Issues in Workers’ Compensation Versus Tort

1. Tort Remedies in Workers’ Compensation
2. Comparative Awards in Tort and Workers’ Compensation
3. Tort and Workers’ Compensation as Institutions of Justice

By

David K. Law, LLB

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Tort Remedies in Workers’ Compensation
1. Introduction

Workers’ compensation systems typically bar workers from pursuing certain rights of action. In exchange, it is said that workers have received a form of “social insurance”. Employers are charged with funding that insurance, but are protected from liability. This, in essence, is the “historic compromise” - the rock upon which workers’ compensation is built.

This paper briefly explores some issues related to exclusivity. First, what are the merits and de-merits of exclusivity? Second, what is the status of basic exclusivity before the courts? Third, what forms of action outside WC might exist between worker and employer under exclusivity? Finally, how might the legislature amend exclusivity so as to improve the system without jeopardizing the “historic compromise?”

2. Aspects and Value of Exclusivity in Canadian Workers’ Compensation

Section 10 of the British Columbia Workers’ Compensation Act (the “Act”)\(^1\) bars a worker and his/her family from bringing an action against the worker’s employer, the employer’s agent or a co-worker in respect of “any personal injury, disablement or death arising out of and in the course of employment.”

This provision, in one form or another, is contained in every North American workers’ compensation (WC) statute. In Canada, we can trace this back to the report of Sir William Meredith\(^2\) who after enumerating the sacrifices of workers under the proposed WC insurance plan, stated the most significant one of all:

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\(^1\) Workers Compensation Act, RSBC 1996 ch. 492, s.10

\(^2\) Final Report on the Laws Relating to the Liability of Employers, Sir. Wm. Meredith (1913)
“It must be borne in mind that the workman is required, as the price of the compensation he is to receive, to surrender his right to damages under the common law, if his injury happens under circumstances entitling him by the common law to recover...”

The key logic to this sacrifice, as we know, is that the worker traded his uncertain right to greater awards for a more certain entitlement to limited compensation.

Meredith appeared most concerned with the plight of the injured, those whose damaged health already weighed them down with an unshiftable burden. Meredith foresaw that the WC system would essentially shift risk and cost from the most vulnerable people (those injured and attempting to prosecute a tort claim against the employer or a co-worker) onto others:

“The burden which the workman is required to bear he cannot shift upon the shoulders of any one else, but the employer may and no doubt will shift his burden upon the shoulders of the community, or if he has difficulty in doing that will by reducing the wages of his workmen compel them to bear part of it.”

Study shows that the employer has done just those things - shifting the cost of the WC system into products and services, or by effecting reductions in wages to offset the price of WC premiums. In recent years, employers have also begun to invest in preventing WC costs, both by reducing hazards in the workplace and by more aggressively opposing claim costs that are translated into higher premiums.

What we have learned from experience and study is this: the “exclusivity principle” (restricting a worker to the single WC remedy for workplace injury) has provided

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3 Ibid., p.15
4 Ibid.
workers a fair degree of certainty about compensation, and for the broad middle range of recipients appears to be at least as generous, if not more generous than, awards in tort from Canadian courts. The other lesson is that employers have gained almost total immunity from liability in regards to their acts or omissions as they affect the health of their employees, except as the negative consequences of those acts or omissions are reflected in premiums supporting a collective insurance pool.

As discussed in other papers, the lifting of liability from the employer has possible social, legal and economic consequences which extend far beyond the reach of this paper to canvass in detail. The legislature focused on the result of the system - the worker’s plight - and in so doing shifted some attention and energy away the causes and contributing factors creating the conditions of injury and disease. Thus, when the employer was freed from liability to the worker in respect of workplace injury, the employer was also freed to turn its attention and resources more fully to production, profitability and creativity (relatively unburdened by the threat or reality of being sued for whatever harm the workplace inflicted on the workforce).

What is clear, too, is that the employer’s willingness to fund the WC system hinges upon this freedom from liability; were liability re-introduced, in whole or in part, it could only be done by demonstrating to employers that they would somehow gain (perhaps by using restricted employer liability for certain expensive, and/or exemplary, benefits, so as reduce or contain WC system costs for those employers whose rates of accident cost are better than average).

This writer believes the evidence shows the Canadian injured worker has fared relatively well, on average, in terms of receiving the speedy and reasonably comprehensive compensation required in lieu of tort damages. The non-injured worker has not fared so well, except in knowing the system exists to cushion the blow of a future injury. Not everyone shares this view, however, and the historic compromise has been under some
debate and assault in the community and the courts (see below). The temperament of some Canadian trade unionists, for example, was revealed to the author in a recent off-the-record discussion with a person representing injured workers for a construction union. “Give us the tort system” the Ontario unionist said, arguing that retrenchment of entitlement and reduction of benefits in her province had so squeezed workers’ rights that they’d be better off suing in court than claiming before the Workplace Safety & Insurance Board. Ironically, a variety of employer representatives and some studies have hinted at the favourability of tort, in comparison with WC, for enterprise.

Whether workers are right to want their rights of action back (this writer thinks not) or whether employers would gain in that scenario (this writer thinks so) is not an issue in this paper. Rather, this discussion touches on the very large impediment to a return, in whole or in part, to a worker’s right of action against the employer: the rule of exclusivity.

As shown below, Canadian courts are not much interested in opening the door to a return to employer liability, showing due deference to the legislature. Some Canadian observers believe there is a risk to exclusivity if systems continue to retrench. A variety of American litigants, jurists and commentators have in recent years begun to test and challenge the exclusivity principle, particularly in that it so severely limits awards to workers. The limitations on WC payments are particularly glaring in the United States, where benefit schedules are more restrictive in terms of amounts and durations than in Canada, in contrast to the almost notoriously generous American tort regime. This observation is important, not only in highlighting the sharp differential in awards under U.S. tort and WC, but also the differential in perceptions of the issue on either side of the border.

For while Canadians have begun to query the ongoing feasibility and fairness of the WC system here, exclusivity has seen few substantial challenges in the courts and no
legislative action either to expand a worker’s rights of action, or to foreclose judicial “loopholes”.

3. Exclusivity in the Law of Canada - recent judicial comment

It must be first be said that there are few threats to the principle of exclusivity in the Canadian law - a worker’s rights of action against his/her employer are effectively barred by legislation. There have been two decisions of the Supreme Court of Canada (SCC) in recent years which have touched upon the matter of whether a worker may sue the employer in respect of a workplace injury, both upholding the principle of exclusivity. The first is the “Piercey” case, first adjudicated as a reference to the Newfoundland Court of Appeals the decision of which was upheld by the SCC.

That case, framed as a challenge to the alleged inequality of treatment afforded injured workers as opposed to persons injured away from work, saw the Newfoundland exclusivity principle tested under s.15 of the Canadian Charter of Rights and Freedoms (“the Charter.”) The Newfoundland appeal court upheld the barring of rights of action on the basis of a “displacement test” - that WC benefits, in their global effect on the recipient, provided an effective replacement for tort remedies.

The Newfoundland appeals ruling underscores the basic principle of WC that a worker’s rights of action are limited only against those specific parties enumerated in the exclusion (in the case of B.C. today, employers, their agents and co-workers of the worker); second, it suggests that where the WC system fails to offer a reasonable substitute for tort damages, the courts may find that WC (in whole or in part) does not satisfy the equality principle.

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6 The Supreme Court of Canada’s conclusion that workers’ compensation amounts to “more or less a form of final exhaustion of remedies” for workplace injury claims still governs: Bell Canada v. Quebec (CSST) [1988] 1 SCR 749, at p. 851.


provisions of the Charter. The Supreme Court of Canada upheld the Newfoundland appeals decision, albeit without reasons.

