

Scanned copy of submission

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To: National Workers Compensation  
And OHS Inquiry  
PO Box 80  
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Dear Mr Plunkett and Commissioners,

This submission is in addition to the earlier submission of the "Workers Compensation Support Network".

I am writing to send the article about Medical Tribunals of the workers Compensation office that explains how unjust is the Medical Tribunals system of hearing some injured workers claims. (" Medical Tribunals- a lawyers nightmare" - The Medical Journal of Australia Nov. 15; 1969). But the article is still relevant to-day. Please see the marked section on page 1023 of the article.

The said section shows how unjust the Medical Tribunal system really is. The article says, " This is not unlike a Kafka-like nightmare of a CRIMINAL TRIAL WITHOUT PROSECUTOR OR COURT, IN WHICH THE ACCUSED HAS TO PROVE HIS INNOCENCE OF A CRIME HE MAY NOT HAVE COMMITTED." Further, when the workers Compensation office fails to apply their "Statutory Claims Procedures" and fail to inform the injured worker about others contradictions to what the injured worker says about work performed or reports of adverse effects , - this denial of Natural Justice would further unfairly prejudice genuine work injury cases.

In or about 1992 The ELECTORAL AND ADMINISTRATIVE REVIEW COMMISSION of Queensland recommended the disbanding of the Medical Tribunals of the workers compensation office because the system is unfair and unjust. The Courier Mail published an article titled "Thousands of injured workers suffer injustice", or words to this effect. The article was about the unjust system of Medical Tribunals of the workers compensation office.

More articles are expected to appear elsewhere. We would hope that the Productivity Commission does not miss this opportunity to speak about the injustice of the medical tribunals of the workers compensation office. Injured workers have lost not only compensation, Some of their families break-up, there are suicidal effects etc, Refer to articles in West Australia about effects on injured workers unjustly denied compensation. The article is attached, referred to above.

Please advise of the outcome of this addition.

Yours Sincerely;

Muriel V Dekker  
(Founder)



Injustice To Injured workers  
Damages Society

ship training for general practice, that is, training by a senior general practitioner in the community. This may well be an advantage to the future general practitioner. There would appear to be no possibility of implementing the Royal Australian College of General Practitioners' Five Year Graduate Training Plan' for more than a minority of trainee general practitioners, as the first two years of this plan include a two-year rotating internship in hospitals to gain experience in medicine, surgery, paediatrics, obstetrics, gynaecology and mental health. The most important problem is the difficulty in obtaining hospital

<sup>1</sup>Australian College of General Practitioners (1967), "Vocational Training for General Practice".

experience in paediatrics, obstetrics and gynaecology. Although these fields are not discussed in this survey, there would probably be similar difficulties in gaining experience in dermatology, oto-rhino-laryngology, ophthalmology and anaesthetics.

#### REFERENCES

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#### Points of View

### MEDICAL TRIBUNALS - A LAWYER'S NIGHTMARE

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THERE is a growing tendency, particularly in Australia, to establish medical tribunals whose sole function is to determine legal rights, in the hope-short lived, as experience has shown-that problems which appear essentially "medical" will be dealt with more expeditiously and with greater insight than by the more customary judicial process. Workers' compensation and repatriation spring to mind as the more glaring instances in which doctors have assumed judicial functions for which they are ill equipped, and in which they not infrequently do less than justice. It is therefore somewhat surprising that the doctor's transition from the traditional role of expert witness to that of judge has not met with more vocal protest from the medical profession, which must surely be somewhat uneasy at having a judicial function thrust upon it for which it is clearly unqualified, from the legal profession, whose hitherto exclusive preserve has been invaded, and, last but not least, from the victim and his trade union, whose rights to pensions, compensation and other statutory remedies provided by social legislation are being subjected to benevolent incompetence. Worse, the decision or recommendation from such tribunals is frequently arrived at without legal guidance in cases in which the subject may be unrepresented; or else, whatever legal submission is made is found to be beyond the comprehension of medical scientists who have no legal training. In many instances, the outcome of a hearing

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may depend on conflicting testimony-or the respective credibility of witnesses-which, it is submitted, only those trained and experienced in the administration of the law are able to sift through with any degree of confidence that they are able to arrive at a just conclusion.

To add insult to injury, these decisions are usually unappellable and pass into history as monuments to a system in urgent need of reform.

