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SOCIAL ENGINEERING IN NEW ZEALAND AND THE UNITED STATES: A COMPARISON OF APPROACHES TO TORT REFORM*

by GEOFFREY W.R. PALMER†

Professor Geoffrey Palmer lectured at William Mitchell College of Law on November 19, 1977, during a day-long seminar devoted to Commonwealth law. His participation had been sought because of his eminence in the field of New Zealand compensation systems and his important advisory role in the drafting of accident compensation legislation for Australia. His lecture proved to be both entertaining and thought-provoking. Excerpts of it are presented here.

In this lecture, Professor Palmer voices his concern for the pattern of selective reform of compensation systems that has emerged in the United States. Not only has reform been piecemeal, but often it has been accomplished through the courts rather than through legislatures. By contrasting New Zealand’s approach to tort reform with the American approach, Professor Palmer demonstrates the desirability—and the political complexity—of reform that is thorough.

I.

In his classic treatise on the common law, Oliver Wendell Holmes remarked that “[t]he state might conceivably make itself a mutual insurance company against accidents, and distribute the burden of its citizens’ mishaps among all its members.” Holmes did not favor such a step. State interference was an evil,
and universal insurance could be better and more cheaply accomplished by private enterprise, in his view. Ninety-seven years after those views were published, many Americans could be found who would be disposed to agree with them.

Despite widespread support for the rhetoric of individual responsibility in the United States, the expectations of Americans concerning what their governments might do for them have changed dramatically in the last fifty years. If one examines what American governments actually do, it becomes apparent that a great deal more government intrusion is tolerated than inspection of the rhetoric would suggest. So strong have the pressures for more government intervention become that the courts have not been immune from them. The tension between the demand for government intervention and the traditional suspicion of government appears to have led to covert and indirect social engineering by the courts. The tendency shows up in cases involving compensation for personal injury.

For the victims of accidental injury, the common law system of tort has always been an important source of compensation. The system revolves around complicated columns of legal doctrine based on the concept of fault. A person who is negligent should pay damages to the person injured by the negligence. In negligence judgments of American courts prior to about 1910, a conscientious effort can be discerned to implement the axiom “no liability without fault.” It was too conscientious; many people who were badly hurt received no compensation. There are those who would argue that the development of the industrial might of America required such laws regulating liability in those days.

One result of holding to principle was the growth and development of workers' compensation statutes which allowed injured workers to recover limited benefits from their employers without the need to demonstrate negligence. With the development of mass use of the automobile, with negligence law as almost the sole means of compensating the victims of road accidents, the principles of negligence began to loosen up a little. Of course, with the prominent part played by the jury in negligence litigation, plaintiffs could always hope that sentiment and sympathy would carry them over any obstacles the formal law of negligence erected in their path. The judges became even bolder. In respect to liability for dangerous and defective products, they developed

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2. The idea sounds simple but for evidence that much law can grow up around it, see W. PROSSER, HANDBOOK OF THE LAW OF TORTS (4th ed. 1971).
liability which was not based on negligence at all. Led by the judges of California, courts throughout the United States adopted the law that manufacturers would be strictly liable for injuries resulting from their products.

All this looks frightfully bold to a lawyer from the British Commonwealth. We do not expect judges to go around, at this point in the history of the common law, inventing new and drastic remedies with profound social effects. The judges may be able to make some modest incremental changes, but restructuring the whole law of products liability would be an inappropriate exercise of the judicial power, we would tend to think. Unkind common lawyers, from where I come, might be disposed to suggest that the development of the common law within the United States has borrowed the techniques of constitutional litigation here, and that American courts, in common law, seem to be veering towards the legislative mode and away from the judicial mode of carrying on their business.

The Supreme Court of California provides abundant evidence to support my contention. Let us examine what the court did to the defence of contributory negligence. It was decided in England in 1809 that contributory negligence was a complete defence to an action for negligence. That is to say, where the plaintiff's injuries were caused partly by his own fault and partly by the negligence of the defendant, he could not recover from the defendant for them. The proposition was little doubted anywhere in the common law world for a hundred years. There were a number of exceptions to the rule, the most famous being that it did not operate where the defendant had the last opportunity to avoid harm.


4. For an account by a former British judge as to the appropriate scope of lawmaking, see Devlin, Judges and Lawmakers, 39 Mod. L. Rev. 1 (1976).


