

# Tort Reform Tension

Some countries, such as the U.S. and Australia, have made headway on reforming tort systems that many perceive to be unfair, costly and inefficient. Joint and several liability, compensatory damages, collateral sources and vicarious liability have specifically been targeted for change. Has the time come for amendments to Canada's legal rules?

August 1, 2005 **by Craig Harris**

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countries has barely caused a ripple in Canada. Despite the 2002 Attorney General Geoffrey Plant's civil liability review project in British Columbia, few provinces have gone fishing for serious changes to the way courts assess and rule damages. But insurers say the recent hard market revealed that reforms to key legal principles are necessary to reach the goals of stability and predictability.

"The primary reason behind the increase in claims (in the commercial liability market) is the cost of settling court cases and potential court cases, which has increased significantly over the past few years," according to the Insurance Bureau of Canada (IBC).

Australia enacted a sweeping series of changes to damage awards in 2003 and have addressed limits to liability but, currently no province is actively looking into tort reforms. Several groups, ranging from the IBC to the Risk and Insurance Management Society's Canada Council to the Voluntary Sector Forum to the Ontario Federation of Snowmobile Clubs, have targeted unreasonable liability lawsuits as a primary source of increasing claims costs and exposures.

"RIMS and Canadian risk managers have long supported meaningful tort reform to eliminate economic unpredictability and inefficiency," Lance Kayfish, chair of the RIMS Canada Council Sub-Committee on Communications and External Affairs and a risk manager for the City of Kelowna, B.C., says. "It has been on our radar screen for some time."

According to the IBC, court awards and legal expenses cost approximately \$7.3 billion in 1998. By 2003, tort costs rose to an estimated \$10 billion. These numbers pale in comparison to the sharp increase in tort costs experienced in the U.S. A Tillinghast study released in January shows that tort costs reached a record \$246 billion in 2003. In Australia, court awards increased at a rate of 10% per year from 1992 to 2002, which contributed to an "insurance liability crisis in 2002," according to the Australian government treasury.

## **ATTENTION TO THE AUSSIE WAY**

In 2003, the Australian government undertook a "program of unprecedented law reform and achieved a raft of changes unmatched in the common law world for their breadth and scope," the treasury department noted in a report. Specifically, the changes involved three main areas – establishing liability, clarifying damages and undertaking procedural reforms. In particular, the amendments changed the way courts decide issues such as duty of care, foreseeability, causation and remoteness of damage and the standards to which professionals should be held.

The U.S. has been equally aggressive in its push for tort reform, spearheaded in many cases by the insurance industry. The Insurance Information Institute, AIG and the U.S. Chamber of Commerce released a paper early in 2005 entitled "Tort Excess: The Necessity for Reform from a Policy, Legal and Risk Management Perspective."

"The American legal system remains the most expensive civil justice system in the world, costing more than double that of other industrialized nations," the study argues. "Civil justice reform legislation aims to return integrity to the U.S. legal system, abolish incentives for abuse now endemic in the system and redirect the system on an efficient, timely, predictable and fair course."

Noting that the "future insurability of some types of liability risks is in doubt," the report cites several key reforms that either have taken or should be taking place across states, including capping non-economic damages, modifying the joint and several liability rule, restricting punitive damage awards and revising the collateral source rule.

## **REFLECTING ON REFORM**

An IBC document stated that "(tort reform) is an area garnering increased attention internationally, as reflected in the tort reforms that several US states have passed and the state legislative reforms to limit the escalation of liability costs in 2003." But the big question now is – what could tort reform look like in Canada and what are the chances of any changes being

enacted here?

The IBC has put some thoughts together on what it would like to see changed in specific areas of tort and general damages. Acknowledging differences between the U.S., Australian and Canadian environments, IBC vice president and general counsel Randy Bundus says there are some clear areas ripe for reform – joint and several liability, the collateral sources rule, establishing net income as the basis for determining damages and vicarious liability. “Our goal is to strike a balance in terms of fairness between the plaintiff and the defendant,” Bundus says.

Some legal groups agree with this approach. Jamie Chipman, a partner with Stewart McKelvey Stirling Scales and president of the Canadian Defence Lawyers Association, says there is a “need for clarity. It’s necessary to finally become proactive in tort reform because I am looking at what the Supreme Court of Canada has been doing of late with respect to any cases involving insurers and statutory language. The Supreme Court is saying if you don’t do anything with this antiquated language, we are going to continue to find a way to come out with decisions that are ‘plaintiff-friendly’.”

Not surprisingly, trial lawyers in Canada tend to disagree with the thrust of any tort reform measures. “The insurance industry likes to look at numbers, but as lawyers we are in the justice business,” Russ Howe, president of the Ontario Trial Lawyers Association and a partner with Boland Howe Barristers, says. “And the number one rule of law is that the innocent party gets full compensation. And that is what rules like joint and several liability are all about.”

## **WHAT CURRENTLY COUNTS IN COURT**

Under the current joint and several legal doctrine, courts allow the plaintiff to recover all of the damages from one of multiple wrongdoers, even if that party is only partially at-fault for the loss. It is one of the primary areas that IBC and other parties would like to see changed. “We don’t think it is fair for a defendant who is found to be only one per cent at fault to potentially have to pay 100% of the loss,” Bundus says.

“RIMS supports the elimination of joint and several liability for all non-economic damages, such as pain and suffering and punitive damages,” Kayfish says. “We believe this would discourage plaintiffs and their counsel from approaching defendants on the ‘deep pocket’ syndrome.”

Eric Gunnell, director of claims and litigation for the Ontario Municipal Insurance Exchange (OMEX), says joint and several liability is a “big issue for us. Because we represent municipalities, we are often the deep pocket they come to. And all they have to do is find that 1% (liability).”