To some observers, the Newfoundland appeal theory of balancing benefits points to peril for the WC system if legislatures don’t maintain and demonstrate equity between the results of WC and other remedies the worker might enjoy against the employer:

“...(I)f the range or level of benefits, as they operate in practice, deteriorate, the argument might be made that they are no longer comparable to workers’ rights at common law; and that therefore the statutory bar violates the Charter. If that argument succeeds, employers would require employers’ liability insurance as well as paying workers’ compensation premiums.”

To date, that argument has not been successfully advanced in the Canadian courts. In fact, a recent ruling of the Supreme Court of Canada casts doubt as to whether a form of “balancing justice” is required to sustain workers’ compensation schemes from constitutional equality challenges.

In Beliveau St. Jacques v. Federation des Employees et Employes de Services Publics Inc. [1996] 2 SCR 345 (“Beliveau”) the Supreme Court heard an appeal from the Quebec appeal court regarding a worker attempting to sue his employer in damages for harassment on-the-job. The worker had alleged harassment and sought exemplary (sometimes described as “punitive”) damages from the employer directly, on the basis that the Quebec workers’ compensation statute did not capture such a claim. In the absence of a statutory remedy, the worker argued, a civil one must exist.

9 Historical Perspective on Contemporary Challenges in Workers’ Compensation, T.G. Ison, Osgoode Hall Law Journal vol. 34, no. 4 (1997)

10 The statute in question, the Act respecting Industrial Accidents & Occupational Diseases (“AIAOD”), RSQ, C.A-3.001, s.438.
Madame Justice L’Heroux Dube, dissenting from the majority, agreed with the plaintiff in distinguishing between damages in respect of personal injury liability and damages in respect of an “exemplary remedy.” The latter, the Justice maintained, was not captured by the Quebec statute either as a form of injury or a form of compensation, and therefore a workers’ right of action in respect of same could not be barred.

The majority did not agree, enunciating a very inclusive principle of liability and damages under the Canadian law of worker’s compensation. Workers’ compensation, Mr. Justice Gauthier wrote, is an exchange of a worker’s civil rights of action for “partial, fixed-sum compensation that did not necessarily correspond to the prejudice they had suffered.”

The legislation had abandoned fault, and in so doing had abandoned liability as well - the worker had absolutely no rights to sue the employer, or a co-worker, in respect of any damages sustained in connection to a work-related injury.

To this reader, Beliveau keeps the lid tight on any expansion of worker rights of action without legislative change; further, Mr. Justice Gauthier’ pointed comments on the issue of WC benefits being inadequate to the case - but still adequate to the law - indicate that the Newfoundland theory of balancing benefits may pose little threat to the constitutionality of Canadian workers’ compensation in the current high court.

Thus, we cannot soon expect a serious judicial test of exclusivity in Canadian workers’ compensation law. Any expansion of a worker’s right of action against those currently immunized falls upon the legislature to enact.

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11 Beliveau, p.
4. Some Theories of Expanded Employer Liability

**Occupiers’ Liability**

In the common law, and under various statutes enacted by Canadian provinces, the “occupier” of premises owes a duty of care to non-trespassing persons to ensure no foreseeable hazards befall the visitor. Some courts have held that an action between worker and employer is not completely barred if that action is founded upon occupier’s liability. Yet most of the litigation between employees and employers is in matters clearly outside the WC regime (An informal survey of approximately 30 Ontario lawyers practicing in the personal injury field found that those who represent workers in lawsuits against their employers for damages in respect of occupier’s liability do so only in instances where workers’ compensation is not available, such as in exempted Ontario employments like banking.) Occupier’s liability cannot be a rich field of endeavour for plaintiffs or their lawyers where the plaintiff was acting in the course of his/her employment at the time, as any injury “arising out of” or “in the course of” employment will generally be presumed to be work-related and therefore subject to the statute bar. Thus, the employee would have to demonstrate that an injury was not in any way a result of the employment relationship before succeeding in an occupier’s liability suit.

**Dual Capacity and Dual Personae**

A related approach to occupier’s liability has had some success in the United States, where worker/plaintiffs have attempted to skirt the operation of exclusivity rules by arguing that while injured in the course of their employment (and thus entitled to

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12 In general, see Linden’s Canadian Tort Law, 3rd Edition, chapter 18
workers’ compensation) the injured party also suffered damages as a person outside of the employment relationship.

The first effort at establishing such a cause of action arose in the “dual capacity” theory. In this paradigm, both the worker and employer have “capacities” as worker and employer, within-which their rights and liabilities are governed exclusively by the WC system. However, they may have other “capacities” as well (say as visitor and occupier) and, in that regard, may owe a duty of care to one another. To the extent that duty is violated, and damages flow, liability might apply to either party.

The problem with this theory, alas, is that it “effectively destroys employer immunity whenever a separate relationship or theory of liability exists.”\textsuperscript{14} Plaintiffs have instead explored a somewhat modified version of dual capacity, labeled “dual persona” or “dual personae.” On this theory, Arthur Larson is quoted:

“An employer may become a third person, vulnerable to tort suit by an employee, if - and only if - he possesses a second persona so completely independent from and unrelated to his status as employer that by established standards the law recognizes it as a separate legal persona.”\textsuperscript{15}

The theory holds that where employer and worker are in a distinct relationship to each other, and where the harm befalling the worker occurs in a context independent of their employment connection, the worker keeps his/her common law right to seek redress for damage owing to the employer’s violations of a duty of care. Where the harm is in some fashion owing to the employment relationship, the workers’ compensation system applies.


\textsuperscript{15} Quoted ibid., at p. 195
To this writer, a re-statement of the dual capacity and dual persona doctrines would be to say that the mere fact that one person works for another does not automatically protect the latter from all accountability and liability towards the former. To cite a real-life case known to the writer, an off-duty school teacher visited a school (not his own workplace) to pick-up his wife after work. The husband slipped and fell on ice at the school steps and was hurt. Whether analyzed under the dual capacity or persona doctrines used in the U.S., the result is the same: the injured party was not hurt while in the course of his employment, nor did the injury “arise out of” his employment.

The school board, of course, vigorously (and rightly) objected to a workers’ compensation claim filed in the matter. On the other hand, the employer was none-too-pleased to know that it couldn’t have it both ways, and that “winning” the workers’ compensation case it meant opening the door to civil liability in its role as occupier.

**Pre-conception Tort**

In a fascinating and important American ruling, the United States Supreme Court ruled that damages inflicted upon an unborn fetus constitute harm only to the mother, and that there is no separate right of action available either to the mother (worker) or the child.\(^\text{16}\) The effect of the ruling was to capture all of the harm in the workers’ compensation regime, obviously containing the size of damages to whatever the state schedule of benefits allowed.

The writer is not familiar with any Canadian caselaw on point, suggesting that this is an area of potential liability (or not, depending upon the courts’ interpretations of the exclusivity principles) for employers.

\(^{16}\) International Union, UAW v Johnson Controls, 111 S.Ct 1196 (1991)
**Intentional Tort**

The most promising domain for creative plaintiffs in the workplace tort environment may be the possibility of pursuing the “intentional tort.” The WC regime operates, clearly, to insure workers against the harm that befalls them at work, provided they suffer “an injury by accident” or occupational disease.

If that injury is not “by accident’ but rather, is a product of someone’s direct and intentional tortious conduct, the intentional tort doctrine holds that the tortfeasor remains liable in the common law, whether s/he be the employer, its agent or a co-worker of the injured party. This doctrine has been debated, and adopted, in a number of states in the U.S.\(^\text{17}\)

While Canadian jurisdictions have hotly debated how to define “by accident” (whether it means a specific traumatic event, or an unintended result) there is no sign that Boards or courts have much examined whether an injury not “by accident” yet arising out of, and in the course of, employment could produce civil liability in the intentional tortfeasor. The Act is not of great assistance, for while the law in B.C. and elsewhere penalizes a worker’s benefit entitlement in cases of “serious and willful misconduct” that obviously refers only to the conduct of the injured party, and not to the serious and willful acts of others (willful being the key word in terms of tracing references to intention under the Act).

