Revue générale de droit

The Future of Personal Injury Compensation

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Volume 18, Number 1, 1987

Colloque sur l'avenir de l'indemnisation du préjudice corporel, à la lumière du droit comparé

URI: https://id.erudit.org/iderudit/1059083ar
DOI: https://doi.org/10.7202/1059083ar

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Publisher(s)

Éditions Wilson & Lafleur, inc.

ISSN

0035-3086 (print)
2292-2512 (digital)

Explore this journal

Cite this article

Wright, B. (1987). The Future of Personal Injury Compensation. *Revue générale de droit*, *18*(1), 23–31. https://doi.org/10.7202/1059083ar

The Future of Personal Injury Compensation

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The Insurance Crisis?

It is alleged that there is an acute insurance crisis having a significant and far-reaching impact on all sectors of the Ontario economy and society.

What is the evidence of an insurance crisis? Let me refer to three pieces of evidence :

1. The Legislative Assembly of the Province of Ontario on July 3, 1986, passed the following unique resolution with 38 ayes and 23 nays :

   That in the opinion of this House, given the present trend towards escalating court awards in the liability insurance sector, and the resultant detrimental effect on the availability and affordability of insurance coverage, the Government should consider placing legislated limits on court awards.

2. Ontario drivers apparently pay 15 to 30 per cent more for insurance than drivers in other provinces while Ontario has more cars than any other province, but a lower number of accidents than the Canadian average. As a result drivers are being introduced to the "pay as you smash" principle, or "next time you crash, reach for your cash".

A friend of mine purchased a brand new 1985 Dodge Aries of which he was particularly proud, but while approaching his place of employment to make a right turn into the driveway, he noticed another car parked in the next driveway with the driver seemingly occupied, with his head down, perhaps reading; my friend put on his signal light and proceeded to make the right turn only to be hit on the door of the passenger side. The other driver pulled out of the driveway without first looking. Immediately, the driver of the other car said, "Please don't call the police, I will pay you for the damages" and proceeded to request my friend to go to his house, which my friend did and was given cash in the amount of $ 350. That evening on the way home, my friend stopped at the dealership where he had purchased the car and was given an estimate of $ 550 to replace the outer skin on the passenger door. My friend phoned the driver of the other car, who at the thought of $ 550 began to suggest that he knew a friend of his who was in the body shop business who would probably do it for less than $ 550. My friend insisted that he

wanted to get the work done at the dealership and if that was not satisfactory to the other driver, that he would have no choice but to call the police and report the accident. The other driver met my friend the next day and provided him with a cheque for the additional $ 200 rather than reporting the accident to his insurance company.

3. The Insurance Bureau of Canada has recently commenced a series of newspaper advertisements depicting two automobiles in collision with the caption "We have to stop bumping into each other like this". The body of the ad states :

> Last year insurance companies spent more than two billion dollars on car repairs. Huge sums were paid for lost wages due to injuries, for pain and suffering, loss of potential future earnings, and similar costs. Substantial payments were also made to the dependents of people killed in accidents. When you add it all up, the insurance industry paid out well over three billion dollars as a result of auto claims. And every year these costs keep going up. Where does it end? It ends up in your premium. The best thing for each of us to do to help control auto insurance costs is to drive more safely.

Tort or no tort — fault or no fault? That is the question. Where does the blame lay for the crisis? What precipitated the question? What is the answer?

As the Slater Report notes, there are no lack of accusations, counter accusations, finger pointing and anecdotal explanations. Some of those include :

1. a scam produced by greedy insurers who are, in fact, making a great deal of profit in the current market;
2. judicial inflation;
3. re-insurers blame primary insurers for pursuing the destructive course of cash-flow underwriting during the heady days of high interest rates while failing to retain sufficient amounts of risk. Interest rates fell, investment income declined, while claims were rising in terms of frequency and size and premium income and reserves suddenly proved wilfully inadequate;
4. failure of public authorities to ensure the solvency and liquidity of insurers, to control rates and to protect consumers adequately.

The Slater Report appears to focus on the question of judicial inflation. Court awards are escalating out of control. Ontario is becoming California North. Courts are simply reflecting the deep social, legal and economic changes that have fundamentally altered the risk environment. It appears that a growing number of Canadians believe that high court awards are a primary cause of the current liability insurance crisis. A Gallup poll taken March 31, 1986, indicated that 33 per cent of the public believe that escalating court awards were to blame for the crisis in insurance.

U.S. studies have concluded that the court system is to blame. State legislatures have introduced bills for tort reform concluding that legislative intervention is needed to rein in the American tort system.

