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Résumé de l'article

L'article que Me John D. Holding, Q.C., a bien voulu nous autoriser à publier est le texte d'une conférence donnée par l'auteur à la Société des Fellows de l'Institut d'assurance du Canada, le 20 mars 1986, à Hamilton, Ontario. Le sujet ne manque pas d'intérêt. Nous avons déjà eu l'occasion de présenter à nos lecteurs des travaux sur l'évolution de la jurisprudence canadienne en matière de responsabilité civile, notamment dans le numéro du mois d'avril 1986. Le discours de Me Holding est dans le même esprit, avec un accent particulier sur l'évolution des règles applicables en Common Law. L'auteur a attaché une grande importance aux décisions rendues par les tribunaux. En plus de l'abondance et de la richesse de la jurisprudence, il signale les recommandations faites par l'Association du Barreau Canadien, section de l'Ontario. Comme l'évolution de la notion de faute a un impact direct sur l'assurance de responsabilité, l'étude de Me Holding est un témoignage important, nous a-t-il semblé.

# The Relationship Between Recent Trends In Tort Litigation and the Current Insurance Crisis in Canada[1]

*by*

John D. Holding, Q.C.



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In this paper, I propose to identify those trends in liability and damages which may have contributed to the current crisis in liability insurance, and to speculate on what the future may hold for the liability insurance industry in Canada having regard for those past trends and current developments.

In Canada, there are two systems which provide for compensation by society for injuries to individuals sustained as a result of accident. The older of these is the tort system which provides substantial damages for pain and suffering and loss of amenities as well as com-

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[1] Ce travail a été présenté le 20 mars 1986 à la réunion des *Fellows of the Insurance Institute of Canada* à Hamilton, Ontario.

pensation for past and future expense and loss of income. The tort system is based on the fundamental concept of liability for accidental injuries caused by negligence or other fault. The cost of the insurance to fund this system is provided through premiums paid directly by the vast majority of members of the general public under automobile and homeowners policies, and indirectly by the general public as part of the costs of goods and services which, of course, include the cost of comprehensive general liability insurance premiums paid by industry.

*436* The second more recent system is referred to as the no-fault system, in that it does not involve the concept of liability for fault. In Ontario, automobile policies now provide no-fault benefits to passengers and pedestrians injured by accidents involving the insured automobiles. These no-fault benefits include payment of medical expenses, limited loss of income, and some limited compensation for non-pecuniary loss. In Quebec, the no-fault system has replaced the tort system entirely with respect to automobile accidents. The no-fault system is supplemented by compulsory medical and hospital insurance carried by all individuals and paid for in whole or in part by premium income, as well as by private accident insurance plans provided by employers or unions.

The largest component of the no-fault system in every province of Canada is provided by workers compensation legislation, in which the right of recovery of employers under the tort system was largely removed and replaced by a no-fault compensation system providing limited benefits through compensation fund assessments or insurance premiums paid by the employers.

The distinguishing characteristic of all no-fault systems is that the compensation provided is of a strictly limited nature, particularly with respect to non-pecuniary loss. This is the case with respect to the no-fault system which prevails in New Zealand, which has replaced the tort system with respect to compensation for all accidental injuries.

For obvious reasons, it would be impossible to combine both the tort and no-fault systems into a single system providing the very substantial damages available under the tort system, but on a no-fault basis. Society as a whole simply could not afford the cost. Automobile owners could not afford to pay through insurance

premiums hundreds of thousands of dollars to all passengers or pedestrians who happen to be injured in accidents involving the insured automobiles. Manufacturers could not afford to pay large sums to all persons who happen to be injured while using their products. Physicians could not pay the premiums required to provide full general damages to every patient who suffers injury or death while under treatment, nor could municipalities or school boards afford the premiums required to pay hundreds of thousands or even millions of dollars to all persons who happen to sustain serious accidents while on municipal or school properties. In the famous trilogy cases, the Supreme Court of Canada held that, while general damages for pain and suffering should be limited to a maximum arbitrary amount, there should be no limit on the compensation required to provide all care and every facility which might compensate for their disables condition to the fullest extent possible. The amounts which have been found required to provide such care and facilities are staggering, and can only be provided by society under the tort system which restricts such unlimited compensation to injuries caused by actual fault.