Intentional tort is a particularly worthwhile venue for the plaintiff, as more generous exemplary or punitive damages are often ordered in instances of heinous, willful acts or omissions. In the United States, both employers\(^\text{18}\) and co-workers\(^\text{19}\) have been found

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civilly liable to injured workers for the harm flowing from their intentional acts or omissions in the workplace. The author is unfamiliar with any Canadian jurisprudence on the question, although it is worth noting that the aforementioned Beliveau ruling does not suggest the courts are warm to the notion of expanding an injured worker’s entitlements under any circumstances.

Non-physical “injuries”

Again, American jurisprudence and writing has explored the notion of a worker suing for non-physical harms inflicted by the employer (even accidentally).\(^\text{20}\) The recent Beliveau decision rejected a civil damages claim by a worker who alleged “harassment” (a non physical injury) on the grounds that it had occurred at work - effectively defining the tort as a form of “personal injury” under the Quebec statute (the Quebec CSST had adopted the same view).

To this writer, if a worker claims damages in respect of harm due to the employer’s or a co-worker’s conduct, where that conduct occurred in the course of employment but is not connected with a physical, functional or psychological injury of any kind, it seems strange to see the cause of action barred by dint of the workers’ compensation scheme. With the greatest respect to the court in Beliveau, rolling “harassment” into the definition of “injury” seems to stretch the workers’ compensation scheme unduly. In this instance, the WC system operates to eliminate rights of action clearly not conceived by Meredith as requiring social insurance. Instead, the WC system inoculates the employer against most liability for its conduct, regardless of the nature of the conduct or the harm. This is particularly odd, when, as Madame Justice L’Heureux Dube wrote, the matter in question is conduct which normally would lead to exemplary damages.

\(^{19}\) Iverson v. Atlas Pacific, 143 Col.App 3d. 219 (1983)

\(^{20}\) See: Russell v. Mass Mutual
The author’s view is that the rule enunciated in Beliveau might be open to review and change, especially under a different provincial statute and perhaps with a more sympathetic plaintiff. Allegations of harassment, defamation and discriminatory behaviour by the employer or co-workers towards a plaintiff should no more be barred by the WC exclusivity principle than should suits for wrongful dismissal.

**Recovery-over by Third Parties**

A worker in British Columbia is not barred from suing any third party, such as the manufacturer or supplier of equipment that inflicts harm upon that worker, even where that harm occurs at work.\(^\text{21}\)

Such an action can effectively ensnare the employer in tort liability. Where the third party manufacturer/supplier alleges that the employer negligently or improperly used or operated the item that caused the injury, the worker is of course precluded from suing the employer but the third party is not. This means that where a worker is cognizant of his/her employer’s negligent or improper operation or use of any imported item in the workplace, and can allege some form of fault in the manufacturer/supplier, the employer can theoretically become indirectly liable to the worker for damages.\(^\text{22}\) Again, Canadian caselaw on such maneuvers is scanty.

### 5. Reform: Bending but not Breaking Exclusivity

The above discussion points out these facts: Canadian exclusivity in workers’ compensation is well-respected and obeyed by both litigants and courts. Where remedies in and around exclusivity may exist, few parties seem to pursue them; when they do, the

\(^{21}\) The BC Act, s.10(2)

\(^{22}\) For a discussion on this see Arthur Larson’s *Tensions of the Next Decade*, in New Perspectives on Workers’ Compensation (1990) or Linda Atkinson’s *Emerging Tort Remedies in the Workplace*, Workplace Remedies II, American Bar Association (1990)
courts (at least one court, the Supreme Court in Beliveau) has resisted giving life to an employer’s civil liabilities even at risk of straining the WC doctrine beyond logic. If exclusivity were to be seriously challenged, or even slightly altered, it would inevitably fall upon the provincial legislatures to amend their laws to do so.

Why bother? What reasons would the legislature have for considering bending, if not breaking, exclusivity as it is practiced? Why would anyone gain, and how would they gain, from expanding any areas of direct employer civil liability?

The answer lies in whether we perceive there to be evident, or latent, problems in the workers’ compensation scheme in British Columbia or elsewhere in the country. In another paper, this writer argues that the absence of civil liability creates in the employer an immunity from the consequences of acts and omissions in the workplace. This immunity, in the writer’s view, rewards inattention to workplace hazards. Some form of direct civil liability, even if limited in form or amount, might be a corrective to this fault of the collective liability system.

The earlier discussion of intentional torts may be helpful in shaping a “doorway to tort” from the current workers’ compensation regime. While intentional torts are effectively outside the realm of exclusivity now, the legislature might consider specifically enacting provisions whereby the Act excludes intentional torts from the WC system - highlighting their availability to workers and their possibility to employers. This could be done with no substantial alteration to the existing system at all.

Another issue is the adequacy of benefits. In the previous paper on the tort system, this writer found that average benefit awards in certain types of cases deliver as much, or more to the workers’ compensation recipient as to the plaintiff successful in tort. Where this is not the case is in the “high end” cases, where (a) a plaintiff’s projected future earnings stream before injury greatly exceeds the pre-injury wage “cap” placed on WC benefits, or (b) non pecuniary damages for pain and suffering, such as in instances of multiple injuries with major disabling effect, do not compare and (c) where egregious
behaviour, particularly intentional behaviour by the tortfeasor, attracts exemplary or punitive damages.

These types of cases, where WC fails to compensate fully or properly, or fails to penalize in any recognizable fashion, could be opened to tort by explicitly removing certain forms of non-physical injury from the scope of exclusivity. For example, instances of harassment, emotional or mental harm, defamation, etc. could be separated from the operation of the WC system. This would ensure that such cases were not squelched by Beliveau-type interpretations of the B.C. statute, would narrow the ground of compensable cases to matters in which the WC administrators have more expertise and would highlight the availability of civil remedies to workers.

It would also be possible to import into WC the two-track system of benefits used in some auto insurance regimes, where “serious” and/or “permanent” impairments may be subject to a basic payment under the WC regime, with additional damages available in the courts if the plaintiff can demonstrate (a) a threshold degree of impairment, (b) a degree of damage exceeding the WC scheduled benefit and (c) some form of fault on the part of the employer, its agent or the co-worker.

A further, and more radical step, would be to take areas of damage currently included in the realm of the WC system and push them out into tort. For example, workers’ compensation might be confined strictly to pecuniary loss evaluation and compensation, with the quantum of non-pecuniary and/or other forms of damages left to the courts. This would create room for the growth of “high end” case benefits, would create a new “punitive” measure for culpable employers and would relieve the WC system of some cost. It should be noted, though, that other jurisdictions have achieved the cost-saving end in non-pecuniary loss compensation simply by cutting awards to a relatively small amount (i.e. Ontario’s non economic loss system).
The difficulty of exporting non-pecuniary loss evaluation and compensation from the WC regime, however, is that the physical, functional or emotional injury is the foundation for the pecuniary loss. It might make more sense to have the WC system compensate the non-pecuniary loss and to leave the plaintiff worker to seek economic loss compensation in the courts. The great advantage of this to workers is that many suffer losses of future income which the WC system does not recognize (i.e. anything exceeding the pre-injury rate of earnings); the signal gain for the system as a whole is that it would no longer be asked to perform tasks at which it isn’t very good (predicting, preventing and compensating wage loss). Such a move would be a serious incentive for employers to re-employ workers as well, in order to mitigate future long-term wage losses. It would cost employers considerably, however, if they were found liable for the worker’s future loss of earnings, but that is something against which the employer would privately insure.

