

COMPENSATION SCHEME OR TORT LIABILITY

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The basic problem to be examined in this paper, whether or not a compensation scheme can replace the present law of torts, must be subdivided into four problems or issues. The first of these four problems relates to the purpose of the present law of torts. Without first establishing the precise function of this branch of the law, no measure can be taken of the adequacy of the present principles of tort liability, nor of any proposed compensation scheme. The second problem is of a philosophic nature and relates to the old conflict between social responsibility and individual freedom. I will deal only briefly with this issue as in the nineteen sixties it has become merely academic. The principles, procedures and effects of the present law of torts form my third subdivision. Before any change is considered, it is essential that the relationship between theory and practice, between what the courts profess to be doing and the effect of their judgments, be determined. In the fourth subdivision, I will examine the adequacy of present insurance and compensation schemes; these schemes are of importance, both for their influence on the present law and for the guidelines they might provide for further improvements in the law. After I have established this four-point framework, I will consider whether tort liability should and can be replaced by a compensation scheme.

PURPOSE OF THE LAW OF TORTS

There is some difference of opinion among legal writers as to the place of deterrence in the law of torts. The vestiges of the influence of torts' early association with criminal law still remains, at least in theory. Salmond, as late as 1924 suggested that the ultimate purpose of the law in imposing liability on those who do harm to others is to prevent such harm by punishing the actor.¹ In recent years, however, this view has become the extreme one; most jurists are now content to suggest that the deterrent function of tort is a minor one. A recent judicial decision seems to indicate that at least the British Courts have adopted this view. In *Rookes v. Barnard*,² the House of Lords indicated that they would be inclined to grant punitive or exemplary damages only in the most extreme cases.

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1. *Salmond on Torts*, 13th edition, by R. F. Jeuston. Quoted by the editor.

2. (1964) All E.R. 367. (This decision seems to be relevant to the issue in the recent Ontario case of *Pretu v. Tidey* (1966) 1.O.R. 191, but was not mentioned in the judgement.)

Some writers ascribe a further, but closely related function to the law, namely, that of serving the interest of morality, or justice. These writers, most notably D. R. Harris, in his article, "The Law of Torts and the Welfare State"³ offer the view that the law of tort liability serves the moral aim of making the wrongdoer pay for the consequences of his fault. It is somewhat difficult to determine exactly what is meant by "moral-aim" but I presume this concept is related to that of retribution as employed in the criminal law, in its popular not strict sense.⁴ It seems somewhat illogical however, to attempt to relate the damages many tortfeasors are required to pay and the personal fault that contributes to any particular injury or loss. By no juggling of the figures can the addition of fault and the resultant liability for damages ever equal any moral interest that might be served. One recent Manitoba case that stands out in this context is that of *Huba v. Shultz and Shaw*.⁵ In this case the defendants were required to pay \$13,500 for what the Court determined to be exactly ten minutes of negligent conduct.

The third most commonly accepted aim of the law of torts is that of compensation:

Be the exceptions more or less numerous, the general purpose of the law of torts is to secure a man indemnity against certain forms of harm to person, reputation or estate, at the hands of his neighbors, not because they are wrong, but because they are harms.⁶

Not only is compensation generally accepted as a function of the law of torts, but many writers believe it to be the major function; a few even accept it to be the only function of the tort law. Rather than attempt to restate the views of such respected jurists as Fleming, Williams, Holmes and Wright, I will simply state that I accept compensation as the major if not the sole function of the law of torts. What follows is premised on compensation being tort's prime function.

THE PHILOSOPHICAL AND SOCIAL CONTEXT

As a multitude of writers have observed, many of the basic principles of the contemporary law of torts originated in the eighteenth and nineteenth century theories of individualism and the belief characteristic of that age that the purpose of the law was to bring about the widest possible individual liberty. Collateral to this belief was the tendency to expect any individual to fully bear any consequences of his actions. This emphasis on individual responsibility has been countered to a great extent by the twentieth century ideal of community responsibility. The changes within our society providing the

3. (1963) N.Z.L.J., p. 171.