Historically, in the tort system, there has been a slow but inexorable trand towards a complete compensation and towards wider liability recovery. In the last century, legislation was introduced to provide for recovery of pecuniary loss to spouse and children resulting from accidental death, where no such recovery was recognized under Common Law. Early in the present century, negligence legislation was introduced which permitted partial recovery for accidental injury to which the injured person had contributed by his own negligence, where no such recovery was permitted at Common Law. No doubt these and other legislative reforms were regarded as radical at the time of enactment, but they are now rightly regarded as necessary and fully justified.

I have been practicing law for 26 years. During the first half of my legal career, I observed the same slow trend toward increased liability exposure and increased assessment of damages. Like inflation, this trend was something we all learned to live with, and like inflation was not too difficult to adjust to, provided that the increases were not too steep at any one time.

In the past ten years or so, I have seen, at an accelerating rate, dramatic increases in damage awards accompanied by a strong trend towards findings of liability for alleged fault in situations where no such liability would have been found previously because no actual fault would have been thought to exist. In other words, the courts appear to have been intent on creating a system under which we are approaching liability without fault for greatly increased damages. As the damages go up and liability exposure increases at the same time, society finds itself in a crunch where premiums rates necessary to fund insurance for such liability and damages are higher than in-

dividuals and businesses can afford to pay. The insurance industry has found itself in the crisis of having to pay out vastly increased amounts in damages at a time when premium rates have not caught up sufficiently to cover the cost. The consequent losses which have disrupted the insurance industry, and the industry's perception of a legal system which seems to be going out of control, have combined to result in situations where insurance coverage is no longer available, or if available, only at prohibitively high premiums and with extraordinarily high retentions.

At this time, I would like to examine this past trend, which if it continues at an ever accelerating rate, will almost inevitably result in the destruction of the tort system and its remplacement by partial of complete no-fault systems on the Quebec and New Zealand models. Insurance coverage under such no-fault systems is usually compulsory and provided under state operated and funded insurance plans, and would thus result in the virtual disappearance of the primary liability insurance industry.

In product liability cases, we have found increasingly that manufacturers are being held liable for injuries arising from their products even where the products are property designed and manufactured, unless the risk of serious injury is spelled out in the most explicit terms on warning labels and literature accompanying the product. Manufacturers have found it increasing difficult to meet the higher standards imposed by the courts. In the recent case of *Buchan v. Ortho Pharmaceutical* (1985 – unreported), the Ontario Court of Appeal cited with apparent approval a recent line of American decisions which had effectively displaced in birth control pill cases, the so-called *learned intermediary* rule, that manufacturers of drugs have a duty to warn only prescribing physicians with respect to dan-

gers in the use of prescription drugs. As noted later, there has been pressure to adopt a strict liability regime. The higher and stricter standard imposed, with respect to warnings and strict liability, the closer the liability of manufacturers in product liability cases approaches a no-fault position.

School boards are being held liable for sporting injuries sustained by students in situations where there would have been no liability twenty years ago. In *Myers v. Peel County Board of Education* (1981) 17 C.C.L.T. 269, the Supreme Court of Canada restored the trial judgment holding the School Board liable for a quadraplegic injury sustained by a high school boy when he fell from the rings in gym. Mats were in place, and the boy had violated strict instructions from the teacher to use a spotter while carrying out the exercise. The Ontario Court of Appeal had reversed the trial judgment, finding that a prudent father would have allowed his son to use the rings unsupervised, given the strict instructions which had been provided, and the duty of the School Board was no higher. The Court of Appeal had also held that there was not sufficient evidence that another thicker mat would have prevented the injury. In restoring the trial judgment, it appears the Supreme Court of Canada set the standards of care so high, that the liability of the School Board approached perilously close to liability without actual fault.