6. Conclusion

The current WC system creates doorways to tort actions by workers against employers, but the trend among litigants and courts is not to open those doors. Certain of the deficiencies of the WC system might be corrected through subtle, or more aggressive, action by the legislature to highlight or expand areas of employer liability to workers in respect of workplace events and injuries. Properly balanced, such a use of tort might greatly improve the environment for workplace safety, the achievement of justice in cases of intentional torts or egregious negligence, and possibly shift costs more fairly from the collective liability of covered employers onto individual actors responsible for harms.
Comparative Awards in Tort and Workers’ Compensation
1. Introduction

Since the replacement of tort with workers’ compensation (WC) in addressing the compensation of work-related personal injury, system participants and observers have wondered about the respective merits and disadvantages of the two schemes. This brief discussion paper examines how tort and workers’ compensation systems in the provinces of Ontario and British Columbia deal with damages for personal injury.

The comparison of awards for personal injury in tort and workers’ compensation is fraught with problems, particularly in obtaining data. There is no perfectly reliable source for data on the fashion in which the courts, or settlements between the parties, determine awards for damages in tort claims.

Perversely, neither is there a systematic collection of information by the workers’ compensation regimes as to awards granted in respect of particular types of injury. This caveat on sources of data is crucial to the reader’s assessment of what little information there is, for while this paper includes references to awards in both systems, it is without pretense of comprehensiveness.

2. Comparative approach

This paper compares the tort and WC regimes in these respects:

1. the nature of the wrongs addressed;
2. the nature of damages assessed and forms of compensation awarded;
3. the value of awards granted, in respect of two specific types of injury: back claims and facial disfigurements;
4. a comment costs and their allocation in the two systems.
3. The wrongs addressed

While both the tort system and the WC regime address personal injury, the “wrongs addressed” differ. In tort, a private person is empowered to bring a cause of action against another party for damages resulting from the breach of a duty of care. That duty of care is implicit in the norms and standards of civil society. Where breaches of that public duty of care inflict damages upon a person, that person may seek redress against the culpable parties.

The private parties set themselves up as adversaries, one the plaintiff (initiating the complaint and seeking redress) and the other the defendant (seeking to rebut the allegation of responsibility and the liability that may flow therefrom). Redress is paid by the responsible person(s), and/or their insurer, to the private party who suffered the damage and lodged the claim. Damages are assessed, as is culpability, and responsible parties are directed (or agree by settlement) to pay their share of damages in an effort to restore the plaintiff to a position akin to, if not identical to, that enjoyed prior to injury.

In tort, the action brought is “public” insofar as it relies upon public administration of the courts to assert the claim, navigate the litigation process and where necessary, seek adjudication. The parties are addressing a private violation of a public standard (this is the key distinction from contract law, where the parties wrangle over the violation of privately-negotiated standards of conduct between them alone). There is a strong public interest in the successful processing and resolution of tort claims, as the system is a mechanism whereby society reinforces and redefines the general consensus on norms of appropriate conduct. There is further public interest in the peaceful resolution, by court order or settlement, of these disputes, as the use of the law in this context displaces the need for “private justice.”

Workers’ compensation carries with it no sense of a “duty of care” or, for that matter, any notion of a “wrong” being committed or suffered. The WC regime focuses only on the
matter of causation (was the injury caused by the injured person’s employment) and compensation (to what, under the limits of the law, is the person entitled in respect of the injury).

In workers’ compensation there are really no “parties” at all, but rather workers and employers who have rights and responsibilities in respect of the workers’ compensation legislation. The only “party” in WC is the agency which receives, adjudicates, pays and collects-upon injury claims lodged by workers and reported through employers; that agency is usually called the Workers’ Compensation Board, or some variation thereupon.

The administration of the WC system is a purely public responsibility, with purely public aims: to ensure injured workers are compensated and rehabilitated under the terms of the law and applicable policy, to fund the system through insurance premiums mandatorily exacted from employers covered by the scheme, to enforce rules and apply penalties where subject members of the public have responsibilities pertaining to the prevention, reporting and management of injury claims and related issues.

Notwithstanding this “public” agenda and administration, there are clearly “private” effects upon both workers (who have some guarantee of insurance protection from penury in the event of workplace injury) and employers (who have an ironclad guarantee of protection from liability in respect of those same injuries). Both actors pay a private price as well - the worker is restricted to the publicly-determined schedule of benefits without a right to sue the employer, while the employer is bound to pay whatever premiums demanded by the Board.

In asking what “wrongs” or social ills the systems seek to cure, it can be said that tort:

- offers plaintiffs redress for a variety of damages
- penalizes tortfeasors for negligent or hazardous conduct
- reinforces and refines the social consensus on appropriate conduct
The workers’ compensation system, on the other hand, acts primarily to address the “wrong” of injured parties having to take private responsibility for injuries sustained in environments where they spend most of their waking time, confront most of the hazards they are likely ever to face and must pursue more powerful economic and social actors for redress. The same system protects those employers from the potentially disastrous expense of tort claims lodged by numerous employees with clear claims of damage resulting from the employer’s omissions or acts.

4. Nature of damages and forms of compensation

Both tort matters and workers’ compensation systems address the question of assessing damages, determining liability and awarding compensation in respect of personal injury. This paper categorizes personal injury awards in the following fashion:

1. immediate income replacement post-injury
2. extended medical coverage
3. vocational rehabilitation and labour market re-entry assistance
4. permanent impairment loss of function awards
5. permanent impairment loss of earnings awards
6. other forms of damages

Immediate income replacement

In the tort system, the party ultimately responsible for bearing the claim cost (presuming the defendant is found liable) will not be required to meet any costs immediately upon the claim, as redress is of course contingent upon a finding or admission of fault. As a result, the injured party falls initially upon her own resources, which in most instances means privately-obtained disability insurance. Thus, the immediate availability of income replacement coverage is absent from tort.
Further, while tort awards are perceived to be grander in scale than payments made by
workers’ compensation systems, the truth is that most claims are settled for an amount
less than claimed, and that means a likely reduction of the income-replacement portion of
any award. While WC systems pay high and almost-instant income replacement (B.C.’s
rate is 75% of gross without deductions, for example) tort awards are commonly less than
the actual loss and recipients must also sustain substantial tax and other deductions, when
and if the award is paid.

Another factor reducing the real value of the immediate income replacement element of
tort is the fact of fees, not only those incurred in hiring counsel but also administrative
fees required to register claims, file motions, etc. Thus, as a leading writer on Canadian
personal injury compensation recently wrote:

“in (workers’ compensation) the amount recovered as income
substitution will usually exceed what would be obtained in tort
litigation, if one assesses the defacto compensation from that
system, including settlement sums, deductions of legal fees and the
availability of funds to satisfy judgments.”23

Beyond the fact that tort does not appear to pay as well as workers’ compensation in
regards to income replacement, there is the fact that often tort does not pay *at all* - claims
languish in the litigation system, are delayed or even withdrawn because of costs. In
such instances, losses of income are absorbed first by the plaintiff and any other parties
upon whom that plaintiff is dependent. Among those parties, it is worth noting, is the
Treasury, for in Canada individuals with no other resort still have certain entitlements
with respect to public support (be it disability employment insurance, or more typically,
the Canada Pension Plan). These costs are in turn circulated through taxpayers and
employment tax payers back into the economy. The measure of these costs and losses is
beyond the scope of this paper.

Extended medical coverage

Universal medical insurance in Canada has reduced the significance of “medical aid” as a form of compensation today, in comparison with the first 50 years of WC in Canada. Nonetheless, most boards and commissions administering WC in Canada maintain provision for enhanced services to injured workers in the form of relationships with outside providers and in-house rehabilitation facilities.

This provision of enhanced medical, in comparison with standard coverage under public health insurance, is controversial for what it implies about the injured worker population. The clear driver behind such programs is cost - Boards are attempting to reduce benefit costs through rehabilitation efforts designed to maximize recovery and/or prove recovery. This is perceived to be necessary because of concerns over prolonged durations on benefits post-injury (believed to be comparatively longer in WC than in other areas of insurance).