6. Apparently there were some exceptions. Georgia adopted a form of comparative negligence as early as 1855 and pure comparative negligence was adopted in Mississippi as early as 1919. See C. GREGORY, H. KALVEN & R. EPSTEIN, CASES AND MATERIALS ON TORTS 433 (3d ed. 1977).

7. See, e.g., Davies v. Mann, 152 Eng. Rep. 588 (Exch. 1841). The most remarkable application of the doctrine came in British Columbia Elec. Ry. v. Loach, [1916] 1 A.C. 719 (P.C. 1915) where the defendant was held liable, even though the plaintiff was contributorily negligent, because defendant had a last opportunity to avoid a collision except
Criticism has been directed for many years against the principal rule, since it means that a defendant who can show that a plaintiff has been partially to blame can avoid liability altogether. That, at least, was the theory. Juries often lessened the rigour of the legal rule where it seemed to them appropriate to do so. In some jurisdictions, including most of those in the British Commonwealth, it was replaced many years ago by comparative negligence statutes. Such legislation was passed in the United Kingdom in 1945. In the seventies, many state legislatures in America passed similar statutes. The same result was accomplished in California by judicial decision in 1975. The state legislature had made several prior attempts to change the rule, but without success. The decision of the court offers remarkably few reasons why comparative negligence was to be preferred to contributory negligence, and contains a rather dubious construction of the California Civil Code provision concerning negligence.

The Supreme Court of California has made many reformist forays into the doctrine of tort law, and few of them have brought any joy to the hearts of defendants. The products liability development has already been referred to. In 1968, the California court abolished the time-honoured distinctions of the common law between trespassers, licensees, and invitees as the means of deciding the duties of the occupiers of land to persons coming onto their property. Again, in the British Commonwealth, that

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for previous negligence of not keeping the train brakes in good order.
8. Law Reform (Contributory Negligence) Act, 1945, 8 & 9 Geo. 6, c. 28. This statute provides in part:
Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such an extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage . . . .

reform was made by statute.\textsuperscript{14}

To my admittedly un-American eye, the judicial reforming trend goes further. When dealing with traditional rules of tort law, upon which no explicit policy attack is made, the California courts tend to stretch the law. I hesitate to use the word "pervert." The aim appears to be to see that plaintiffs in personal injury cases get paid for serious losses they have sustained where the defendant sued has the money to pay. In some of these cases, to assert that the defendant was to blame, in the sense that he was at fault or that his conduct caused the harm, is not credible to people of ordinary common sense. Let me mention two recent decisions.

In one 1970 case, a father and his five-year-old son were staying at a motel in Palm Springs.\textsuperscript{15} The motel had a swimming pool. It was the off-season and the motel was not crowded. The father and son went for a swim. They were drowned under circumstances which could not be explained because there were no eyewitnesses. A California statute provided that, for swimming pools such as the one the motel had, "lifeguard service shall be provided or a sign shall be erected clearly indicating that such service is not provided." The evidence showed that there was no lifeguard service and that there was no warning sign. The Supreme Court of California was prepared to hold that the defendant had the burden of showing that the absence of the warning was not a cause of the deaths. A verdict for the defendants given by the jury was overturned, since the court held defendants had not met the burden. How any defendant could ever meet such a burden, the court did not explain. A lawyer from the British Commonwealth would regard that decision as nothing less than remarkable.

In a 1975 case, the Supreme Court of California was dealing with a defendant radio station which had sponsored a contest featuring a disc jockey.\textsuperscript{16} The disc jockey, the "Real Don Steele," was running a "Super Summer Spectacular" from a fire-engine red Buick automobile which he drove about the San Fernando Valley. The person who first approached him at each location was given an opportunity to win a small money prize by answering a simple question. Messages would be broadcast that "the Real


\textsuperscript{15} Haft v. Lone Palm Hotel, 3 Cal. 3d 756, 478 P.2d 465, 91 Cal. Rptr. 745 (1970) (in bank).