4. The popular sense being that of "an eye for an eye"; the strict sense being that of Bentham's repudiation.

5. (1964) 32 DLR, 171.

6. Oliver Wendell Holmes, *The Common Law*, 46th edition, p. 144.

spring for this philosophic change have been most forcefully, almost evangelically expressed by Rosco Pound:

The philosophic change has resulted from the witness of the annual total of nine million victims of personal injury to which total of injured, maimed and slain must be added the widows, orphans, and dependants deprived of maintenance to which they were entitled. Tempest, fires, flood, pestilence and famine . . . take no such toll today. The two million annually victims of accidents in factories and workshops, and the seven million more injured in automobile, railway, airplane, shipping, store and home accidents have made even war take a second place.⁷

To observe that we are living in a welfare state, where society assumes a great portion of what only fifty years ago was the subject of individual responsibility is a trite observation. The numerous arguments of contemporary authors advocating individual responsibility are in many cases futile. The majority of these authors are arguing for the retention of control of various activities in private as opposed to government hands on the philosophic basis that individual responsibility and freedom is preferable to social responsibility and control. But this basis is fallacious, as in most instances individual responsibility is not even at stake; it has been long lost. The only real alternative is between state social responsibility or private social responsibility. The question of whether or not we will have pension schemes, for example, is no longer asked; it has long been answered, positively. The only remaining question is who shall operate any particular scheme of social responsibility, the government or private companies. This question cannot be answered by applying the arguments of the old debate between individualism and socialism.

I believe that it is apparent from these facts and comments that a compensation scheme cannot be rejected on philosophical grounds, all other problems aside. Any philosophic argument rejecting the principle of compensation is itself invalid. The only philosophic question left, if the the problem of compensation may be dealt with in philosophic terms at all, is whether the government or private groups will administer such schemes.

LIABILITY IN THE MODERN LAW

The present law of torts is supposedly based on the fault principle—"he who is at fault must pay". However, in considering this whole question of liability in the modern law, I will stress the fact that the courts are even now abandoning the fault principle and moving towards strict liability, or liability without fault. The law of torts adheres much closer to the principles of compensation in practice than one would conclude from the fault language of judicial decisions. The significance of this fact is great. It has been established that the prime purpose of the tort law is compensation and that the principle of social

7. *The Role of the Will in Law*, (1954-55), 68 *Harvard Law Review*, p. 17 at p. 20.

responsibility is the touchstone of the twentieth century philosophy. These are the two premises upon which a compensation scheme is built. Strict liability is one of the mechanisms by which such a scheme may be established.

Fleming, in his *Law of Torts*,⁸ traces the pattern of economic development that he believes underlies the philosophic changes from the eighteenth to the twentieth centuries; he relates these changes to the basis of liability in tort. As to the present law, he offers the view that now, as industry and commerce have achieved considerable financial stability, and the ability to absorb and distribute the cost of accidents and injuries, the eighteenth and nineteenth century impetus to fault is subsiding and being replaced with the trend towards strict liability. The danger of tort liability inhibiting to any degree freedom of action has been greatly lessened in the twentieth century. This change, while not apparent in the language used by the courts, is apparent from the operation of the law.

In fact, a substantial degree of reform has been accomplished, occasionally with the aid of statutes, more often by resort to fictions and other surreptitious legal devices which are commonly pressed into service in transitional stages of legal developments to pave the way to a franker recognition of altered concepts.⁹

The most obvious indication of this reform is the present concept of negligence. The objective standard of care used by the courts bears little relationship to any real personal fault. The case of *Ayoub v. Beaupre*¹⁰ illustrates this point well. A garage mechanic was in the process of emptying gas from a car, suspended over a grease pit, into a drum. He was employing a safety light, enclosed in a wire screen and insulated with a rubber core base. One or two drops of gas from the car splashed on the outside of the drum, forming gas fumes in the pit. When the mechanic had finished he inadvertently knocked the safety light to the ground. The light smashed and ignited the gas vapors, causing an explosion which destroyed the garage and adjoining property. The mechanic was held liable by the court for all damage to the adjoining property. In this case, as in numerous others, it is obvious that the question of any real negligence is subordinated to the interest of compensating the victim.