The existence of such early-intervention programs itself underscores the impression that WC systems are more profitable forms of injury insurance than those managed by private insurers (cases which might ultimately surface in the tort regime). Further, enhanced medical coverage and rehabilitation assistance to the injured worker is a clear benefit advantage of the WC system: the worker gets more services, earlier and at greater investment than patients outside the workers’ compensation realm. Even if these investments were unnecessary and abandoned, that would imply that Boards had (a) greater control over case management and (b) reduced costs, which in turn opens the possibility of other program advantages for the recipient and, at a minimum, reduces pressure on premium-payers.

Other forms of additional medical care (attendants, home care, etc.) are typically paid by both systems; for tort victims, this comes first through private insurance and then, once
liability has been determined, those insurance costs are shifted to the responsible party’s insurer.

In tort, again, there is no mechanism for charging the responsible party with the immediate costs of the medical care required by the plaintiff, who must fall upon her own insurance. A key difference from income replacement, however, is that in the realm of medical provision the WC system is a net payer into public health (most Boards are billed for the costs of medical afforded to injured workers) while in the tort regime, medical services are a net cost to the medicare plan. Given the rigidity of Canadian publicly-provided health care, there is little difference in the basic care afforded a patient regardless of forms of insurance, other resources or reason for injury - save and except for the provision of specialty care services for which the insurer has incentive to provide.

In summary, the provision of medical care to injury victims under tort and workers’ compensation in Canada is relatively equal, with certain small advantages being available to the WC recipient.

**Vocational rehabilitation and labour market re-entry**

Whether it actually works or not, there is no disputing that workers’ compensation driven and funded vocational rehabilitation (VR) and labour market re-entry (LMR) provisions are a substantial investment in the injured party’s long-term earnings ability which is basically absent from the tort system.

While private insurers will endeavour to test, and in some instances provide assistance in enhancing, employability, none have embarked upon the kind and degree of VR service provision infrastructure witnessed in Canadian workers’ compensation agencies. Further, the legal provision of new LMR rules (such as Ontario’s 8 year old re-employment provisions, or its newer obligations upon employers to re-hire or assist workers in seeking re-employment) offer greater benefits to the injured party under the WC regime.
The limitation on the value of this investment, noted at the outset of this section, is the question of whether these programs actually “work” - that is, whether they achieve their putative end of rendering a worker employable or enhancing the earning capacity of that worker. Where they do not, of course, the cost will fall generally upon three parties: the worker him/herself, who typically absorbs some degree of wageloss over the course of the post-injury lifetime, (2) the WC system, which provides earnings loss replacement benefits to workers up to retirement (or beyond in some cases) and (3) the Treasury and CPP fund, which are often called-upon to shore-up the minimum income requirements of unemployable or unsuccessful graduates of the workers’ compensation system.

The existence of these VR and LMR programs, like the medical services mentioned above, is a clear indication that the party responsible for paying in WC (the Board) has incentives to try and mitigate wageloss costs. It is the complete absence of such incentives in the tort regime which puts a break on the investment in the non-WC sphere. There, the ultimate payer is undetermined until such time as the respective insurers litigate or negotiate a resolution. The uncertainty as to “who pays” shifts the cost of long-term earning loss onto one party - the injured person - who must bear greater personal responsibility and expense for the provision of services required to maintain or enhance earning ability. Even when the case is resolved in the plaintiff’s favour, the delay in achieving that outcome precludes any “early” efforts at VR or LMR.

**Compensation for permanent functional loss**

Where the injured party suffers a permanent loss of function (an impairment) or other physical damage as a result of the accident, tort and WC grapple with the question of measuring that loss on a recognizable, plausible scale.

The issue at stake is assessing a dollar value for the loss of a person’s enjoyment of his/her faculties, and the deleterious effects such loss entails upon that person’s life and
happiness. It can be said with confidence that there is absolutely no “fair” or “good” way to go about this unhappy task.

That said, the workers’ compensation schemes have gone about it in a particularly odd and seemingly unfair way. Both provinces under scrutiny here, Ontario and British Columbia, operated permanent impairment assessment under a straight table of injuries. An impairment was given a percentage value of total functionality; that percentage value was applied to the statutory pension calculation scheme (usually applying the degree of impairment to the worker’s pre-injury monthly earnings - governed by the maximum and minimum compensation rates - and then paying 75 to 85% of the result, every month for life as a pension).

Putting aside questions on the viability of the “meat chart” percentage values, this methodology is a peculiar mix of functional and earnings loss compensation. In fact, it uses earnings as a means of measuring the dollar award granted in respect of something which has nothing to do with earnings. As a form of “earning loss compensation” it is clearly neither rational nor efficient; as a form of functional loss compensation, all that can be said for it is that it is well-known, if not very well understood.

Both Ontario and B.C. have recognized the problems inherent with this mixed system of calculating functional loss awards. For Ontario, the solution was a complete bifurcation of impairment from earnings issues - hence its introduction in 1990 of the pure “non economic loss” (NEL) award which measures and compensates only physical and functional loss. Again, the process begins with a medical assessment and the establishment of a percentage value of loss (Ontario has abandoned its “meat chart” for the more up-to-date and popular American Medical Association guidelines on disability). Instead of an earnings benchmark, the NEL system draws a line at the maximum award payable to a worker in the case of a 100% impairment, adjusting the maximum up or down in increments to reflect the worker’s age (the younger the worker, the higher the maximum award to compensate for the greater likely duration of suffering).
British Columbia’s answer to the problem of functional impairment awards has been to partially abandon those awards. B.C. still measures and pays the functional pension, but where that pension would be less than the statutory provision for long-term loss of earning capacity, the pension is junked and the earnings loss award is paid instead.

In the realm of tort, fair compensation for a person’s suffering a permanent functional loss is perhaps the most sensitive and difficult of tasks. The matters taken into account are the person’s personal characteristics, age, gender, personal relationships, activities and the fashion in which the personal injury negatively affects any or all of these factors of life. The nature of the injury is a crucial element in making this determination. Trial awards use precedent, of course, as benchmarks both for the range of award appropriate in a case and where in the range the non-pecuniary damages should be placed. It is, frankly, more of an art than a science, and to that degree is far less predictable than the provision of permanent impairment awards under the schedules employed in Ontario or B.C.’s workers’ compensation schemes.

**Compensation for permanent loss of earnings**

This paper cannot describe, in adequate detail, the respective mechanics of assessing likely future earnings abilities or losses. It is sufficient to state that in both the Ontario and B.C. workers’ compensation regimes, the Boards are required to assess permanently-impaired workers in terms of their likely ability to earn in future. The worker is “deemed” able to command a wage consonant with his/her abilities and competitiveness in whatever field of endeavour is followed; this wage is compared with the pre-injury wage, which places a very significant cap on the award. The wageloss compensation decision reflects the gap between the pre-injury wage “cap” and the current/future “deemed” earnings.

In B.C. this calculation is not meaningful in terms of benefits unless the prospective wageloss exceeds the calculated monthly permanent impairment pension. In Ontario,
prospective earnings form the basis for the worker’s compensation up until retirement age.

In the tort regime, the process of projecting likely future earnings prior-to, and after, injury is a remarkably complicated feat. Assessing the “earnings stream” as if the injury had not occurred, the court begins with the base rate, rate of growth in income, positive and negative contingencies, proximity to retirement age, loss of pension income and factors related to probability of survival as the plaintiff ages. The second, injury-related “earnings stream” does this same extrapolation, based upon what the court now deems to be the worker’s fitness and competitiveness in whatever alternative careers are left to him/her.

The court then measures the difference between the two “streams” and, depending upon the defendant(s) degree of liability and the plaintiff’s degree of contribution to the loss, awards damages for pecuniary loss.

5. A Comparison of Damage Awards in Selected Cases under the Two Systems

Tort and workers’ compensation operate very differently, but for the plaintiff/claimant are similar in that they are expected to deliver an award of damages or compensation as redress for the losses sustained due to the injury.