Slater concludes that Ontario is not California North but there is an indication that it may become so in the foreseeable future, not so much in the escalation of the size of the awards, but in the continuing expansion and extension of liability.

The Slater Report refers to the case of *McErlean* v. *City of Brampton et al* 32 C.C.L.T. 199. This case involved a collision by two unlicenced trail bikes with a capability of going fifty miles per hour driven by unlicenced 13 and 14 year olds on a sharp and blind curve in a road on vacant park land which contained an abandoned gravel pit. The court found that the municipality made no attempt to exclude the public. The road was a good smooth gravel road and trail bike riders could round the curve at speeds of up to 50 miles per hour and still remain on their own side of the road. The court also found that, "the combination of circumstances, a road which narrowed at a sharp, blind curve and its use by other young trail bike riders, was, an unusual danger for trail bike riders". One of the drivers was an inexperienced driver weaving back and forth on the wrong side of the road. The court said :

> He was old enough and knowledgeable enough to know that it was not reasonably prudent to drive a motor vehicle around a blind curve on the left hand side of the road and to know that, if he could not drive a vehicle well enough to control it, he ought not to drive it at all, let alone around a blind curve on a road used by young trail bike riders.

The court found him to be 15 per cent at fault.

The injured plaintiff is paralyzed, incontinent and unable to speak. The court said with respect to the plaintiff :

> To have used that curve even at a moderate rate of speed and entirely on his own side, in all of the circumstances, was a failure to take reasonable care for his own safety.

He was found ten per cent responsible.

The City's failure to act was found to be more blameworthy and it was assessed 75 per cent of the total plaintiff's damages of $ 7,230,150.

An important point to note is that in reference to this case, Slater comments that the seeds of the insurance controversy lie not in the amount of the award but rather in the imposition of liability.

Subsequent to that case, the same Ontario Supreme Court judge, in a case called *Giannone* v. *Weinberg* gave the largest medical malpractice award in Canada's history totalling $ 3,2 million. A six-year old girl fell and the result was a compound fracture of the right arm. The doctor put her arm in a cast at the hospital on August 9, 1981. On August

the 11th, she commenced to run a fever and was returned to the hospital where it was determined that the cast was too tight. The cast was split and the doctor prescribed 222's for the fever. The problem persisted and on August 12th, the cast was removed and the doctor discovered that the arm had developed a gas gangrene. Unfortunately, the dominant right arm was amputated at the elbow.

The court found that she suffered daily pain, that there was a serious danger that she will develop skin problems, neck pains and psychological problems with depression. She has had a lot of mental suffering and will probably experience an emotional crisis during adolescence. The court also found that it was improbable she would go on to post-secondary education and she will probably not marry. Liability was admitted and the only question was the amount of the damages.

Both of these cases are under appeal. Until final decisions are rendered, it would be unfair to use them to denounce the tort system as a failure.

Slater attacks the tort system and decides that tort reform is not the answer. The basic insurance problem is three-fold : availability, affordability and overall adequacy. There are three basic reasons why tort reform is not the answer.

1. No strong connection has been established between the areas of difficulty and the present insurance crisis. The proposals would make only modest differences to the costs and availability of insurance.
2. Even if some measures are implemented, there is no evidence that the tort system would, in fact, be improved.
3. Any reform of the tort system should only be implemented when objectives of that system have been satisfactorily identified. Slater states, "when the operation and objectives of the tort systems are mired in contradiction and confusion, adding ad hoc 'reform' measures that exacerbate the problem is no solution".

Slater believes that modern tort law has been dramatically transformed from a mechanism primarily concerned with deterrence to one whose main purpose is compensation. He refers to the Osborne Study and quotes :

> The massive transformation of the fault system... is a change which is explicable only on the basis of liability insurance and judicial compassion for the victims of social progress. Judges who in their written judgments give no indication of the prevelance of liability insurance are, in fact, keenly aware that in almost all cases, the defendant is not paying, and that they are in the last analysis deciding whether or not the plaintiff should be compensated from insurance monies.

> The prevalence of liability insurance fundamentally altered the moralistic nature of the law shifting function of fault. The law shifting mechanism was converted into a law spreading mechanism and it became more realistic to speak of the fault system as a fault-insurance system. The punative and deterrent aspects of fault were diminished and compensation became the predominant function of tort law.

Slater concludes that there is a profound inequity and unpredictability in continuing to use tort as a mechanism for accident compensation.