In medical malpractice cases, surgeons are now being held liable in the absence of any professional negligence in carrying out the operation, upon the ground of failure of *informed consent.* Here again, the Courts are imposing an increasingly high standard with respect to the duty of the physician to inform the patient of all surgical risks, and are imposing liability without fault.

In sewer and water main cases, throughout the first sixty years of this century, the law was considered clear that the municipality could be held liable for breakages and overflows only upon proof of actual negligence in the design, installation and maintenance of the system. In a line of cases commencing with the Supreme Court of Canada decision in *Portage La Prairie v. B.C. Pea Growers* (1966) S.C.R. 150, and followed by the British Columbia Court of Appeal in *Royal Anne Hotel v. Ashcroft* (1979) 8 C.C.L.T. 179, and by the Saskatchewan Court of Appeal in *Temple v. City of Melville* (1979) 6 W.W.R. 257, the Courts have found liability based on the principle

of trespass without actual negligence on the part of the Municipality, and have held that such liability exists except in cases involving an Act of God where no amount of care and money could have avoided the damage, even though the system had been designed, installed and maintained in accordance with accepted standards. Municipalities were required to satisfy the almost impossible onus of proving that the damage was the inevitable result of operating the sewage or water main system. The same principle was applied by the Ontario Court of Appeal in *Schenk v. The Queen* (1981) 20 C.C.L.T. 18, where the province was held liable to the owner of an orchard adjoining a major highway for damage to trees resulting from the use of salt on the highway during winter months. In that case the trial judgment, affirmed in the Court of Appeal, held that the expense involved in removing ice by other methods had no bearing on the issue of liability, as citizens could not be permitted to hold their costs to a reasonable level at the expense of individuals who sustained damage. These cases are the clearest indication of the trend towards imposition of liability without fault on what the courts perceive to be socio-economic principles.



I can remember when voluntary assumption of the risk was a viable defence in clear cases where the injured person had obviously voluntarily exposed himself to a particular risk, for example by entering an automobile which he knew was being operated by an intoxicated person. It is now generally recognized in the profession that this defence is a dead letter, as the Courts have held that one must prove the existence of an actual agreement by the injured person to assume the risk of injury.

The high water mark in this trend towards liability without fault is found in *McErlean v. Sarel and City of Brampton* (1985) 32 C.C.L.T. 199. In this case, which is currently under appeal, the injured plantiff was operating a dirt bike round a curve on a road in a municipal park, when struck by another youth operating a bike in the opposite direction on the wrong side of the road. The evidence was uncontradicted that the road was of the kind one would encounter in cottage country, and the curve was safe to be used by dirt bikes even at high rates of speed, provided they were operated without negligence keeping to their own side of the road. The Municipality was held liable upon the ground the road constituted an unusual danger if used by young dirt bike riders in a negligent manner, and

the Municipality could have anticipated such negligent use. Without commenting on the correctness of this decision, it must be observed that, if upheld, it imposes a liability on municipalities for injuries sustained by users of public parklands if occasioned by the negligent acts of others which could have been foreseen. As there is no practical method by which a municipality can effectively provide against such injuries, it appears that this decision would effectively impose liability without actual fault.

Mr. Justice Krever of the Ontario High Court, in a recent address to the University of Manitoba Faculty of Law, commented on what he perceived as "a propensity – in those cases where there will be no compensation unless there is fault – toward intellectual dishonesty". Although he conceded that most of his colleagues on the Bench would disagree with his comments, he went on to say that Judges sometimes tell themselves :



> "This is a case in which everybody agrees damages should be paid to the plantiff. I know that nothing can be paid to the plantiff unless I find fault, so I am going to find fault. I know perfectly well that if I find fault, even though the evidence, intellectually applied, doesn't enable me to find fault, the Court of Appeal will. not interfere with my finding of fault because it is a finding of fact made by a trier of fact who saw the witnesses. So I can get away with it. I am therefore going to find so-and-so was negligent".