Don Steele is out driving...; could be in your neighborhood at any time and he's got bread to spread, so be on the lookout for him.” Two teenagers listening to the broadcast had failed to reach Steele at his prior location. When they heard his new location, they sped in two cars along the freeway in tandem at over eighty miles per hour, forcing the decedent’s car into a spin which caused it to overturn, killing him. Plaintiff, in a wrongful death action, secured a verdict from a jury against the radio station which the supreme court upheld, even though the California Court of Appeals had reversed on the ground that the radio station had no control or right of control over the drivers of cars on the highway. The supreme court was “not persuaded that the imposition of a duty here will lead to unwarranted extensions of liability.” It seems to me that theories of recovery against the State of California for allowing such youths to drive at all, or against their middle-class parents for allowing them to speed about in potent machinery, would be just as persuasive. Perhaps my skepticism is unfounded. In the peculiar environment of southern California, it may be that nothing is unforeseeable.

It looks to me as if the courts have begun to try to turn the tort system in the United States into a mutual insurance company against accidents. It is certainly difficult, if not impossible, to defend modern American tort law as a serious attempt to implement a system of recovery based on fault. In California, which in so many ways represents the direction in which the rest of Western civilisation will travel, the feeling seems to be that, where there is a serious loss, someone should be found who will pay for it. So far as losses from accidental injuries are concerned, I find the attitude acceptable. As a common lawyer, I find the means by which it is implemented distressing. In the end, I do not think that the aim can be accomplished through judicial initiatives by the courts. Certainly it cannot be achieved in a principled and orderly fashion by the sporadic method of common law adjudication.” Indeed, the only reason it is being attempted through the courts, I suspect, is that it is politically risky, not to say embarrassing, to pass legislation to pay money to people who are incapacitated by accident. It does not conform to the rhetoric of free enterprise and individual responsibility.

Many states have passed no-fault statutes to improve the...
plight of those injured on the roads. Some of those statutes remove part of the tort remedy in return for guaranteed benefits. California has passed no such statute. Perhaps part of the explanation of the need to bend the rules of tort resides in that fact. It may be that the California Supreme Court will find a way to implement a no-fault scheme by judicial fiat, although if that were done, I think the distinction between legislative and judicial responsibilities would break down altogether. I offer the heretical suggestion that social engineering in the United States might be more successful if the courts did not try to relieve the strain of outworn doctrines, but left the legislatures to take the burden. Change would take longer, but it might be more thoroughgoing when it came. Neither legislative nor judicial social engineering in America ever seems to reach fundamentals in the income-maintenance area. Everything seems to be a palliative. Let me introduce to you another way to skin the rabbit.

II.

New Zealand, a country on three main islands in the South Pacific, occupies the same area as the State of Colorado. It has three million people of predominantly British stock, although ten percent of the population is Polynesian. New Zealand has a unicameral legislature. Parliamentary elections must be held every three years, and a very high proportion of the electorate votes. There is no written constitution. New Zealand has cabinet government and very strong party discipline. That means the executive will get the legislation it wants through Parliament. Ministers will take the advice of their civil servants and get the approval of the government caucus. The legislation will come out the same way it went in, unless the government makes a decision to change it. It is extremely rare, almost unheard of, for a member of Parliament to vote against his party in the House of Representatives. These constitutional facts make New Zealand a country in which it is possible to make very big legislative changes easily, with no possibility that any court will hold them unconstitutional. I might add one more observation, one which many Americans find particularly unpalatable: New Zealanders like the government to do things for them; they expect it; they are not afraid of it.

In 1967 a Royal Commission, set up to consider the state of the workers' compensation law in New Zealand, reported. It recommended abolition not only of workers' compensation but also complete removal of the common law action for negligence for personal injury. Twenty-four hour-a-day coverage for all accidents for everyone was the recommendation.

The fundamental principle adopted by the Royal Commission was articulated in this way:

[I]n the national interest, and as a matter of national obligation, the community must protect all citizens (including the self-employed) and the housewives who sustain them from the burden of sudden individual losses when their ability to contribute to the general welfare by their work has been interrupted by physical incapacity. . . .

There was to be a comprehensive and integrated approach to personal injury. Benefits were to be earnings-related. They were to be free of any means test. They were to be paid without proof of fault. The only restriction was that compensation was not to be paid for deliberately self-inflicted injuries. Such a wide-ranging plan obviously raised the question of the relationship of the new accident plan to the rest of the social welfare income-maintenance program in New Zealand. If incapacity arising from injury became the responsibility of the community, why not sickness, unemployment, and all the rest on the same basis? The Royal Commission answered that conundrum in this way:

We are able to understand the logic of the argument, but the proposal we have put forward is far-reaching and is designed to remedy a situation which at present is the subject of attention by unrelated processes which produce inconsistent and inadequate results. Moreover, there is a need for more statistical information in the area of sickness and disease before firm decisions could be taken as to the cost of a scheme which would embrace incapacities arising from these causes.