A further indication of the trend towards strict liability is the *res ipsa loquitur* principle. By assuming negligence without specific proof, it serves as a "straddle between fault and liability".¹¹ As Fleming points out, even if the rules serve only to establish a *prima-facie* case, it still represents a move to strict liability, since the plaintiff will almost undoubtedly succeed once he gets to the jury. If, however,

8. 3rd edition, pp. 289-298.

9. *Id.* at p. 292.

10. (1964) 45 DLR, 411.

11. C. A. Wright, 26 Canadian Bar Review 46, 49.

the rule is used to actually change the burden of proof, in effect it becomes "a means of creating a new head of strict liability under which the defendant may be held liable for negligence, notwithstanding that negligence has not been, and cannot be established".¹²

A third major area in which the trend to strict liability can be detected is the occasional practice of the courts to use the breach of safety statutes as evidence of negligence *per se*. In many such cases the court is pursuing a fictional legislative intention to confer civil causes of action and the inevitable consequence is the imposition of strict liability as "intended" by the particular statute.¹³ Even proof that all possible care had been taken is no defence for deviation from the rigid standard of conduct prescribed by these statutes.

EXISTING INSURANCE AND COMPENSATION SCHEMES

The effect of insurance on tort liability has been great. Liability insurance has provided much of the momentum for the trend to strict liability. Although in theory insurance has no bearing on liability, in fact the juries trying negligence cases frequently ignore the finer points of the law in favor of finding against the insured defendant.¹⁴

(I)

Property insurance is fairly common today. Excluding motor-vehicle insurance, this type of insurance is generally privately run and distributes any losses through a particular group of policyholders. With the exception of certain qualifications relating to deliberate damage inflicted by the policyholder, this type of insurance provides for the adequate compensation of the policyholder for any damage to his property. However, in the numerous cases of damage inflicted by the "negligence" of a third party, the insurance company simply takes the place of the property holder and sues the person causing the damage. Instead of the insurance company spreading the loss, the tortfeasor must bear it, even though he likely would be without insurance. Apart from whatever vague appeal this might have by reason of the more fitting justice of the situation, an appeal based on a fictional notion of fault, society is no better off. As Fleming points out, the economic assets of the community are not increased, and expense is incurred in the re-allocation of the loss.¹⁵ This type of insurance is of real value only when the damage caused is purely "accidental" or when it is caused by an insured defendant, the driver of a motor vehicle for example, for it is only then that the loss is distributed.

Personal injury insurance is much more limited in existence than property insurance and has the same defects.

12. Fleming, *Tort*, p. 295.

13. E. R. Alexander, *Legislation and the Standard of Care in Negligence*, (1964), 42 Canadian Bar Review, p. 243 at p. 266.

14. *Supra*, at p. 294.

15. *Id.*, at p. 117.

(II)

Motor-vehicle insurance in Canada, aside from the Saskatchewan plan, is generally privately organized, and distributes losses through a particular group of policyholders, providing compensation for all those injured, and insured. This type of insurance is a definite improvement over property and personal insurance as it can provide compensation for third party injuries. Its chief deficiency however, is that a great number of injuries, to uninsured pedestrians for example, are caused by insured motorists, yet, because the motorist is not "at fault", the injured party must bear the loss.

Before considering existing compensation schemes, I will briefly summarize the merits and defects of existing insurance plans.

DEFECTS: (1) Insurance, to be really effective, must be universally held. This is not the case with regard to property or personal insurance, although most motor vehicles are insured. (2) The types of insurance in existence too frequently fail to provide for third party losses, with the result that those injured by or on property or by the policyholder are not compensated. (3) Where property damage or personal injury can be attributed to a third party under the present system of tort liability, the insurer steps in and recovers his costs, leaving the loss to be borne by the frequently uninsured tortfeasor.

MERITS: (1) An insurance plan compensates the policyholder for personal injuries and property damage and (2) compensates for injuries to third parties, most notably in cases of damage or loss due to motor vehicles. In both cases, the losses are satisfactorily distributed.