It has been suggested that the *McErlean* decision may have been the single case most directly responsible for the current insurance crisis, because of the perception in the insurance industry that no-fault liability was being imposed, and because of an unprecedented damage award in excess of six million dollars which represented a quantum leap from previous levels. In studying the *McErlean* decision, however, it will be seen that the large amount of the award was in reality the predictable result of the trend which had already been clearly established by cases following the Supreme Court of Canada trilogy cases decided in 1978. As I mentioned previously, the Supreme Court held that although general damages should be strictly limited to a maximum of $100,000 at that time, there could be no limit on the compensation which should be provided for future care and loss of income. The trilogy cases opened the door to more and more extravagant claims for specially equipped homes, vans, 24-hour nursing care in the home, where previously the provision of

the cost of institutional care was considered sufficient. It was then determined, based in part on statements in one of the trilogy cases, that this provision for the cost of future care had to be grossed up to provide for the impact of income tax on the fund provided for that care. In a number of cases, the Courts recognized the principle of gross up, but arbitrarily limited the percentage gross-up to a relatively modest figure in the face of actuarial evidence which would have called for very large allowances. In *Nielsen v. Kaufmann* (1984) 28 C.C.L.T. 54, for example, Mr. Justice Holland arbitrarily reduced the gross-up by a contingency reduction of 25%. The same

judge in *Riosa v. Marco* (1984 unreported) arbitrarily applied a gross-up of 70% and then discounted is by 40% by assuming some tax sheltering. In *Schmidt v. Sharpe* (1983) 27 C.C.L.T. 1, Mr. Justice Gray was asked to gross up a $1,000,000 award to $2,000,000 on the basis of actuarial evidence, but declined to do so because of future contingencies and arbitrarily applied a gross up of only 35%. In *McErlean*, however, the sum of $2,054,366 was found required to provide $77,226 per year for the cost of future care, and the additional sum of $3,136,324 was found necessary to gross up for income tax, resulting in a total award of about $5,200,000 to provide the plaintiff about $77,000 per year for future care. Interestingly, the award for future care included approximately $8,600 per year to provide a specially equipped van, presumably for the purpose of taking the plaintiff to hospital on occasion, and accordingly for that limited purpose alone approximately $582,000 was awarded against the Municipality.

I seem to recall that the first damage award in Canada which exceeded $1,000,000 occurred not more than ten years ago. Awards in excess of $2,000,000 and $3,000,000 are now routine. Although the cost of future care and gross up for income tax provide two of the most striking reasons for this dramatic increase, there are other indications of a strong trend towards increased damages. The Family Law Reform Act was enacted in 1978 to provide for payment of non-pecuniary benefits for loss of companionship, care and guidance to a wide family circle including grandparents, brothers and sisters and grandchildren. The Ontario Court of Appeal in *Mason v. Peters* (1980) 30 O.R. (2d) 733 set the scene for substantial awards in this area, when it awarded $50,000 to the invalid mother of the deceased teenager, and made it clear in their decision that substantial benefits

were intended by the amended legislation. In *Reidy v. McLeod* (1984) 30 C.C.L.T. 283, Mr. Justice Bowlby took up this challenge. His judgment waxed eloquent on the relationship between parent and child, a companionship which was "a truly unique pleasure". He awarded the mother of one 17-year old deceased son $65,000 and the mother and father of another deceased teenage by $50,000 and $35,000 respectively, plus thousands of dollars to the various siblings. This case is under appeal. FLRA claims routinely increase middle of the range awards by 25% through awards of $1,000 – $5,000 each for numerous relatives outside the immediate family.



Pre-judgment interest, which was introduced in November 1977, has had an increasing effect on the level of damages. When it was first introduced, cases were routinely settled without payment of interest, whereas today full interest is almost always demanded. While I cannot fault the principle of pre-judgment interest in the proper case, as defence counsel, I have found that plaintiffs and their solicitors now seem less concerned about getting on with settlement of claims than was previously the case. Furthermore, I cannot see the justification for payment of interest on general damages which by the time of trial have already been increased substantially by inflation from the level of damages in effect at the time of the injury. It seems to me that this is one of those luxuries which society as a whole can now ill afford to pay in the form of increased insurance premiums.