This report of the Royal Commission on Compensation for Personal Injury—known as the Woodhouse Report after its chairman Sir Owen Woodhouse—was presented in 1967 to a National Government, the conservatives. Not surprisingly, the government

19. See generally ROYAL COMM'N OF INQUIRY, COMPENSATION FOR PERSONAL INJURY IN NEW ZEALAND (1967).
20. Id. para. 55.
21. Id. para. 290(b).
had some difficulty in digesting a report with such wide-ranging ramifications.

In 1972 the New Zealand Parliament enacted the Accident Compensation Act. At that time the Act covered all those injured in motor accidents and all those in employment, however injured. In other words, it excluded only nonearners who did not suffer injury on the road. The Labour Government came to office in 1972 pledged to extend the Act to all nonearners. Extension was accomplished by means of amending acts in 1973.

On 1 April 1974, the accident compensation scheme started to work. It is administered by an independent body, the Accident Compensation Commission. The scheme has proceeded without much public attention. It runs fairly smoothly and has done so since its inception, with few signs of public dissatisfaction. The common law claim for damages for personal injury is dead. So is workers' compensation. The new scheme, it was estimated, would cost no more than the old fragmented and uncoordinated remedies. Three years of operation of the new scheme has justified that prediction.

While consideration of the Woodhouse Report's recommendation was still continuing, the government established another Royal Commission, this one on social security. In 1972, the very year when a modified Woodhouse scheme finally reached the statute book as the Accident Compensation Act, the Royal Commission on Social Security reported. These Royal Commissioners did not find themselves attracted to the wide-ranging changes recommended by the Woodhouse Report. The benefits for the accident scheme were earnings-related. They were paid free of any means test. That approach clashed with a long tradition of welfare benefits in New Zealand. Old-age pensions had

23. Compensation for earners is based on 80% of earnings up to a maximum of $15,600 per year, a figure which includes the entire earnings of a very large proportion of earners in New Zealand. Earners may receive lump-sum benefits, too.
The amendments allow nonearners to claim under a supplementary scheme which pays lump sums of up to $17,000 for loss of bodily function, pain and suffering, and loss of amenities, as well as medical and rehabilitation expenses. The nonearners do not receive a periodic payment as the 1967 Woodhouse Report had recommended they should, but they do receive lump sums.
26. See generally ROYAL COMM'N OF INQUIRY, SOCIAL SECURITY IN NEW ZEALAND (1972).
been introduced in 1898. The tradition called for flat-rate benefits to be paid to those who had no other assets or income on which to fall back. The Royal Commission on Social Security said that it did not detect any widespread desire for radical change. The tradition called for flat-rate benefits to be paid to those who had no other assets or income on which to fall back. The Royal Commission on Social Security said that it did not detect any widespread desire for radical change. It wanted the continuation of the mixture of selective and universal benefits which characterized the New Zealand system.

The Royal Commission was opposed to use of earnings-related benefits across the board in the social security system. There was no strong public demand for earnings-related schemes; the cost of providing them would be far too high. Those who would stand to benefit most would be those most able to provide for themselves. People providing for themselves should not be compelled to be in a compulsory system, reasoned the Commissioners. People should be free to spend their income as they wish, without having to contribute to the compulsory scheme. The exception recommended was short-term sickness compensation, which was justified on the grounds that sickness was usually of short duration and private provision for it was not usually made.

The Royal Commission on Social Security also investigated the position of the aged in some detail. At that time, social security provided two types of income-maintenance programs for the aged. Under one program, income-tested age benefits were payable from the age of sixty. Under a second program, universal superannuation benefits (pensions) were payable at the age of sixty-five, free of all income tests. Universal superannuation was subject to taxation. There were residential qualifications for both benefits. Both benefit rates were brought into parity in 1960 with some differences for married couples.