(III)

In turning now to existing compensation schemes, I wish to first note that the chief difference between a compensation scheme and an insurance plan is that the former dispenses with any question of liability for fault, while the latter retains tort liability. Perhaps the most common type of compensation scheme is that for medical services. This type of scheme, often referred to as social insurance where there is distribution over a broad area, is generally state controlled and compulsory, and is usually supported by annual premiums paid by the recipients of the benefits. The chief merit of these plans is that everyone is compensated for the cost of all medical services required. The major defect of these plans is that they provide only for basic costs, not allowing for such factors as pain, mental suffering, and loss of income.

(IV)

The motor vehicle insurance scheme in effect in Saskatchewan is another type of compensation scheme. The plan is compulsory and state controlled, distributing losses throughout the motoring public. This plan offers a number of improvements over standard insurance.

Anyone injured by a motor vehicle receives compensation; unlike private plans, this compensation is extended to every injured party, not simply to those injured through a motorist's negligence. Unlike the state run health schemes, the awards are of reasonable amounts. For example, third-party liability coverage provides payments up to \$10,000 per injury, and \$20,000 per accident. Additional private insurance is available from the government or from private concerns.

(V)

The vast majority of industrial injuries are compensated for by Workmen's Compensation. All employees receive this benefit as a right, and are not required to show fault on the part of the employer, nor disprove negligence on their own part. The employer is required to obtain insurance against the incidence of liability. Insurance premiums are charged to production expenses, and the cost of the scheme is therefore borne by the consumer public, resulting in wide distribution of losses.¹⁶ The chief disadvantage to such a plan is the standardization of, and the limits on, compensation. Compensation is calculated primarily on the basis of loss of income, pain and suffering being totally neglected. Furthermore, in Canada, under the various provincial schemes, the employee is not permitted to go to the courts for further damages.

REFORMS

It would be obviously impossible to attempt to replace completely the present laws of tort liability with a compensation scheme. The idea of compensating everyone for every injury is obviously untenable.

It is an obvious truth that each individual in a community must put up with a certain amount of annoyance, inconvenience and interference, and must take a certain amount of risk in order that all may get on together. The very existence of organized society depends on the principle of "give and take, live and let live", and therefore the law of torts does not attempt to impose liability or shift the loss in every case where on person's conduct has some detrimental effect on another. Liability is imposed only in those cases where the harm or risk to one is greater than he ought to be required to bear under the circumstances.¹⁷

In the reform proposals to follow, three basic principles will be adhered to: (1) Compensation should be made where practicable. While a complete scheme of compensation is impossible, there are types of injuries now dealt with by tort liability that could be more adequately compensated for by means of a compensation scheme. (2) Compulsory insurance should be provided where compensation is impractical, and where the possible loss or damage is substantial. (3) Optional insurance should be made available for all other loss or

16. *Id.* at p. 471.

17. *Restatement of the Law of Torts*, 822, quoted in Fleming, p. 373.

injury, and for amounts above those available from a compensation or compulsory scheme. In the following discussion of reforms of tort liability, I will deal with personal injuries and property loss separately.

(I)

The first step towards reform would be the institution of a provincial or a national medical services plan in Canada. The purpose of such a plan would be to compensate everyone for basic medical costs resulting from any physical or mental injury or illness. The plan would provide for any professional care, hospital services or drugs required. No account would be taken of the extent or cause of any injury. The plan would be vest operated by the government, as for example the British Health Plan. The government could probably operate the plan most economically, although a private plan may be more desirable from the standpoint of choice. The plan could be supported in much the same way as the present government operated hospitalization plans, with joint contribution by the public, by means of annual premiums, and government subsidies provided from other sources of revenue.

(II)

Compensation for personal injuries above this basic level can be most effectively dealt with in three parts; injuries resulting from the operation of a motor vehicle, injuries arising in the course of employment, and all other injuries. The division is a logical one for a number of reasons. A comprehensive compensation scheme above the basic plan covering all types of injuries is actuarially impossible or at best, unsound. Accidents result more frequently from some activities than from others. It is only reasonable therefore to assign the cost of these accidents to the activity producing it. The other alternative, distributing the costs evenly over the general population would saddle many with economic burdens far outweighing any advantages resulting from such a compensation scheme. The third alternative, having the government subsidize such a scheme, still begs the question of adequate limitations on who is to be compensated. The second reason for this breakdown is that compensation and or insurance plans are now in operation in the areas of motor vehicle injuries and injuries arising from employment. These plans are considerable improvements over the law of tort liability, and their operational methods and general acceptance by relevant elements of the public can be of great value in any proposed system of reform.