The past trend may continue. There has been much pressure for imposition of strict liability on manufacturers in product liability cases. The Ontario Law Reform Commission submitted a report several years ago advocating a strict liability regime and proposed a draft statute. Their report has not yet been acted upon by the Ontario Government, but it certainly would not surprise me if the present government decides to implement this proposal.

We are also seeing increased pressure for punitive damages in negligence cases, as are currently being awarded in some American jurisdictions. In 1978, the Ontario Court of Appeal in *Dodge v. Bridges*, 6 C.C.L.T. 71, affirmed the principle that punitive damages may be awarded for conduct in negligence cases which is considered to have been high handed, malicious or showing contempt for the plaintiffs' rights. I have seen punitive damages claimed with greater

frequency in statements of claim during the past few years, although it was virtually unknown to see such a claim ten years ago. It remains to be seen whether our courts will in future apply the above criteria in a less strict manner, thereby opening the exposure flood gates in this area.

In the United States, probably the single most important factor in the escalation of litigation and high awards has been the contingent fee system. Several Canadian provinces have legalized contingent fees, although they remain illegal in Ontario. I understand that
*444* contingent fees in these other provinces are not as yet widely used and their full effect has not yet been felt. I am not aware of the policy of our present attorney general on this issue, but if contingent fees are introduced in Ontario, you can expect to see in the long term a substantial rise in litigation.

I do however see a few encouraging signs indicating that the pendulum may have reached its farthest point, and may have begun to swing the other way towards moderation, at least in the short term. In my view, the principal initiative must come from the Courts. In the past, we have seen our Courts respond constructively and positively to situations of perceived imbalance in the law which have resulted in social detriment. In arson cases, for example, when I first began to practice, it was considered almost impossible to succeed in an arson defence, and most arson cases were defended on other grounds such as fraud in the proof of loss. The Courts then tended to impose a standard of proof on the insurers equal or close to the criminal standard of proof beyond a reasonable doubt. When it became recognized that arson had become a serious problem, the Courts appeared to respond by imposing a lower standard of proof, equivalent to the ordinary standard in civil cases of proof on the balance of probabilities, although a high standard of cogent evidence was of course required. I personally have taken four arson defence cases to trial in the past six years, and succeeding in proving arson in each case, although in the first three cases, there was not considered to be sufficient evidence to warrant criminal charges and in the last case, the charges were dismissed at the preliminary hearing. In the result, insurers have taken a tougher stand against arson because they have feld that they had reasonable support from the Courts, and the financial motive for arson has thereby been substantially undermined.

I feel that we may be seeing a similar positive and constructive response by the Courts to perceived excesses in liability findings and damage awards which have generated the current insurance crisis. With respect to the FLRA problem, in *Gervais v. Richard* (1894) 30 C.C.L.T. 105, Mr. Justice Krever rejected the approach taken by Mr. Justice Bowlby in *Reidy v. McLeod*, and held that non-pecuniary losses arising in accidental death cases must ultimately be conventional in nature. He quoted the Supreme Court of Canada in *Andrews v. Grand and Toy* (1978) 2 S.C.R. 229 where it was held that there is no objective yard stick for translating non-pecuniary losses such as pain and suffering into monetary terms and that "this area is open to extravagant claims". In the *Gervais* case, Mr. Justice Krever allowed for the death of a 16-year old girl, $12,000 to the mother and $10,000 to the father. The Court of Appeal has yet to finally pronounce on the appropriate level of awards in such cases, but it is to be hoped that the Court will adopt the more moderate approach proposed by Mr. Justice Krever.



In *Khan v. Salama* (1985 unreported), Mr. Justice R.E. Holland adopted the so-called functional approach previously advocated by the British Columbia Court of Appeal in *Knutson v. Parr* 12 D.L.R. (4th) 659, and awarded in the case of a seriously brain damaged person not aware of her surroundings the sum of only $10,000 for general damages on the basis that the plaintiff would not benefit substantially by any higher award.