This paper cannot compare the relative generosity of the two systems on any comprehensive scale. Instead, it seeks to illustrate their attributes by examining awards made in instances of two specific types of injury: back injuries (primarily “soft tissue” injury cases reducing mobility in the cervical, thoracic, lumbar and/or sacral spine) and facial disfigurements.

The injuries selected are chosen because of their sharp differences. Back injuries are typically difficult to assess, rely heavily upon subjective reporting by claimants for
evidence of impairment and often significantly reduce the injured person’s capacity to continue in pre-injury activity or employment. Facial disfigurements are very easy to objectively assess, do not require subjective pain reporting and, in and of themselves, do not impair the worker’s ability to function or work. It is hoped that these two forms of injury will illustrate divergent characteristics of the assessing system and the ways tort and WC award damages.

**Back injuries**

In British Columbia, the WCB assesses permanent back impairments according to a scale laid-out in the Rehabilitation and Claims Services Manual. The absolute maximum level of impairment, combining scales for the cervical, thoracic and lumbosacral spines, is 51% of total functionality. This means that in B.C., a worker with extremely serious loss of function throughout the spine can expect a pension of approximately 50% of his/her pre-injury wages, reduced by one-quarter (B.C. pays 75% of gross earnings as its compensation rate). For a 35 year old worker with pre-injury gross earnings of $4,000 per month (a relatively high wage in Canada) this back impairment award translates into a lifetime monthly pension of about $1500. Actuarial life expectancies suggest this person might live at least another 30 years, meaning that without inflation this very serious back injury has earned an award of damages of about $540,000 current dollars.

That is not the whole story in B.C., of course, as provision exists to replace that award with a higher one if it can be found that the worker’s likely future earning capacity will be reduced by an amount more than the value of the pension.

In Ontario, the new Workplace Safety & Insurance Board administers claims which fall under the old pension scheme, as well as the current NEL system described above. The pension system achieves results very like those described above in B.C. The replacement system, NEL and “future economic loss” or “Loss of future earnings” splits the calculation into two separate streams.
The NEL system uses the AMA guides to evaluate back claims, and few if any back cases under that scheme are rated over 25% impairment. Applied to a formula where the maximum award ranges from $35,000 to $75,000 depending upon the claimant’s age, it can be seen that even a high NEL award for back injuries will earn something in the range of $7500 to $20,000 as the total award in respect of functional loss. Obviously this constitutes a significant saving in comparison with the predecessor pension system, particularly when we remember that Ontario operated an extensive and expensive “pension supplement” program alongside pensions, compensating workers for losses of earning capacity that exceeded those typically associated with a particular permanent impairment.

(This program is still in effect for pensionable injuries arising prior to 1990).

Where Ontario has incurred expense since 1990 is in the provision of future economic loss (FEL) awards, which lock-in to age 65 a monthly payment in respect of lost earning capacity. Hinging these determinations to the success of VR programs, Ontario met substantially more cost than anticipated when it introduced FEL at the outset of the recession in the early 1990s. Recent changes (reductions in the rate of compensation from 90 to 85% of net, recalculation of the earnings base, elimination of long-term funded job search, etc.) are designed to trim these awards, and to reduce the use of “FEL supplements” which top-up benefits to the maximum amount during the worker’s active rehabilitation program. A back injury is typically the worst, and most disabling, form of impairment in terms of future earning ability; at even a nominal FEL of about 10% (and many exceed that greatly) the 35 year-old average worker cited in earlier

A key point to make about both the B.C. and Ontario back injury pension and NEL/FEL experience is that very few claimants actually receive the maximum awards. Typical back awards under pension schemes run in the 10 to 15% impairment range, which on the earlier B.C. case example cited earlier would be valued at $100 to $200 thousand over the average life of the pension. In Ontario, the NEL award of 5 to 10% for a back is quite
common, providing a lump sum award of perhaps two to five thousand dollars for the “average” claimant described above. Examples will receive about $130,000 in current dollars (for high wage-earners at or above the maximum compensation rate who are re-trained for jobs just above minimum wage - not an uncommon result - the FEL cost could treble or quadruple).

By contrast with the B.C. pension and Ontario NEL/FEL programs, tort awards are almost always paid as lump sums (or are paid in “structured settlements” designed to pay an annuity based upon the value of the lump sum). In a Goldsmith survey of damages paid in respect of non-pecuniary and pecuniary loss for injury cases primarily from BC and Ontario in the period 1991 through 1997:

• of 97 spinal cases examined where non-pecuniary damages were allowed, 28 also included awards for losses of future earnings;

• of the 69 cases with non-pecuniary damages only, the average non pecuniary damage award for spinal injuries was $72,600;

• of the 28 cases with both types of damages paid, the average non pecuniary damage award for spinal injuries was $44,600;

• in those same 28 cases, the average loss of future earning award for the effects of spinal injuries was $118,000. The highest award was for $550,000 granted to a British Columbia registered nurse, who at age 40 sustained lumbar spine injuries inducing “paralyzing” pain interfering with her sleep;

The source material for these statistics, a guide to personal injury damage awards in Canada, is an admittedly unscientific but relatively comprehensive annual survey of reported and unreported caselaw in the field. It is crucial for the reader to recall that
these awards flow from trial decisions, which mean that they must be substantially
discounted to allow for both delay in resolution and the cost of litigation. Further, it is
also important to remember that settlements of like cases (which by anecdotal evidence
far outnumber court decisions) will inevitably result in lower awards (and in lower costs).

Based on these numbers for the relative value of a back injury under the tort or workers’
compensation systems, it is evident that the British Columbia workers’ compensation
pension scheme is more generous than either the courts, or the parties in settlement, under
the tort regime.

*Facial disfigurement*

Facial disfigurement cases offer an example of a “pure” non economic loss, where the
impairment has little functional impact and, usually, no significant effect on earnings. In
British Columbia, a complex formula exists under policy whereby a facial disfigurement
is evaluated on 5 criteria and allocated “points.” The higher the total number of points
across the 5 criteria, the higher the range of award. Relatively minor, or “class 1”
disfigurements earn awards of just under $5,000 as a lump sum payment. The most
severe disfigurements, with possible impact on facial function, are grouped in “class 4”
and merit awards of anywhere from $25,000 to $45,000 in a one-time payment.

Ontario’s pension scheme table for facial disfigurements assesses them as permanent
partial disabilities, from about 2% for relatively minor scarring to a maximum of 25% for
“gross disfigurement.” Translated into a pension for the $4,000 per month earner, in
Ontario under the pension scheme this would amount to anywhere from $ 75 to $900 per
month - but almost always in the range below 10 percent, or about $300 per month. Even
the minimal award of 2% equals a total value of $27,000 in current dollars. Ontario’s
NEL awards for facial disfigurements are also quite small, not typically exceeding a 15%
impairment rating (about $2,000 to $5,000 depending on the worker’s age).
Contrast this to the facial disfigurement survey of 21 cases in the 1991-97 period, again primarily from the trial divisions of Ontario and B.C. courts. There, the highest award given for facial disfigurement was $50,000 for injuries requiring 78 stitches, repeated plastic surgeries and leaving residual pain and headaches. The average award in this class was $21,000 - and that includes the worst cases adjudicated. The comparison with the B.C. or Ontario pension schemes is striking, and again it would appear most advantageous to lodge one’s claim in the workers’ compensation realm as opposed to the tort system.

6. A Comment on Comparative Costs

The tort regime carries with it significant administration, as well as award-related costs. According to a recent study of world tort costs, about 48% of the total bill for tort claims is paid to parties in the form of damages; the remainder is paid to system participants and institutions charged with adjudicating or settling cases. By contrast, the B.C. Board keeps its administrative costs generally under 15% of total revenue, which suggests greater “efficiency” in the workers’ compensation system in terms of converting premiums into awards.