Injuries Arising from Operation of a Motor Vehicle

A Compensation Scheme similar to that now in operation in Saskatchewan should be introduced in all cases of injuries arising from the operation of a motor vehicle. Persons so injured would receive

compensation, regardless of fault, for pain, mental suffering and loss of income, to a ceiling of \$15,000. The scheme could be controlled by the government, but administered by a crown corporation much as the Polymer Corporation was operated during the past war by the federal government, employing modern business techniques and practices. Such a plan could alternatively be operated by private companies, provided such coverage was compulsory; but here again, as with the medical scheme, the economic advantages outweigh the desirability of choice.

The major difference between the Saskatchewan plan and the scheme I would propose is that the latter would not compensate for any damage to property, for reasons that I shall explain later. Premiums would be paid by all motorists; those with poor driving records paying a higher one. The premium rate will be established in accordance with the statistically predicted costs of the scheme, as is now the case in Saskatchewan.

A third level of compensation should be made available, over the \$15,000 level. This insurance can be handled by the government or by private companies. In this area, the present laws of tort liability will still apply, subject to the various reforms set out below.

Injuries Arising in the Course of Employment

With regard to injuries arising in the course of employment, two levels of compensation above the basic medical services should be provided. The first level should provide for the payment of the employees salary while unable to work. This level will be administered in the same manner as the present Workman's Compensation Scheme is administered. The company alone will pay compensation, under the supervision of a compensation board.

The second level will provide for the compensation for any worker's pain or mental suffering. The cost of the plan will be borne equally by the company and the worker. The maximum amount payable would be adequate if approximately \$25,000 in any one case. There would be no recourse to the courts; all settlements would be administered, and disputes arbitrated, by the board.

(III)

I would propose that all other personal injuries and all property damage be dealt with under the present law of torts, subject to the reforms set out below. As mentioned earlier, some limits must be set on the types of personal injuries to be compensated for and the extent of compensation. It would be obviously impossible to spread the compensation costs for all injuries across the general public or some arbitrary group. The same principles apply to property damage. It would be most unsatisfactory to even attempt to distribute the loss suffered, for example, by a shipping company, in the destruction of one

of their vessels, by means of a compensation scheme. Private insurance is the most effective means of loss distribution in cases such as this, indeed, in all cases of property loss. Furthermore, I do not believe there is the same urgency attached to the problem of property damage as there is to personal injury. The loss of an automobile or damage to a building has much less harmful effect on the injured party than, for example, the loss of a limb, or prolonged mental suffering.

One of the basic reforms that I would propose in the area of property damage and personal injuries other than those provided for above, would be the introduction of universal and compulsory insurance. Everyone should be required to possess third-party liability insurance for any injuries or damages caused to others. This insurance could be offered either by the government or by private organizations. However, I believe the government could operate such an insurance scheme as efficiently and more economically than private companies. The minimum amount of government activity required regardless, would be to strictly control the cost with which insurance is provided by private organizations. At least this degree of control is required by the fact that the insurance would be compulsory. Perhaps the ideal solution is that employed by the Saskatchewan Government. Insurance for amounts above those offered by the compensation scheme is made available both by the government, and by private companies. The insurance is compulsory but may be obtained from either source. This type of insurance, in addition to the personal (as opposed to third-party) insurance now available would ensure that the majority of the personal injury and property damage losses would be effectively distributed.

In conjunction with the introduction of universal insurance, I would propose a number of reforms in the present law of tort. These reforms are based on the premise that, with the existence of insurance the law can be made to serve more satisfactorily the compensatory function, by adhering closer to the principles of strict liability, and by making hitherto protected interests subject to tort liability. It is beyond the scope of this paper to examine all areas requiring reform in detail, and so I will simply mention only a few of the more significant areas.