The tendency towards “plaintiff-friendly” rulings makes some insurance groups reluctant to go to court. “We don’t like to go to trial, because there is no rhyme or reason to the settlement,” Gunnell says. “So we go to mediation and sit down and say if we don’t throw something in today, we could lose it all tomorrow.”

But Howe says trial lawyers must demonstrate that there is some liability for a party in the case of a loss. “To get them in the game, we have to prove they did something wrong,” he notes. “And realistically, lawyers don’t go to trial on cases where they think they are going to get one point on liability. That is way too risky.”

Howe also argues that joint and several liability has the salutary effect of increasing efficiency in the legal system. “It promotes settlement in many cases. If parties were only going to end up paying on some percentage basis, we would have way more trials. That would be very expensive and slow the whole system down.”

Jim Sami, general manager and attorney in fact for the Ontario School Board Insurance Exchange (OSBIE), says “trial lawyers play the (joint and several) card to the extreme, not only at the trial but also in negotiations at mediation. They know if they have a deep pocket there they can use it to the maximum.”

Sami acknowledges that “there is a fairness issue in that maybe the guilty party does not have the ability or coverage to indemnify the injured party. Having said that, there are different ways to look at how joint and several could be changed. One way is to have a fund to pay for these kinds of lawsuits, similar to PACICC.”

Gunnell says if joint and several liability is not scrapped, it should at least be amended so that it is proportionate. “If you are going to keep it then let’s change it around, so that if you are in for 1%, just pay your 1%; not in for a penny and pay the pound,” he argues.

## **THE BIGGER PICTURE**

There are other areas beyond joint and several liability that insurers and other groups are interested in amending. Currently, damages for loss of income are determined on the basis of gross earnings, which do not take into account taxation and other employment deductions. In other words “plaintiffs can collect more than they would have received if they were working,” Bundus says. In addition, the collateral source rule means that plaintiffs have the potential for “double recovery” – once from the wrongdoer and secondly from insurance, sick pay and disability plans carried by employers or employees.

Gunnell argues that when it comes to loss of income “it is too easy to ramp up what this person could be worth. You start getting some astronomical numbers, and that ends up scaring you off going to trial, because your policy is going to be tagged. It is amazing what people could end up making when they ramp it all up.”

Howe counters that the government has granted the victim’s right to full compensation by not taxing future income. “This is a tax break that the government has decided to give to injured people and the insurance industry wants to steal it,” he says. “The question of taxes is between the individual and the state. The insurance industry is sticking its nose where it doesn’t belong.”

## **VESTING VICARIOUSLY**

In terms of vicarious liability, Gunnell says last years introduction of Bill C-45 into Ontario, which introduced criminal liability for employees and organizations for negligent conduct, has raised awareness of the issue. “We are starting to see it come out more now, ” he says. “Some of our members are saying ‘we have to look at our procedures, we don’t want to be held responsible for what one of our employees did,’ I think we are getting back to some of the reasons why auto went to no-fault in 1990, and that was to try to get it away from liability. Now, we seem to be falling right back into it.”

Vicarious liability is a broad, complex area of the law, Kayfish says, “but risk managers share the view that the standards and test for establishing vicarious liability are not high enough in many cases.”

The two main issues in vicarious liability today are sexual abuse claims and car leasing or renting (see Canadian Underwriter, March 2005 “The Politics of Leasing” and May 2005 “Staying on the Road.”). Howe says “vicarious liability is vital, you can’t dump it. For the leasing companies, it would be the biggest joke of all. Because it would mean the companies that are making money off this would be held to a lower standard than me if I lend my car to my brother.”

Other topics on IBC’s laundry list of legal reforms include disallowing gross-up for income tax and requiring that the courts order structured settlements in all cases where the plaintiff has future care or future income losses. Additional changes could see the elimination of prejudgment interest on general damages and the calculation of prejudgment interest on pecuniary losses from the date the claimant notifies the defendant they will be suing.

One area not mentioned in IBC documents, but still of concern to large insurance organizations is class action lawsuits, according to Sami. “These lawsuits are the one area that could create major havoc,” he says. “The cost of defence is a major concern and you can spend a lot of time and money in just fighting a certification case. I believe class action reform would be a valuable

area to consider.”

Another issue that risk managers think should be reviewed is severe sanctions on frivolous lawsuits, according to Kayfish. “We think this will go a long way toward improving efficiency in the tort system.” He notes that in provinces like Alberta, there are available remedies, such as the awarding of “double costs’ against plaintiffs for frivolous lawsuits.

For Gunnell, the entire process of tort reform is long overdue here. ” I think there is an appetite for tort reform in Canada,” he says. “I used to think we were years behind the U.S. in terms of settlements. Now, I think we are right up there. We have to start moving from talking about it to doing something about it.”

Howe argues that litigation in the U.S. is a “whole different world.” The so-called reforms, like caps on non-economic damages, already exist in Canada. The same goes for punitive damages, which are minimal here compared to the U.S. The bottom line is that if the innocent victim doesn’t get full compensation, we have just abandoned Magna Carta and hundreds of years of jurisprudence,” he explains.

Bundus says the current tort reform proposals are just that – proposals – which could form part of an organized lobby to legislators. At this stage, however, it is not clear which group, or whether a coalition of groups, will lead the charge on tort reform. In Canada, the common law, including the law of negligence, falls within the jurisdiction of the provinces (Quebec operates on the civil code). That means lobbying for tort reform, if and when it comes, will need to be coordinated with various attorney generals.

“Tort reform will have to be done on a province by province basis,” Bundus says. “Hopefully, there will be some receptive provinces and this will allow the industry to show that the experiment can work. This is an issue that affects all of society and requires some necessary changes.”