The Royal Commission recommended the retention of both benefits with the same age qualifications and other conditions that existed at the time of its report. In particular, the Commission was opposed to universal benefits for all at the age of sixty. This was despite the earlier opinion on the matter which had been

27. See id. 64.
28. The two main universal benefits were the family benefit, which the Commission recommended be doubled to three dollars per week per child, and universal superannuation, a flat-rate benefit paid at age 65 to everyone. The selective benefits were for sickness, invalids, widows, unemployment, and some other minor categories.
29. Sickness, it was said, often strikes during periods of higher earnings and higher responsibilities. Because the duration of the incapacity is likely to be short, the earner should not have to change his way of life to the extent that would be justifiable in the case of permanent disability. Although most of the recommendations of the Royal Commission on Social Security were adopted, nothing was done about the earnings-related sickness benefit.
expressed in New Zealand in the 1930's, which the Commission summarized in this way:  

The views expressed in the 1930s (particularly those in the 1938 Parliamentary Select Committee) make it reasonably clear that the Government envisaged that the superannuation benefit would eventually be given at age 60 without a means test. In effect, it would replace the selective age benefit. There seem to have been two main arguments. Probably the most important was that at a certain age people should gain rights to benefit by virtue of their past contributions to tax revenue and production irrespective of their means. But in addition, the strong opposition to traditional forms of means tests led to the view that need for financial help could be assumed from the fact of age.

There had been insufficient money to do it in the 1930's. The approach was rejected by the Royal Commission in 1972 because it was thought the two benefits had somewhat different aims: the one in response to need, the other as a reward to those who had worked and served in the community for a long time. It would be hard to increase the level of benefit if it were a universal one, since the cost of doing so would be higher than under the dual system.

Whatever the quality of its analysis, the Royal Commission turned out to be a poor prophet. A little more than four years later, exactly what it had recommended against reached the statute books. How it got there is a story rivalling accident compensation in its fascination.

For some years, the Labour Party had been floating ideas for an improved superannuation scheme. In 1972 the party formulated a detailed policy which was a prominent plank in the party's election platform that year. The proposals owed something to the earlier Woodhouse idea: the benefits under the proposed scheme were to be earnings-related. The scheme was occupationally based and contributory; there was no provision for coverage of those who had not been members of the work force. Contributions were to be made by employers and employees. The key idea was to provide superannuation in a form which would allow the employee to change his job without losing his superan-

nuation rights. Benefits were to be protected against inflation. All contributions were to be kept in a special fund, as a source of investment capital in socially significant areas of the economy. The prime emphasis in the pre-election publicity was on the social aspects of superannuation payments in assisting old people to enjoy a higher standard of living.

On being elected the government in November 1972, Labour took steps to formulate legislation to implement its superannuation policy. The first step was the establishment of a committee of officials, almost always the key people in setting the details of legislative policy in New Zealand. The original proposals underwent some important changes in the lengthy gestation period before a bill was introduced in October 1973. Rather early in the policy formulation process it was decided to abandon the possibility of implementing Labour's 1938 policy of building up the level of the universal superannuation benefit as a way to assist the aged. In the end, a two-tier system was chosen. The existing flat-rate universal superannuation was to remain at the first tier and the new contributory superannuation scheme placed on top. This formulation finally received the royal assent on 26 August 1974 after it had been stoutly resisted in all its stages by the National Opposition.

Labour's two-tier scheme had obvious advantages. It did not increase ordinary taxation. All the working population would be provided with increased income to support them in old age. The accumulation of those rights would not be lost by a person changing jobs throughout his life. The amount of a benefit in the case of a person who had worked forty years would reflect his earnings and would accordingly ensure that the drop in the standard of living upon retirement was not too drastic.

The scheme was also susceptible to some serious criticism. It would be many years before full annuities would have accumulated and begun to be paid. Indeed, it would be well into the next century. The contributions, on the other hand, would begin immediately. Nonearners were not included and that fact caused resentment among the housewives and women's groups. A good deal of administrative difficulty was involved: employers had to make deductions and pay them to the fund. The massive size to which the fund would eventually grow created much political debate. The National Opposition said that the fund would be-

32. See note 30 supra and accompanying text.
come an economic octopus which would strangle free enterprise. Labour said it would be a new source of money for beneficent capital investment. From a political point of view, the Labour scheme was hard to sell because it was complicated.