The standard rules of negligence should apply to negligent misstatement, to negligence in the sale or lease of real property, and to negligently caused economic loss. The protection granted these areas has been eroded to some extent in Canada by decision of various provincial courts, but has yet to be authoritatively altered. The sections of the various provincial highway acts requiring gross negligence on the part of the driver of a motor vehicle before a guest passenger can sue should be amended, and only negligence required. The present provision is nothing more than a device by which insurance companies are subsidized, at the expense of the accident victim. The defence of

contractual consent, more particularly as it applies to negligence, should be replaced by the *Lehnert and Stein*¹⁸ concept of consent. The courts have been most progressive, in their concern with various types of compulsion, and with actual as opposed to constructive knowledge and consent insofar as non-contractual consent is concerned. But in what situation could the elements of compulsion and actual knowledge have brought more injustice than the case of *Dobush v. Greater Winnipeg Water District*.¹⁹ The defendant company operated a railroad to a rather isolated part of Northern Manitoba, thus providing the only practical means of transportation to the area. The plaintiff, an illiterate woman, purchased a ticket containing a clause exempting the defendant for any injury caused by its negligence, but was unsuccessful in her claim because of the existence of contractual consent. Yet, obviously, she was compelled to enter the contract as the railroad was the only practical means of travelling to and from her home. She likewise had no knowledge of the exemption clause as she was illiterate. A fourth possible reform relates to the defence of insanity. As tort is concerned primarily with compensation of the injured victim, insanity should be no defence unless it amounts to almost complete unconsciousness. The existence of insurance would prevent such a principle from causing any degree of injustice to a tortfeasor. A further reform would involve the adoption of the principle contained in the recent amendment to the British Statute of Limitations, providing that where personal injuries are suffered, the injured party may, with the consent of the court, sue within one year of learning of the injury.

CONCLUSION

In my consideration of whether a compensation scheme can adequately replace tort liability, I have attempted to demonstrate that the prime function of the law of torts is compensation, and that this function is in accord with modern philosophic and social beliefs. I have pointed out the areas of the present law where a trend to strict liability and compensation is discernable. The major defects of present insurance and compensation schemes were noted, and their assets examined as presenting a guide to possible reforms of tort liability.

While, as was noted, a scheme providing for the compensation of all accident victims is obviously impractical, there are many injuries presently provided for only by tort liability that could be more adequately compensated for by the introduction of a compensation scheme, and the introduction of compulsory liability insurance combined with the retention of a reformed law of torts.

Of the reforms proposed, I personally consider the introduction of compulsory liability insurance for injuries arising from sources other

18. (1963) S.C.R. 38.

19. (1946) 54 M.R., 137.

than motor vehicles and workmen accidents, as being of top priority. While this type of injury is less frequent than the types arising from other sources, it is the least protected by insurance or compensation. The introduction of this insurance even without the proposed reforms in the law of torts would be a tremendous improvement over present conditions. Personal injuries arising from motor vehicle accidents and employment would be second on my list of priorities. The incidence of insurance and compensation is highest in these two areas, but the number of non-compensable injuries is still great. The extent of possible injury in these two fields is the second factor making these reforms of second priority. The medical services compensation scheme, and compulsory property insurance would be of lower priority. The medical compensation scheme, occasionally described as "the least for the most", is of considerable importance, but is designed to provide only basic compensation. Property interests have here been considered secondary to personal insurance, and I believe this is a just reflection of accepted values.

The probability of any reforms of the type mentioned here being effected is difficult to gauge. There is little doubt about the medical compensation scheme, as the present federal government plans to introduce such a scheme within the next session or two. The changes proposed in the workmen's compensation are more radical and will naturally be strongly opposed by business and commercial interests, in all probability with considerable support from the legal profession. Changes affecting other personal injuries and property damage will be similarly opposed if operated by the government, as suggested. One concession that might be made to these business and commercial interests would be to leave the provision of all forms of insurance in the hands of private companies. If such were the case, we might have the unusual and unexpected situation in which insurance companies would be participants in "socialist" lobbies.