The writer proposes to restrict himself to the Queensland workers' compensation experience, in order to illustrate the most extreme example of social legislation being frustrated by a "judicial" process grossly inadequate to deal with it within the aim and purpose of the legislation.

Pursuant to recent amendments to the *Workers' Compensation Act* of Queensland, a whole series of expert medical tribunals have been created, designed to handle all the ills that flesh is heir to arising out of or in the course of employment; indeed, no specialty is unrepresented. This has had the effect of effectively removing the earlier judicial appeal structure provided for by the earlier *Workers' Compensation Acts* which had allowed a worker whose compensation claim had been rejected at first instance to appeal to the special judicial machinery created for that purpose. Henceforth, all workers' compensation claims, if not admitted at first instance, come before a panel of medical specialists whose recommendation to accept or reject the claim is final and unappellable. No legal member is coopted on to this panel, and this compels a group of medical consultants to grapple manfully with

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insignificantly, to the totality of the harm suffered. If a man's death has been hastened, if only by one minute, by the factum of his employment, his widow is entitled to compensation as of right, and it is no answer, as a doctor once told me, that work is "a permanent feature of modern life. Again, the widow of the workman who dies of a ruptured ulcer may be entitled to compensation notwithstanding that the ulcer was unconnected with the employment, if the condition became inoperable owing say, to, an underlying pneumonia, which in turn may have been caused, aggravated or accelerated by his employment. Again, it is no answer to say that the man would have died in any case. The true test is whether he would have died at that moment in time if he had not been afflicted with the employment injury or disease. So rigid is the insistence of the law on attributing legal responsibility to causally relevant employment factors that the right to compensation of an injured workman may continue, notwithstanding that he would have, in any event, reached total disablement from non-employment factors. Thus, a worker who may have suffered a compensable injury resulting in total disablement for work will continue to be entitled to receive compensation, despite supervening events which in themselves are totally disabling and may be unconnected with the employment injury (for example, a man who suffers a compensable coronary occlusion and subsequently suffers a non-compensable stroke). The question is not "when would this man have become totally disabled if he had not been injured?"; the relevant question is "would the injured worker, had there been no supervening nonemployment injury, still be incapacitated by the effects of his employment injury operating solely or as a contributory factor?". Again, let us suppose that a man suffers a below-knee amputation as a result of the negligence of another. Before the claim comes to trial, he suffers a total amputation of the same limb for reasons unconnected with the original injury. He is still entitled to compensation for the notional loss of the below-knee amputation at both common law and workers' compensation (see per Jordan Salisbury v. Australian Iron and Steel Ltd, 44 S.R. (N.S.W.) 157; Baker v. Willoughby (1969) 1 Q.B. 38).

Furthermore, there is a long line of judicial authority which holds that the onus of establishing that the employment injury has ceased to operate as a cause of the present incapacity is on the employer. In Queensland, it must be remembered, the employer is not represented before medical tribunals; neither, in practice, is any oral medical testimony heard, so that it falls to the worker's lot to prove affirmatively what, before a judicial tribunal, would be regarded as a presumption in his favour. In the result, what may be a complex medico-legal question may thus be resolved contrary to legal presumptions, solely and exclusively by the particular view held by a majority of a medical panel which happens to be sitting that day. This is not unlike a Kafka-like nightmare of a criminal trial without court and without prosecutor, in which the accused has to prove his innocence of a crime he may not have committed.

In truth doctors would appear as mystified by metaphysics as lawyers are by the electronic grams and graphs to which the body is subjected. The judicial process is likely to become a

mockery when the one seeks to usurp the function of the other, and the legislative process is least likely to be frustrated when judicial officers, trained in law, decide legal issues on facts properly presented by expert medical testimony and tested by skilled cross examination. If nothing else, it would do away with the anomaly of having similar fact situations producing opposite results depending on whether the case is heard, say, in Victoria, where the judicial trial process prevails, or in Queensland, where the evidence is looked for solely on the examination couch. It is surely ironic that if in Queensland the milkman and the postman both suffer a fatal occlusion on their rounds, the latter's widow is likely to receive compensation by trial process under the *Commonwealth Employees' Compensation Act*, whilst the odds are that the former will be left lamenting despite identical substantive provisions, after being subjected to trial by doctors who tend to disregard strenuous employment as aggravating or accelerating the development of progressive heart disease, and to dissociate the disabling phase of such illness from factors connected with that employment.