The costs described in tort pose a real barrier to the achievement of justice by plaintiffs, and offer a welcome wall of defense and delay for those to whom the plaintiffs point. The other obvious advantage of the WC system for plaintiff/claimants, if this study is at all accurate, is that awards for particular types of impairment and losses of earning appear to be greater in the WC scheme than under tort. For employers funding the WC system, they are protected from the hazard of extremely expensive litigation and atypical awards at the extremely high end of the tort damages spectrum, but it is difficult on the evidence seen here to argue that workers’ compensation is more “cost effective” for employers than a tort regime would be.
Tort and Workers’ Compensation as Institutions of Justice
1. Introduction

This paper addresses the matter of how the tort system, and the workers’ compensation system as it functions in Canadian jurisdictions, operate as institutions of justice. The concept of “justice” is one which is born in the Judaeo-Christian tradition of laws and norms, in which human beings carry within-them innate rights and responsibilities; it shapes how we expect to be treated, and govern ourselves.

Our “institutions of justice” are the legal, bureaucratic and other social networks which replenish the soil of that tradition, sustaining all that is grown and built upon that ground. We cannot live fruitfully without peace, and we cannot have peace without justice. It is this inescapable truth which drives us to build, tear-down and build anew the rules and mechanisms necessary to achieve that peace - the institutions of justice.

2. Justice and Peace

The Anglo-American tradition is one where the executive (or Crown), the legislature and the judiciary have continually drawn and re-drawn the boundaries of social interaction. The effort is one of defining entitlements within groups and on behalf of individuals, as they interact socially and economically, and is imbued with an elusive but potent idea: justice.

The idea of justice, in western society, can be traced back to the Judaeo-Christian traditions of equity, fairness and balance. Like art, justice (or its opposite) is easy to see, but difficult to define. Of the many efforts to describe it, the most straightforward assist:
“Justice, I think, is the tolerable accommodation of the conflicting interests of society, and I don’t believe there is any royal road to attain such accommodation.”

There are no end of ways in which humans, their agents and institutions, hold interests which conflict with those of others. Indeed, it would appear as cultures become more complex they open more avenues of competition, conflict and contest. Absent any “royal road” to eliminate these differences, a resolution of differences inevitably comes down to actors’ values and choices in respect of how they will use their power to achieve their ends.

Tempering the use of power by individual social actors, and teaching some degree of restraint, is a necessary measure to achieving not only order in society, but also genuine peace (peace being a state of relatively consensual equilibrium, order being a situation where norms are enforced coercively rather than co-operatively). As Reinhold Niebuhr wrote, “(m)an’s capacity for justice makes democracy possible, but man’s inclination to injustice makes democracy necessary.”

What is compelling about democracy and justice, particularly in North America, is their interwoven concepts of fair results and due process. Whether in the face of established royal prerogatives, established vested interests or titanic economic forces, the instruments of democracy (typically the legislative branch) and justice (the judiciary) have worked together to re-tilt the balance of social power so as to achieve some modicum of “accommodation” between parties, and in so doing refresh the social consensus. Where an injustice is odious enough to warrant such action, its correction reminds all concerned that in a democracy power is embedded in the citizenry as well as its individual members.

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25 Mr. Justice Learned Hand, quoted in Philip Hamburger’s *The Great Judge* (1946)
26 Reinhold Niebuhr, *The Children of Light and the Children of Darkness* (1944)
3. Tort as an instrument of justice

Students of the law know that this century has been marked by the surging force of equity, crashing through the rigid lines of old Common Law traditions. As our economic life has grown more complex, the interdependencies and inter-relationships of people become more compelling, yet more difficult to define. Increasingly, individual actors (be they single persons or other entities with legal rights) have gone to the courts, and the legislature, to have their “rights” recognized and enforced. Inevitably, the acquisition of “rights” by one party entails the depositing of “responsibilities” upon another. In the accelerating interaction of modern life, the boundaries of rights and responsibilities are stretched and shifted so as to ensure some measure of “justice” pertains in the relationships of different parties.

It should be said at the outset, that while many observers view the expansion and alteration of rights and responsibilities as a positive good (and many others are aghast at it), the writer accepts it simply as a fact. It is a fact that our economic and technological sophistication has created a vastly more complex web of potential interactions among parties who may have few, or no, “personal relationship” but who owe and expect some degree of consideration to and from the other. The first place we meet this, most days, is on the highway; it is, perhaps, the best and worst example of how modern life plunges us into the mix together - sharing the fantastic conveniences of speed and freedom, sharing the fantastic responsibility for not killing each other in the process.

Not killing each other, or at least not perpetrating some harm upon each other through inadvertence or neglect, is the province of tort. Tort is the Anglo-American legal precept wherein “wrongs” are corrected or redressed. Tort is at once a method of assigning culpability, allocating responsibility, identifying inappropriate behaviour, measuring loss and ordering redress. The clear purposes of tort are to enforce appropriate conduct by means of penalizing its opposite, and to achieve fairness by providing the wronged party some recompense to heal the “damage” done.
The ultimate product of a well-executed tort regime is the continual reinforcement of the social consensus on what is “right” and what is “wrong” and by serving those ends, achieving justice. This not only works as a palliative for the harm done in the individual case, but more important as a fixative for the norms and rules to which the broad citizenry adheres.

The tort system hinges on the concept of responsibility (or “fault”) - tracing who or what is accountable for a result, measuring the loss incurred by the injured party and allocating the cost of redress among the parties “at fault.” In this way tort is also a moral instrument, pivotal in sustaining and reinforcing the aforesaid consensus on norms and rules.

It is clear, though, that the tort system has characteristics which did not always serve these ends. The system of assigning fault, seeking out contributory responsibility and allocating costs accordingly works well in some instances, but at the turn of the last century appeared to be failing the test of “justice” within the confines of the workplace.

4. Tort and injustice in the workplace

The economic and technological forces mentioned above have their greatest laboratory in the modern productive enterprise. With the sole aim of producing goods and services, and with a rapidly evolving culture of efficiency as the highest value, modern productive enterprise has squeezed out traditional methods of production and replaced them with speed, repetition, mechanical intervention and the steady reduction of human physical labour (and often, of human craftsmanship). Put simply, the control over the tools, environment and output passed from those doing to the work to those managing it; with those factors, the determination of how a job was done shifted from the worker to the management caste.
We are familiar and largely comfortable with these facts today, but one hundred years ago the massive shift of population to urban centres and the shift of productive activity from agriculture and artisanship was accelerating at a rate which must have seemed far more frenzied and dazzling than anything we experience now. With all those changes, life at work simply became more complicated and more dangerous - the machinery, the air, the productive requirements - all exacted a price on the individual worker who, in a moment of inattention or fatigue, could fall prey to a hazard.

For the injured worker, unable temporarily or permanently to work, the industrial accident was a genuine disaster. Unless sheltered by intimates or supported by charitable institutions, the worker and his/her dependents saw their lives shattered by serious injury or ill-health. They suffered, without help. They became a burden to others, and thus to the society in which they lived.

It was in just such an instance where the law of tort could be expected to intervene and to cure the harm done. The case was clear to the injured party - with the control of the work and workplace entirely in the hands of the employer and its managers, and with the prevention of hazards almost entirely within those persons’ powers, the injured worker could rightly point to the employer and ask for redress for the “wrong” done.

It is familiar now to students of workers’ compensation history how the complex web of defenses erected by employers protected them from full, or even partial, responsibility for the harms suffered by workers in their employ. The cost of prosecuting a tort claim against one’s employer far exceeded the resources of the typical worker, even in association with others, and too seldom achieved an end worthy of the effort, as the distribution of fault among the employer, co-workers and the injured party himself typically meant little or no reward.

As the failings of the system became manifest, and the courts themselves did not yet see the need to strip away the employer’s defenses, the rank injustice of the situation became
offensive to increasing legions of workers and other members of society. Eventually, legislatures were called-upon to pass remedial laws to enhance the employer’s accountability and in so doing give the plaintiff worker a chance at fair redress.