Slater believes that the answer lies in separating the compensation function from the deterrence function. He quotes from the Ontario Law Reform Commission Report of 1979 that, "Tort law is a haphazard and inefficient means of deterrence". Slater also finds that the tort system fails with respect to compensation; one-third to one-half of accident victims get compensation while others are left out — they are denied compensation because fault could not be found. He also complains about the enormous delays under the tort system.

Slater recommends a no-tort system of accident compensation run by the private insurance industry. Compensation would be provided on a no-fault basis, but fault will remain relevant and deterrence will be achieved through a more refined and rigorous penalty-rating or premium-pricing mechanism. He recommends unlimited medical and rehabilitation benefits, including costs of care and income care benefits at levels that would be reasonably adequate for the vast majority of citizens. With respect to additional coverage for income replacement, additional layers of insurance could be purchased voluntarily.

Slater concludes that :

> The crisis reflects serious socio-legal and economic changes of a structural nature that give rise to such a degree of uncertainty as to permanently alter the risk environment and the insurance market. Certain fundamental reforms to the system are required in order to stabilize the risk environment and insure the provision of available, affordable and adequate insurance.

What have been the responses to the Slater Report?

The Ontario Branch of the Canadian Bar Association agrees that there are significant problems within certain lines of insurance, but :

> These difficulties will not be solved by general system-wide changes. Instead, specific and focused solutions are required. Should focus on the specific problem areas instead of focusing on a no-fault insurance scheme — an insurance line in which few problems exist.

The C.B.A.O. claims that there are two general shortcomings of Slater : (1) The Report did not examine the role of tort as educator, re-enforcer of values, avenger of persons injured by anti-social behaviour, keeper of the peace and ombudsman. (2) The Report is based on the false premise that tort should ideally compensate everyone.

The C.B.A.O. response points out that the State of New York has had no-fault insurance since the 1970's and is currently suffering from the same problems within the same insurance lines as is Ontario. In Michigan, the issue of availability and adequacy of auto insurance persists despite a no-fault system. The response also claims that premiums do not decrease with the introduction of no-fault insurance.

Specifically, the C.B.A.O. response addresses the role of tort in an interesting paper prepared by Professor R.J.S. Gray, Assistant Dean of Osgoode Hall Law School. He states :

> The law of tort has played a significant role in establishing the societal values we most cherish. It has created, nurtured and propagated these values so that today we consider them to be essentials of the kind of society we hope to live in.

He quotes from Linden, *Canadian Tort Law* :

> We have not yet invented (better) mechanisms, nor is there any guarantee that they would be introduced if discovered. We do, however, possess tort law which is aimed at "maximizing service and minimizing disservice to multiple objectives". This description may not stir excitement in our hearts. But it should make us pause before we conclude that tort law is "doomed to irrelevance".

Philosophizing further, Gray states :

> The idea that a person who imposes harm on another or deprives another of a benefit through wrongful conduct should and will correct the situation is the corollary of the "golden rule". All of us want to live in a society that contains, protects and endorses these ideals. The tort of negligence with its insistence on the worth of the individual and the validity of "fault" as the basis for loss fixing is a significant part of the underpinning of these values in our society.

In response to the alleged deficiencies of tort as a compensatory mechanism, specifically that it does not compensate all victims of injury, Gray retorts that :

> If it is meant to be a system of distributive justice, which is the assumption made in the Slater Report — then, no doubt, it is a failure, but it seems bizarre to assail tort for failing to accomplish that to which it has never aspired. Tort is about correcting hurtful "wrongs".

He claims that Ontario is not bereft of mechanisms to deal humanely with the victims of "pure" accidents as distinct from "negligent" accidents. A very extensive network of social benefits does exist.

Replying to Slater's alleged deficiencies of tort as a deterrence mechanism in that deterrence does not work any more because of "widespread phenomenon of liability insurance" which takes the pain out of tort liability, Gray responds that for every theoretic piece minimizing tort's role as a deterrer, there is another applauding it.

With regard to the scare of the California North syndrome, Gray responds :

> What relevance is this comparative exercise outlining the woes of tort in our friendly, but culturally and politically, quite different neighbour? Why, when the existing situation is found to be relatively problem free, predict the slide into oblivion. Nobody wants this to become the situation in Canada. Why should we envision an insensitive and radicalized judiciary forcing us to become "California North", over the will of the citizenry and the Legislature and the corpses of bankrupted insurance companies?

Gray comments on the bonus-malus device saying that "it violates our societal conviction that citizens should not suffer penalties, in this case quite significant dollar penalties, without the ability to be heard before an impartial tribunal".