In the recent case of *Champlain v. Etobicoke General Hospital* (1985 unreported), which is also under appeal, Mr. Justice Montgomery adopted an approach very different from the *McErlean* case in determining the gross up for the cost of future care for a seriously brain damaged plaintiff. Through the application of appropriate contingencies and the acceptance of important economic evidence not available in the *McErlean* case, he reduced the gross-up from upwards of 100% on the plaintiff's actuarial evidence to about 35% of the future care award. The contingencies he applied were with respect to the likelihood of tax sheltering and the likelihood of reduced life expectancy. He also found that the future rate of inflation, which has a very important effect on gross up, had been greatly over estimated by the plaintiff's economist. If the same approach had been taken in the McErlean judgment, in my opinion the award would have been reduced by at least $2,000,000.

In the very recent case of *McDermid v. The Queen,* decided in November 1985, Mr. Justice Rosenberg declined to apply the 2.5% discount rate provided for in the Rules, in calculating the present value of future loss of income, in the face of evidence that the true net difference between interest and inflation over the short term would be 6.5% for eight years. This is a landmark decision which introduced realty into a situation where previously the 2.5% discount rate had been considered untouchable.



An initiative is also being taken by the Canadian Bar Association, Ontario Branch, which may well result in remedial legislation which could substantially rectify some of the inequities which now exist in the damages field. The CBAO proposes to submit a brief to the Slater Task Force on the property and casualty insurance industry which will include the following recommendations :

1. Amendment of the FLRA to restrict damages for loss of guidance, care and companionship to cases of serious or permanent loss.

2. Amendment of the Courts of Justice Act to provide that prejudgment interest should not commence to run until the defendant has received medical information.

3. Legislative changes to eliminate gross up, by permitting the trial judge to offer the option to the plaintiff of an ungrossed up cash award or a structured settlement which eliminates the need for gross up.

An important indication of the current attitude of the Court of Appeal may be found in their very recent decision in *Nielsen v. Kaufmann,* released on February 7, 1986. The Court upheld the 25% contingency reduction in the gross-up made by Mr. Justice R.E. Holland in his previously referenced trial judgment, but declined to reduce it even further to 50% as requested by the defendant. They accepted in principle, however, that investment assumptions made in calculating the gross-up should be reasonably balanced on the facts of any given case. They suggested that, if uniformity in gross-up was considered desirable, it was a matter for legislative intervention. Importantly, the Court also reduced various aspects of the award in other areas, resulting in an over-all reduction of 31%, thereby demonstrating a moderately conservative approach.

On the liability side, it was refreshing to read the recent decision of the Ontario Court of Appeal in *Crocker v. Sundance* (1985) 51 O.R. (2d) 608. That case involved a quadraplegic plaintiff, who had attempted to participate in a rather dangerous race involving riding on an innertube down a mogulled ski slope, while seriously intoxicated. The majority resisted the temptation of transferring some of the responsibility to the defendant ski resort which conducted the race, finding that the plaintiff was entirely responsible for his own conduct which resulted in his injury. One of the judges dissented, and leave to appeal to the Supreme Court of Canada was recently granted. I was however encouraged by the statement of the majority at page 618 "liability must be predicated on fault". I would like to see every judgment on liability begin with the statement of that principle which is so essential to the continuation of our tort system.



Having reviewed the historical and recent trends and current developments, I have concluded that it is too early to say whether the Courts have recognized the imbalance which has developed in the tort system and have determined that the situation requires rectification. As noted, some of these recent cases are under appeal to the Ontario Court of Appeal and Supreme Court of Canada. The few encouraging cases may simply represent temporary set backs in the inexorable trend towards broader liability without fault and greatly increased awards.

It is also too early to determine whether the present government in Ontario has the political will to respond positively to the Canadian Bar Association recommendations, and we will simply have to await the publication of the Task Force Report and any legislation arising therefrom. I am convinced, however, that unless there is combined action by the Courts and the Legislatures to correct a worsening situation, we are headed sooner than we think towards a no-fault system on the New Zealand model to replace a tort system which society can no longer afford.