#### CONCLUSION

It is submitted, first, that the Queensland experience of trial by doctors has shown that, however imperfect the present system of judicial process, doctors by the very nature of their training and experience are even less well equipped to arbitrate on vested rights than lawyers.

Secondly, when so little is known about the etiology of so many diseases, it is clearly wrong to place the onus on an injured worker to rebut presumptions designed to operate in his favour and to pit him against a gaggle of doctors (or whatever the collective noun may be). To make the ultimate result wholly unappealable seems less than fair in the circumstances.

Workers' compensation is remedial legislation designed to protect the workman from the harmful effects of employment; it was not contemplated that he should have to face the added hazards of the medical profession dabbling with the law. It is true, of course, that all of us must work. But just as the wear and tear on machinery becomes part of overhead and is relieved by tax concessions, so the wear and tear of the human frame by work is to be compensated by legislation designed for that purpose.

It is submitted that doctors should resist the temptation to participate in the judicial charade currently erected in Queensland to arbitrate on compensation claims unless at the very least there is one legally qualified member on their panel to whom they should defer on all matters of evidence and law; in addition, they should insist, as the price of their participation, that they should not be allowed to play God and to have their decisions made the subject of review at the request of either party. It is surely ironic that judicial infallibility is confined to medical tribunals least qualified to handle legal issues.

If the writer has spoken in a somewhat strong and intemperate language, it is because, having spent many years as counsel before workers' compensation tribunals under several different Acts, he has become convinced that the Queensland attempt to oust the courts from deliberating on compensation claims has produced a great injustice.

is for this reason that he urges that the medical profession should not unwittingly lend themselves as instruments designed to defeat the purpose for which medical legislation was enacted.

It is a pity that in many States medico-legal societies have become defunct. They would appear to be the ideal meeting ground for the fruitful exchange of ideas between the two professions for the mutual benefit of both.

Finally may I, with tongue in cheek, refer the reader to the delightful essay by Stephen Leacock on "How to be a Doctor"?

Just think of it. A hundred years ago there were no bacilli, no ptomaine poisoning, no diphtheria, and no appendicitis. Rabies was but little known, and only imperfectly developed. All of these things we owe to medical science. Even such things as psoriasis and parotitis and trypanosomiasis, which are now household names, were known only to the few, and were quite beyond the reach of the great mass of the people.

Or consider the advance of the science on its practical side. A hundred years ago it used to be supposed that fever could be cured by the letting of blood; now we know positively that it cannot. Even seventy years ago, "Literary Lapses", 1910.

ago it was thought that fever was curable by the administration of sedative drugs; now we know that it isn't. For the matter of that, as recently as thirty years ago, doctors thought that they could heal a fever by means of low diet and the application of ice; now they are absolutely certain that they cannot. This instance, shows the steady progress made in the treatment of fever. But there has been the same cheering advance all along the line. Take rheumatism. A few generations ago people with rheumatism used to have to carry round potatoes in their pockets as a means of cure. Now the doctors allow them to carry absolutely anything they like. They may go round with their pockets full of water-melons if they wish to. It makes no difference. Or take the treatment of epilepsy. It used to be supposed that the first thing to do in sudden attacks of this kind was to unfasten the patient's collar and let him breathe; at present, on the contrary, many doctors consider it better to button up the patient's collar and let him choke.

Leacock is full of glowing praise for the progress in medicine. Certainly the progress of science is a wonderful thing, and one cannot help feeling proud of it. But is it possible that we are currently dismissing compensation claims in cases of degenerative heart disease because the current medical opinion finds insufficient evidence to link heart disease with effort, and in ten years from now ... ?

## BOOK REVIEWS

**The Growth Plate and its Disorders.** Edited by Mercer Rang, M.B., F.R.C.S.: 1969. Edinburgh, London: E. & S. Livingstone Ltd; Melbourne: John Cochrane Pty Ltd. 9" x 6 1/2", pp. 214, with illustrations. Price: \$9.15.

ALL too occasionally this reviewer receives a book which different from the others and finds himself reading it avidly from cover to cover. This monograph by Mercer Rang falls into this special category and must be labelled as a minor classic.