The whole superannuation issue had turned into a monumental political battle. The National Opposition had opposed it at every opportunity, attracting great amounts of publicity. National had announced in March 1974, well before Labour’s bill was passed, that National proposed to devise an alternative policy. The numerous representations made to the Parliamentary Select Committee on Labour’s bill had given National Members of Parliament plenty of political ammunition and some insights as to what sort of policy to formulate. National promised to repeal the new act if it became the government. At the 1975 general election, National beat Labour, and its single most important positive policy was superannuation.

The scheme advanced by the National Party was the essence of simplicity. 34 Ironically, the National scheme was virtually the same as the 1938 Labour policy of replacing the social security age benefit with a broad superannuation scheme. 35 A married couple of sixty years of age or over would receive eighty percent of the average weekly wage in the community; a single person would receive sixty percent of the married rate. The benefit was to be paid in equal amounts to each partner in the marriage. Benefits were to be subject to income tax.

Whether National would have devised any superannuation policy at all in 1975, had it not been for Labour’s legislation, must remain a moot point. But as an exercise in how to make policy on the rebound, National’s effort resembled something approaching an art form. The feat was all the more amazing, since during

34. The first two paragraphs of the policy show how easy it was to understand:

The next National Government will abolish the present New Zealand Superannuation Scheme and replace it with a pay-as-you-go, flat-rate superannuation financed out of ordinary government revenue.

The National Superannuation Scheme will pay retirement pensions to all New Zealand residents of ten years standing who are aged 60 years or more. The scheme will replace the present age benefit and superannuation.

Benefits under the new scheme will be available as of right and will not be subject to any means test or income test and will provide substantially higher cash-in-hand payments to those over 60 who are presently receiving State benefits.

NEW ZEALAND NATIONAL PARTY, A NATIONAL PARTY POLICY STATEMENT: SUPERANNUATION 1 (June 24, 1975).

35. See note 30 supra and accompanying text.
the election campaign National stressed the poor state of the economy. Yet on the National Party's own figures, spending on welfare cash benefits was to be increased by thirty-five percent as the result of the superannuation proposals and expenditure on the aged would go up by almost fifty-eight percent.

National's scheme was simple to understand in contrast to Labour's, which was complex. National's scheme paid benefits quickly, in contrast to Labour's, which would delay them. National's scheme was aimed at helping the aged and nothing else, whereas Labour's scheme suffered from a confusing duality of purpose. That is not to say that National's was the best policy, although it might have been. It was certainly the easiest to sell. On any view of the matter, the new superannuation scheme amounted to a massive injection of money into the hands of the aged. The scheme was implemented rapidly after the election. Payments began early in 1977.

So New Zealand now has three basic income-maintenance systems. For all victims of injury, accident compensation benefits are paid. These are earnings-related for those with earnings. They are paid free of any means test. Those couples who survive to the age of sixty receive eighty percent of the average weekly earnings of the community free of any means test. The benefits of both accident compensation and national superannuation are subject to tax. For the rest—the sick, the invalids, the solo parents, and the unemployed—flat-rate benefits are paid subject to an income test. The rate of those benefits is significantly lower than those of national superannuation.

In the New Zealand government estimates of expenditure in the year ending 31 March 1978, money for income maintenance took up thirty percent of government expenditure. The total outlay for income maintenance was estimated at $1493.5 million. National had said that its superannuation scheme would cost $275 million per annum in new money. The total cost estimated for 1978 was $930 million before the taxation clawback. By comparison, the accident compensation scheme's estimated cost for the same year was about $100 million. Accidental injury forms a relatively small part of the income-maintenance problem.

37. The following table from the Estimates of Expenditure for the Government of New Zealand for the year ending 31 March 1978 shows the allocation of dollars to be spent on income maintenance.

http://open.mitchellhamline.edu/wmlr/vol4/iss2/2

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Prior to 1972, the social security flat-rate, income-tested system had been the foundation of the income-maintenance system in New Zealand. For the fortunate few, there were common law damages, and for those injured at work there was workers’ compensation. In 1972 the comprehensive injury scheme was enacted. In 1976 the new superannuation scheme was passed. Within five years the basic pattern of New Zealand’s income-maintenance program had been turned on its ear.

