

The book will be of special interest to social scientists and lawyers, but it has been written with the general reader in mind. It assumes no special knowledge. The techniques by which public policies are altered do not belong exclusively to any one discipline. Thus the work does not employ any rigorous methodology, nor does it contain much by way of models or explanatory hypotheses.

The structure of the book reflects the problems of making the development of policy intelligible to those not familiar with the field. For the sake of clarity, a somewhat artificial division has been made between the processes of reform and an analysis of policy. Part One attempts to set the scene for the reform and to introduce to those who are not familiar with them, the systems of compensation which the reform supplanted. Parts Two and Three deal with the process of reform in New Zealand and Australia respectively. Part Four is a bridge between politics and policy. Part Five deals with selected policy issues and where appropriate discusses the performance of the Accident Compensation Act in New Zealand. Appendix I, which charts the changes of policy at the various stages in detail, may be useful to specialists and enlighten the general reader.

Reforming personal injury and welfare law requires an array of expert skills: lawyers need to analyse the legal doctrines and practice of tort law and the workers' compensation systems, as well as to draft legislation; statisticians and actuaries must assess the expense of existing systems

and estimate the cost of proposed reforms; public administrators must analyse the most effective organization and techniques for delivering benefits; medical people must devise ways of assessing degrees of incapacity; social workers provide insights into the strengths and weaknesses of various benefits. The list could continue – rehabilitation and safety issues call for a host of other skills. In the pages that follow, I will undoubtedly treat some of these disciplines in a way which people trained in them may not find congenial. For that I apologize. To cover the territory I am aware that I must often leave my own ground.

My first contact with the reforms came in 1969 when I was retained by the New Zealand Government to draft a White Paper on the 1967 Royal Commission Report.[5] I first determined to write the book when it became clear that the New Zealand Parliament would pass the Accident Compensation Act 1972. At that time I was teaching law at the University of Iowa in the United States but I was able to spend three months on research in New Zealand in 1972 during the time the legislation was moving through the final stages of the legislative process. The fruits of that work have appeared as articles in legal periodicals.[6]

When Sir Owen Woodhouse was asked to head the Inquiry in Australia he asked me to go there to become Principal Assistant to the inquiry. That inquiry was completed by July 1974; from then until the fall of the Australian Labor Government in November 1975 I was frequently in Australia as a consultant to the Australian Government which was endeavouring to pass a Bill based on the Australian Woodhouse Inquiry. In New Zealand I did some consulting work for the Accident Compensation Commission and in 1975 I was appointed by the Government as a member of the Committee on Compensation for Incapacity from Illness, which was to investigate the feasibility and desirability of extending accident compensation benefits in New Zealand to incapacity resulting from other causes. The Committee was disbanded, before it had accomplished anything, by the National Government elected in November 1975.

All these activities directed towards producing reform have delayed work on reporting how New Zealand came to pass its pioneering legislation in 1972. Meanwhile a great deal more has happened: the reform attempts in Australia, the performance of the New Zealand Act, and the move to extend earnings-related compensation to sickness.

The book spans developments of more than a decade. During that time the value of money changed a great deal. In New Zealand, for example, the Consumers' Price Index went up by 167 per cent in the decade ending 31 March 1978. All money values are stated as at the date under discussion. No adjustments have been made.

My increasing personal involvement in the process of reform has made it impossible to preserve the sort of scholarly detachment usually expected from those who chronicle important social changes. My point of view is that of a committed believer in the type of reform with which this book deals. It is the view of a policy-oriented lawyer who is interested in changing the law to meet new demands. The institutional context of any reform can be acquired only by personal experience, the process of generating policy should be more widely known than it