This text is based on a conference held in Jamaica and sponsored by the University of the West Indies. The list of contributors is impressive and their message clear, but each credit must go to the author for assembling it in such a form and sequence that it becomes an exciting story of our present knowledge of the growth plate. A study of the biochemistry of the growth plate sheds new light on its pathology, and the pattern of disorders of the plate emphasizes certain features of its normal function, successive chapters relate the basic sciences of the growth plate, disorders in systemic disease, generalized and local disorders and finally the basis of treatment including the practical management of leg inequality. A useful appendix briefly outlines the specialized methods of investigating clinical disorders of the growth plate, and the book concludes with a comprehensive bibliography.

This book should be regarded as compulsory reading for all orthopaedic residents and indeed for all orthopaedic surgeons concerned with the care of disorders and injuries of the musculo-skeletal system in childhood.

**Craniofacial Anomalies: Pathogenesis and Repair.** Edited by J. J. Longacre, M.D., Ph.D.: 1968. London: Pitman Medical Publishing Co. Ltd; Philadelphia: J. B. Lippincott Company. 10" x 7", pp. 402, with illustrations. Price: E8 10s. (English).

THIS book is made up of the papers presented at an International Symposium and Workshop on this subject held in May, 1966, which was apparently to its participants

"most stimulating, intense and provocative meeting". Here are 35 contributors listed, their names including many which are well known to those interested in this field.

The practising clinician may be excused and perhaps not surprised if he finds its contents patchy and at times some

what irrelevant to his work. Much of Part 1, "Etiology", presents animal experimentation which may or may not be applicable to the human. Dr Fogh-Anderson makes the point that there is apparently a world-wide rise in the incidence of facial clefts, and believes that this may be largely due to exogenous rather than genetic factors. He believes that all kinds of drugs should be avoided in the first trimester of pregnancy. Genetic studies in relation to the first branchial

arch and Treacher-Collins syndrome are included.

Part 2 is devoted to pathogenesis. Little of a positive nature appears in this section, and it is hard to agree with Dr Blair Rogers' proposition that the simple prominent or protruding ear is a true congenital deformity rather than a variation of the normal. One may ask at what point does a large or hooked nose become similarly a congenital deformity? There is much sound common sense in Richard Stark's paper on page 91, in his discussion of mesodermal deficiency. Paper 17 by Lester W. Martin of Cincinnati, should act as a powerful corrective to those who believe that major surgery in the neonate can or should be carried out elsewhere than in a major paediatric centre.

Parts 3, 4, and 5, entitled "Cranial Anomalies", "Mandibulofacial Dysostosis (First and Second Branchial Arch Syndrome)" and "Cleft Lip and Palate", provide most of the clinical interest. The view of Robert McLaurin of Cincinnati that craniostenosis is of importance in skull shape rather than in restriction of brain growth leads him to give the following indications for surgery: (i) to improve cranial configuration for cosmetic reasons; (ii) to preserve cranial nerve function in the presence of coronal synostosis; (iii) to decrease the hazard of eye exposure by orbital decompression in cranio-facial dysostosis; (iv) to prevent intracranial hypertension and restriction of brain growth when all cranial sutures are involved by premature closure.

Article 23 on "Functional Craniology", by John Durst, is also of interest, with a restatement of van der Klaauw's division of the skull into two main functional components - neural and facial - and their relations to brain and somatic development. Various osteotomies described for the treatment of hypertelorism (Eduard Schmid) and jaw malformation (John Converse) are to be contrasted with dermal-fat and onlay split-rib grafts for other contour defects described in the latter part of Part 4.

what frequently prove to be extremely difficult medicolegal problems.

The difficulty arises at the level of "causation", since the Act postulates, as a condition precedent, that there must be a causal connection between the injury or disease and employment. "Injury" is defined as personal injury arising out of or in the course of employment and includes a disease which is either contracted in the course of the employment or to which employment was a contributing factor including the aggravation or acceleration of any disease to which the employment was a contributing factor to such aggravation or acceleration. (Even lawyers have difficulty in definition. No definition has yet succeeded in defining "injury" without using the word to be defined.)

It will be submitted that, to the social scientist, the conception of "cause" may assume a radically different meaning from that understood by the physician, and that this difference may be responsible for frustrating the purpose for which workers' compensation legislation was enacted.

