

POSTURING, TINKERING AND REFORMING THE LAW OF NEGLIGENCE — A CANADIAN PERSPECTIVE?

BRUCE FELDTHUSEN*

It is a pleasure to have been invited to participate in this dialogue regarding the reform of the law of negligence. Obviously, given the work and report of the Panel of Eminent Persons ('Ipp Panel'), this is a topic of current interest in Australia. However, the movement to reform tort law has ebbed and flowed in every common law jurisdiction in the world for more than 50 years. It will be interesting to discover from this volume whether there exist many significant jurisdiction-specific variables in the debate.

The courts in the United States ('US'), particularly those in California, have expanded the boundaries of negligence law the furthest. Accordingly, this has also been the most fertile ground for retreat, or reform. Developments in negligence law in Canada, England, and Australia have been far fewer and much less dramatic. Tort doctrine remains strikingly similar in these three jurisdictions. I am not sure there exists a unique Canadian perspective. There may, however, be a distinctly Canadian dynamic.

Canada's social and business culture resembles increasingly that of the northern US. US media have a huge influence in Canada. Many of the major liability insurance companies (who drive the tort reform movement) operate on both sides of the Canada-US border. Not surprisingly then, tort reform rhetoric spills over into Canada after it has gathered a good head of steam in the US. But given Canada's much more restrictive rules of liability and damage quantification, we usually reject the American case for reform. We can easily conclude our tort law is in good shape compared to what we perceive as the excesses generated by our southern neighbours. An element of national pride may manifest itself in the debate. A good example of this dynamic may be found the Ontario Law Reform Commission's *Report on Exemplary Damages*.¹ The Commission was empowered to consider *whether* a problem existed. It concluded that the law of punitive damages could be left to Canadian judges and juries without driving anyone into bankruptcy.

Over the last 25 years, much Canadian tort reform has taken place in the Supreme Court of Canada. Opinions differ as to whether the Court has reached the correct conclusions on particular points, but certainly it has been attentive to

* Dean, Faculty of Law, Common Law Section, University of Ottawa.

1 Ontario Law Reform Commission, *Report on Exemplary Damages* (1991).

developing issues. Occasionally the Court has ventured into what some would regard as the exclusive province of the legislative branch to effect tort reform. For example, in 1978 the Court imposed a C\$100 000 cap on non-pecuniary general damages in personal injury cases. The cap has since been adjusted by the courts themselves to take into account inflation and stands at approximately C\$300 000 today. On the other hand, the courts have been criticised for deferring to the legislature too often. One example is the courts' failure to adopt, or at least to strongly encourage, mandatory structured settlements in major personal injury cases.

On the legislative front, the most significant developments have been in the nature of limiting or abrogating altogether the right to sue for personal injury. Although Canada is a long way from a New Zealand style comprehensive no-fault compensation scheme, more personal injuries are covered by no-fault than by negligence. Approximately 20 per cent of personal injuries occur in the workplace and they are excluded from the tort system by workers compensation legislation. It has been estimated that approximately 33 per cent of all serious personal injuries arise from automobile accidents. There are as many automobile insurance regimes as there are provinces. No-fault schemes are proliferating. Examples include pure government no-fault in Quebec, regulated private insurance providing mandatory no-fault cover up to a threshold in Ontario, and consumer choice no-fault in Saskatchewan. The majority of accident costs associated with driving in Canada are covered on a no-fault basis.

Perhaps these are some of the reasons why the US tort reform agenda exhibited in the mandate given to the Ipp Panel has not yet made much headway in Canada. One major exception is found in the province of British Columbia, which is presently engaged in a process strikingly similar to the recent Australian experience.² There may be reasons why we see this in British Columbia, but not elsewhere. Negligence liability of local governments has been a controversial subject in that province for many years. More significantly, automobile liability insurance is provided by a monopoly government insurance company. The province is presently experiencing acute budgetary difficulties.

This takes me to the political dimension of tort reform. Far too much legal analysis in Canada operates on the assumption that law reform issues and solutions find their way on to the public agenda more or less by magic because (a) an important social problem exists; and (b) the proposed solutions are thought to address the problem. I will address tort reform from this incomplete perspective in a moment, but this is not the place to start. The disciplines of economics and political science, and the political transparency of our US friends, make a mockery of this naive approach. The public agenda is set and manipulated by organised interest groups. Elected governments adopt policies that maximise their chances of re-election. In North America, the theory that best explains tort reform is one that comprehends the battles between the incredibly well-organised plaintiff's bar on the one hand and the powerful insurance

2 Government of British Columbia Ministry of Attorney-General, *Civil Liability Review* (2002) <<http://www.ag.gov.bc.ca/liability-review/>> at 21 November 2002.

industry on the other, and the relationship of both these interest groups to political parties in different jurisdictions. The analysis can be enriched by considering also influential consumer lobby groups, and professional organisations that represent doctors, industry, municipal governments and so on. Identifying the power and the political pressure points will often clarify what appear to be irrational definitions of public problems and incoherent solutions. I am sure the same is true in Australia. With that dose of reality in the background I turn to the particulars of negligence reform using the *Review of the Law of Negligence Final Report* ('Ipp Report') as a most useful illustration.³

The mandate given to the Ipp Panel posits that 'damages for personal injury has become unaffordable and unsustainable as the principle source of compensation for those injured by the fault of another'. The solution to the problem was also identified — 'limiting liability and quantum of damages',⁴ and the Panel was provided with a list of particular issues meant to implement the solution. Both the problem and the type of solution appear to have been stated by fiat, with no underlying empirical evidence in support. Nor was the Ipp Panel empowered to investigate or challenge either. Strikingly absent is any desire to investigate alleged malfunction in the private insurance market. The truly interesting issue is how and why this mandate developed. This is best left to observers of the Australian political and social scene.