It does not require a great prescience to discern what the main welfare issue in the 1978 election will be. The cry will be to bring the sick and the invalids into parity with the injured and the old. To bring the whole of the income-maintenance system in New Zealand into line, it is likely to cost even more money. It will need to be done in conjunction with the taxation system. For too long, social welfare benefits in New Zealand have been considered in isolation from the general policies of taxation. It is now time to bring them together. Making accident compensation payments and national superannuation benefits taxable is a step in the right direction. Properly employed, the graduated income tax can serve the function of a means test more efficiently and with less invasion of individual dignity and privacy than the traditional tests.

The idea that income-maintenance benefits should be earnings-related is not one that has attracted widespread support in social welfare circles hitherto. The case was put in the New Zealand Woodhouse Report this way:

The losses of individuals vary greatly and so do their continuing commitments. A fair part of their different losses and a fair part of their sudden problems will not be relieved by a system which ignores lost earnings in favour of a general average of assistance.

<table>
<thead>
<tr>
<th>Expenditure on Income Maintenance in New Zealand</th>
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<tbody>
<tr>
<td>National Superannuation</td>
</tr>
<tr>
<td>Social Security Benefits: widows, sickness, invalids, domestic purposes, family benefit, unemployment</td>
</tr>
<tr>
<td>War Pensions</td>
</tr>
<tr>
<td>Accident Compensation</td>
</tr>
<tr>
<td>TOTAL</td>
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</tbody>
</table>

The only way in which a comprehensive system of compensation could operate equitably is by linking benefits to earning capacity and by taking into account permanent physical disability.

Implicit in that idea is the view that everyone lives up to their income, whatever it is. For the great proportion of earners that is probably true, especially in New Zealand, where taxation rates are high and earnings occur within a relatively narrow band. The approach taken in the superannuation scheme, using community average earnings rather than the individual’s actual earnings, can be defended on the basis that the community’s responsibility to the aged is a different one than to those in their working years who are suddenly incapacitated.

In any event, the approach to income maintenance now being adopted in New Zealand makes it clear that the welfare state is for everyone. The schemes discussed take welfare into middle classes. To that extent, they look a little like social insurance. Most people in the community pay taxes. Everyone is eligible for the benefits. Those in high tax brackets feel they have a real stake in the programmes.

III.

You may be wondering what connection my remarks on American tort law at the beginning have to the development of income maintenance in New Zealand. In these brief concluding remarks, I hope the relationship will become evident.

Reform of the law of torts has profound implications for the pattern of social welfare. It is not feasible to abolish the common law, even for the limited number of people who have access to it, unless what is offered in substitution gives roughly comparable benefits. The removal of the common law begins a reform movement which threatens the capture of the entire income-maintenance system. If all people who suffer accidental personal injury secure earnings-related benefits free of any means test from a state organized as a mutual insurance company, the pattern of all forms of income maintenance must be considered. It will become increasingly difficult to defend a multitude of mixed systems offering different benefits and hedged around with different qualifying conditions. The person who loses a leg from cancer must be treated on a basis comparable to the person who loses a leg in a car crash.

The irrationality and confusion resulting from the mixed systems within the United States has caused President Carter to
propose a massive change to the welfare system. The federal pro-
grammes in the United States exhibit different standards, lack a
common definition of need, and apply different procedures for
assessing income. As the official announcement of the new pro-
gramme observed, "[t]he complexity heightens the chance of
fraud, abuse and error, increases administrative costs, and bewil-
ders caseworker and recipient alike." In my view, however, the
complexity of the new proposals will make them incomprehen-
sible to those they are designed to help. Much bolder initiatives
will be required to rescue American income maintenance from its
fragmented character, such a fertile mother of social injustices.

My impatience with American initiatives to implement limited
no-fault insurance stems from the failure of those proposals to
address the income-maintenance problem as a whole. These
schemes threaten to add to an already confused and overly com-
plex picture. It is time for Americans to decide what they are
trying to do in the income-maintenance area and do it as simply
as possible.

To be sure, a pattern of social engineering which can work in
New Zealand will not function in the United States. The climate
in the United States is not conducive to large-scale social engi-
neering. The reformer exhausts himself persuading the rat to sniff
the cheese; actually catching the rat seems an impossible dream.
So it is not attempted. I have heard from my American friends
the multitude of reasons why big changes cannot or should not
be contemplated. For myself, I think you could do a little better.
You are very wealthy. Why not spend a little more on people?