Let me illustrate this by analogy. If we were asked to determine the "cause" of World War I, the social scientist would think at once in terms of a balance of power, the growing competition for markets in relation to Germany's lack of colonies, the famous Teutonic "*Drang nach Osten*", and a myriad of other socio-economic factors, each of which contributed in the sense that it aggravated and accelerated the ultimate calamity. The physical scientist, on the other hand, trained to look for more immediate causes which are demonstrable and conform to observable laws and phenomena, would instinctively seize upon the assassination of the Archduke Ferdinand, which to the social scientist was merely the occasion, as distinct from the cause. Similarly the lawyer, when dealing with a camel's broken back, is less concerned with the last straw which reputedly did the damage than with the many earlier straws which had predisposed this particular camel to ultimate collapse. The fact that the last straw may not be an employment straw is utterly irrelevant if any of the other straws were placed upon its back by reason of the camel's employment. Similarly, when enacting workers' compensation legislation, Parliament was less concerned with the immediate cause of, say, a coronary occlusion, than with the cumulative effect of employment stresses on the underlying cardiovascular degeneration. The Queensland experience, however, would indicate that in compensation claims for heart disease, the employment history tends to be ignored unless it can be demonstrated that there was cause and effect, in the sense that the Board looks for obvious evidence of exertion beyond cardiac reserve within minutes before the onset of, say, an infarct.

If a man lifts a bag of wheat and collapses with an occlusion, he is held entitled to recover compensation; if on the other hand, he has lifted hundreds of bags per day for the last 30 years and collapses as a spectator at a football match, the employment history is generally held to be irrelevant.

Compare the cautious judicial attitude of the eminent lawyer who, in a widow's compensation claim for the death of a waterside worker from coronary thrombosis, after having heard the inevitable conflict of expert tes-

timony from professors of pathology, some of whom boldly asserted that coronary thrombosis could not be related to physical exertion, concluded:

I do not see why a court should not begin its investigation, i.e., before hearing any medical testimony, from the standpoint of the presumptive inference which this sequence of events would naturally inspire in the mind of any commonsense person uninstructed in pathology. When he finds that a workman of the not-so-young standing attempts in a posture-calculated by reason of the pressure on the stomach to disturb or arrest the rhythm of the heart, a very strenuous task not forming part of his ordinary work, and then collapses almost immediately and dies from a heart condition, why should not a court say that here is strong ground for a preliminary presumption of the fact in favour of the view that the work this contributed to the cause of death? From this standpoint the investigation of physiological and pathological opinion shows no more than the current medical views find insufficient reason for connecting coronary thrombosis with effort. Be it so. That to my mind is not enough to overturn or rebut the presumption which flows from the observed sequence of events. If medical knowledge develops strong positive reasons for saying that the lay commonsense presumption is wrong, the courts, no doubt, would gladly give effect to this affirmative information. But, while science presents us with no more than a blank negation, we can only await its positive results and in the meantime act on our own intuitive inferences. (per Rich, Acting Chief Justice of the High Court of Australia, *Adelaide Stevedoring Co. Ltd v. Forst* (1940) 64 C.L.R. 538.)

This view would suggest that in the field of remedial legislation such as workers' compensation, designed to ameliorate the adverse effects of employment on working capacity and health, the onus of proving a causal connection between work and injury, though on the worker, is readily discharged by the intuitive inference derived from the observable sequence of events, unless "medical knowledge develops strong positive reasons for saying that the lay commonsense presumption is wrong". It will therefore be readily seen that, particularly in the area of progressive or degenerative disease, the legislative purpose will be frustrated if the medical tribunal restricts its investigation into "causes" to narrow, presently known, demonstrable scientific phenomena which must behave as though they conform to some ineluctable determinist sequence of events. This view, it is submitted, is unduly narrow, in that it may ignore the strongly persuasive factum of employment as a causal condition which may operate as a nutrient medium in which the disease or injury is cultured.

Let us take a homely example. Suppose a fire starts in the attic and the whole house burns down. Let us assume further that there is an insurance policy indemnifying the owner for damage caused by "accidental fire". The dispute arises between the company and the policy holder, and a panel of three physicists is appointed to determine the cause of the fire. After sifting through the ashes looking for inverted T waves and other aids to navigation, the panel solemnly concludes that the fire was started by a spark which, in combination with the oxygen in the air, burnt the house down. Q.E.D. This ignores (legitimately) that if the attic had not been full of junk or if the Fire Brigade had arrived in time, the damage would not have occurred.

Unfortunately, workers' compensation legislation is<sup>9</sup> - little more complex, insisting, in its search for causes, that all causes are to be deemed to be sufficiently proximate for purposes of liability if they contribute, no matter how