Terrence Ison once described personal injury tort law as the '[f]orensic [l]ottery'.⁵ No rational being would ever adopt (or have adopted) negligence law as an accident compensation scheme. It excludes too many, takes too long, and costs too much. Prudent individuals and compassionate governments do not and cannot depend on a liability system to spread the costs of illness and accidents. If compensation alone is the issue, outright abolition of personal injury negligence law is the obvious answer. Tinkering with doctrine is at best a compromise of competing political demands and at worst a wasteful sham.

Negligence law is, at least in theory, a fault regime. Supposedly, it exists to effect unmediated corrective justice between a wrongdoer and a victim. The restitutionary measure of damages is employed to correct the fault. Some would question whether inadvertent carelessness has the moral weight necessary to support the case for corrective justice. At the practical level there are many cases in which fault-based liability has been imposed in the absence of any act or omission that an ordinary person would comprehend as morally blameworthy. The chances of a defendant succeeding with a standard of care defence are poor. Why? In part because human decision makers prefer to find fault, apparently affecting adversely only a deep pocket defendant or a liability insurer, than to deprive a seriously injured plaintiff of the funds necessary to lead a decent life. The fault principle confronts our social failure to care properly for the sick and injured, and sometimes the latter triumphs in a negligence case.

3 Panel of Eminent Persons, *Review of the Law of Negligence Final Report* (2002).

4 Ibid ix–xii.

5 Terrence G Ison, *The Forensic Lottery: A Critique on Tort Liability as a System of Personal Injury Compensation* (1967).

The first thrust of negligence reform, exhibited in the Ipp Report, is to tighten the doctrinal definition of fault. I suspect Australians, like Canadians, attach far too much significance to legal rules and the nuances of legal language. As long as the human and social pressures to compensate persist, the elasticity of legal interpretation will allow it. It may be more fruitful to evaluate these proposals for their symbolic value to the general public.

The Ipp Panel was not permitted to challenge the premise that negligence law was 'unpredictable'; nor that it was 'too easy' for plaintiffs to recover; nor that damages were 'too high'. It did however gather 'evidence' that negligence law was so perceived by some members of the Australian public. Moreover, it reached the conclusion that the perception alone was sufficient to justify reform. If we leave aside the provocative questions of how such a perception arose, how it was proven, and how it might be corrected, as did the Panel, the Panel cannot be faulted for tightening the definition of fault in negligence law. The problem they identified was the perception that it is too easy to recover in negligence. The solution they recommended was to create the perception that this would be so no longer. Much of law reform operates entirely on this level.

The second thrust of negligence reform, again exemplified by the Ipp Report, is to reduce damages payable to plaintiffs who do succeed in establishing liability. There is probably no more straightforward and sensible type of tort reform, nor any more significant recommendation in the entire Ipp Report, than that which abolishes the common law collateral source rule and makes tort the last source for compensation.⁶ Allowing someone to recover twice for the same loss, or requiring that this double recovery be corrected by costly subrogation between insurers, is wasteful. The cap on an earning capacity award accepts the notion that high earners ought to privately insure the upper ranges of their salaries, rather than have low earners bear that cost through liability premiums. This is consistent with distributive justice, but not corrective justice. The limits to future care bring tort principles in line with other compensation schemes. Money by definition cannot restore non-pecuniary loss. Some would argue for the outright abolition of non-pecuniary damages. Most compensation schemes ignore or limit recovery under this head. The suggested cap on general damages is comparable to the common law cap adopted in Canada 25 years ago. On the whole, these suggestions are sensible. The real problem is that all these modifications and more will never create an effective compensation scheme from negligence doctrine. So many other costs, unnecessary from a purely compensatory perspective, remain.

Finally, we should observe that the term 'reform' in the tort context inevitably means to roll back, to limit, to restrict. Why do we preclude the possibility that tort reform might create for example, new causes of action, or a much expanded role for punitive damages? Empirical evidence about the existence of the problems and the efficacies of the proposed solutions is not the only thing missing from reform exercises exemplified by the Ipp Report. Where is the reference to deterrence? Without tort law, the legislatures would still be debating

6 Panel of Eminent Persons, above n 3, [13.134]–[13.158].

whether Pintos were dangerous, or tobacco smoking a matter of individual choice. A good case can be made for taking tort out of the routine compensation industry associated with automobile accidents and the like. A good case can also be made for encouraging plaintiffs to discover and sanction the systemic disregard for the lives and health of others too often exhibited by industry and government. Real tort reform should accommodate both these directions.