In conclusion, Gray states that the Slater Report :

> Is in conflict with the fiercely held view that in the society we wish to live in, a person is entitled, when push comes to shove, to "a day in court". This right, while, no doubt, seldom a pleasurable experience, is our ultimate assurance as individuals, of obtaining "justice". In our view, it is a fundamental of our society which should be impinged upon only with extreme caution.

The C.B.A.O. brief submits that a reformed tort compensation is the optimal compensation system for casualty victims.

Murray Thompson, a member of the Slater Task Force and a former Superintendent of Insurance for Ontario, in an address on September 19th, to the downtown Business Council, mused that more drivers might risk going without auto insurance if Ontario adopted a proposal for no-fault car insurance. He said that taking away the right of victims to sue those responsible is no way to attack the problem of insurance costs. He advised opting for changes to the old, rather than inaugurating a new system.

The Committee for Fair Action in Insurance Reform, which I understand is made up largely of lawyers, has claimed that if the Slater no-fault system is introduced, consumers will likely pay more than twice as much for their auto insurance and injured parties will find compensation cut substantially and the number of accidents could rise significantly. The Committee also notes that no-fault plans have had "extremely unsuccessful histories" and that some U.S. states have returned to the tort system. The Committee concludes that :

> The social costs of the abolition of the tort system consequently involve the loss of a significant deterrent to unsafe conduct, of a safety valve for human frustrations over the losses inflicted by others, of an identification of fault and an assignment of compensation to innocent victims.

Along the way in this debate, a number of suggestions for changes to the present system have been made.

Some suggested reforms :

1. Amend *Family Law Act* to limit claims for loss of care, guidance and companionship to "serious or permanent claims".
2. Amend rules with respect to pre-judgment interest which would not begin to run until sufficient medical information has been given to the defendant.
3. Amend *Courts of Justice Act* to give courts discretionary power to impose "structured judgment" in lieu of lump sum to eliminate uncertainties associated with "gross-up" or Federal Government remove tax on income earned on personal injury damages.
4. Legislature intervention to include collateral benefits, i.e. private disability insurance, public assistance schemes, in calculation of actual loss to prevent double-recovery.
5. Possibility of abolishing joint and several liability.
6. Enactment of Good Samaritan legislation to provide greater protection to volunteers providing medical assistance in good faith.
7. Allow arbitration to facilitate a more expeditious resolution of the smaller automobile accident claims.
8. Standardize limitation periods for all accident cases.
9. Increase weekly indemnity, medical, rehabilitation and death benefits under section "B" coverage and provide for greater use of advance payments, particularly where liability is not in issue.
10. Formulation and development of new insurance structures :
    — expansion of farm mutuals
    — development of reciprocal exchanges
    — self-insurance
    — Canadian Insurance Exchange
    — entry of financial conglomerates into general insurance.

There appear to be an abundance of good suggestions for changes to improve the current tort system and the insurance industry generally, but Slater contends that patches to the old are not sufficient. He wants a new garment. The C.B.A.O. strongly suggests that the proposed changes should first be tried before throwing out the old and replacing it with the untried.

What is the answer? With the complexity of such a multi-faceted problem which impacts so tremendously on the social well-being of the public, what should the government do? Improve the old or opt for the new? It is my understanding that the New Democratic Party in Ontario will have as a plank of its political platform a recommendation for a no-fault system run by government.

From my own personal perspective and without in any way purporting to speak on behalf of the government as to what decision it may or should make, my preference is to stick with the old, improve the old, and cast it away only when it is clearly shown that it has run its course.

In our affluent society, it has been easy to evolve the "throw it away" rather than "fix it" mentality. I fear that this same attitude is beginning to permeate the law-making segment of our society. There seems to be a philosophy that rather than amending legislation, when necessary, with a view to improving a situation, we tend to scrap all of the legislative experience of the past and opt for new legislation with new phrases and definitions and untried concepts which in the end result benefit the legal profession and it is questionable whether the public interest has really been advanced.

Clearly, legislatures are faced with many competing views and it is not easy to arrive at the best public interest. In such situations, caution should be the watch word and it should be proven that the old system is tired and worn out and should be buried before we opt for the new. My preference would be to make the suggested changes to the old system first and give it a second chance before abandoning it when it is not clear that a new system would be any better. Especially is this so when the evidence is uncertain that the old system is at fault. As Slater lamented, "... one of the most frustrating problems for the Task Force arose from the scarcity of systematic evidence on awards and settlements and on elements in the legislation and the tort-litigation system that contributed to the determination of awards and settlements".

I would rather opt to continue a fault system than be at fault for suggesting a new system when changes to the old might be more advantageous.