The result, as well-documented in Price Fishback’s recent paper, was movement by North American legislatures to extend employer liability through the elimination of defenses - reforming the tort system. Yet, in a classic irony, it was this eradication of defenses which persuaded employers that they could not go on attempting to dodge responsibility for injuries incurred in the workplace - for if they did, the full force of tort law would inevitably be brought down upon them. Recognizing the risk they ran of incurring substantial and repeated liability before the courts under reformed tort rules, employers themselves acquiesced in the elimination of tort altogether from the modern workplace. In its stead, the legislature built workers’ compensation.

5. Justice achieved through Tort v. Workers’ compensation

The existing workers’ compensation (WC) system is a creature of cultural and historical effort - an institution for achieving justice in a particular area of economic and personal life. It is crucial to understand it, however, as an instrument for a different kind of justice than that sought by its predecessor tort system.

Tort, described above, is a method for attributing fault and allocating cost. Its purpose is only partly to compensate - it is also intended to educate, to restrain and to punish the wrongdoer. This not only tries to prevent a recurrence of the wrong, it re-states the social precept that the responsible party, by commission or omission, committed a “wrong.” For what tort has become, particularly in the last several decades in North America, is a more aggressive and intrusive force in the shifting of rights and responsibilities. Culpable parties today confront an array of potential liabilities and enormous damage claims, so onerous that “tort reform” has become a popular legislative

27 Fishback - complete reference required
movement in itself (for example, the United States Congress currently confronts a number of possible bills drafted for the purpose of protecting manufacturers from certain forms of liability to remote parties). The use of the tort system by plaintiffs, operating as groups or financing their litigation through contingency fees, has converted the courts into a far more active and responsive forum for societal change and the redress of injustices than is possible in the legislature. The judiciary, in re-shaping the boundaries of rights and responsibilities, is both responding to the dynamic pace of change and giving direction to that change.

Such purposes are entirely absent from the workers’ compensation system, which is geared entirely to solving the functional problem of providing income replacement and/or some limited form of damages to those injured at work. Workers’ compensation is a pragmatic, practical means by which a “problem” is solved with attribution or proclamation of the moral character of the persons or processes responsible for that problem.

That can be said of the WC system because it separates fault from damage, insuring the injured party against limited losses and insuring the culpable party against potentially unlimited responsibility. To this extent, the WC system is essentially amoral - although the deleterious effects of insulating the wrongdoer from liability may not be a “neutral” fact about workers’ compensation.

The WC system obviously attempts to achieve a different kind of justice - providing a certain remedy to workers as opposed to the uncertain, difficult process of lodging a lawsuit. In this it handily solves the unjust (and hence immoral) outcomes meted out by the courts under the tort regime of the late 19th century, although we can only speculate how the courts would have addressed these concerns once the legislature had permanently cured the deficiencies of the law.
Workers’ compensation achieves justice through results, not through responsibility. It enforces societal norms not through penalizing misconduct, but by insuring against some of the consequences of that misconduct. In providing guaranteed medical care to the injured person, the most egregious suffering is mitigated and costs avoided. By paying a relatively high (typically 75% of gross or 85% of net pre-injury earnings) temporary insurance amount to the worker, it eliminates the immediate risk to the worker’s personal security and to the security of his/her dependents. Vocational rehabilitation mitigates against some degree of the earnings loss associated with a permanent impairment, and a remarkably generous system of long-term compensation for permanent injury (the pension system in B.C. and the future economic and non economic loss provisions of Ontario, for example) offsets the enduring income effects of an injury.

Such concrete achievements seem like a reasonable return for the sacrifice of the alleged “moral” value of the assignment of fault, and few claimants would trade these benefits for the mere right to point a finger at the responsible party. On the other hand, tort claims achieve certain concrete results as well, results which are lost to the workers’ compensation system.

The key differential between tort and workers’ compensation, in terms of effects, is probably the issue of deterrence. Tort, by focusing on inappropriate conduct, identifies how the wrongdoer has created and exported its risk; tort then applies a cost to that conduct, the recompense which is distributed to (a) the injured party or parties, (b) the system of tort administration (the courts, lawyers, etc.) and (c) society as a whole.

“Society as a whole” gains, if not directly through reimbursement, through protection against repeated exporting of the risk by the tortfeasor. By setting up a substantial cost in terms of process and damage awards, tort ultimately protects other innocent parties from the repeat violation of the social norm.
Some evidence of this exists in studies of the impact of expanded product liability upon manufacturers in the United States. According to one study\textsuperscript{28} enterprise respondents to a survey indicated that 47\% of U.S. manufacturers had withdrawn products from the market in response to concern about product liability. The same study showed 25\% of enterprises claiming to have discontinued research into certain product areas out of concerns of the liability which might ultimately flow from this research. The upshot of these, and literally hundreds of other recent articles and news-stories, is that a significant amount of economic activity and innovation is thwarted through the growth of the tort system in recent decades.

While not defending the worst extremes of tort liability\textsuperscript{29} it is possible to see in these survey results a positive outcome of the tort system which is absent from the WC regime: potential tortfeasors are deterred from exporting their risks onto the market. While it is typical to read of the harm and economic cost incurred to society by the fear of product liability, it must also be true that the 47\% of companies which claim to have withdrawn products from the market for fear of lawsuits must, in fact, have had something to fear. That is, if the party with the greatest investment and interest in the profitability of a product is prepared to abandon research or withdraw a product, that party must have knowledge of a risk to users which would likely cause some form of injury.\textsuperscript{30}

What did employers, responsible-for and in-control of workplace hazards, learn from the process by which our society manages workers’ compensation claims? They learned that these injuries were not their “fault” (they were, in law if not in fact, nobody’s fault).

\textsuperscript{28} A.Tabarrok and E.Helland, The Political Economy of Tort Awards, Center for the Study of American Business Policy Brief #166, October 1997

\textsuperscript{29} For they are indefensible on most grounds of common sense - witness the US $3.4 jury award in a Louisiana train derailment where virtually no personal injuries occurred. “Making a Case for Change” the ABA Journal November 1997.

\textsuperscript{30} It is no small irony that tort reformers consistently call for product liability to be compensable only when the good is “defective” (i.e. not good for the purpose for which it was sold) - effectively adopting the assumption of risk doctrine into product liability, akin to the old employer’s defense of a worker’s assumption of risk.
Employers learned also that there was no significant direct cost associated with these injuries; they also learned that the key to dangerous, hazardous or unhealthy working conditions was to avoid inspection by safety officers so as to avoid relatively benign sanctions.

The lesson of workers’ compensation echoed many of the wider lessons drawn from the modern experience of productive enterprise: that human beings were a form of “resource”, and that resources were to be used, but not necessarily conserved; that waste was to be disposed-of, rather than avoided; that risk was to be exported onto others rather than eliminated through thoughtful planning. In the writer’s view, these principles continue to inform much of our economic thinking and activity; while hardly the “fault” of a no fault workers’ compensation scheme, they are certainly reinforced by a system which never finds fault nor penalizes it.

Indeed, these economic principles have been enormously beneficial to the continuous development of new work processes, greater efficiencies and technological advance. It is the great, incalculable benefit of workers’ compensation to society that employers have been able to innovate, produce and change with relatively little regard for the effect of it on the people doing the work.

For decades, employers in the Canadian workers’ compensation system paid assessments with little or no linkage back to their own hazards and accident costs. There was literally no-one with a real interest in complaining about, or counter-acting, these traits save the workers who were directly affected. Given their relatively weak power position within the working environment, most workers (particularly those not in unions) were in no position to make significant steps to fight for a more safety-oriented workplace. Further, there remains in working culture a fair degree of belief in the doctrine of assumption of risk - that the individual must simply avoid a hazard, rather than petition for its removal, and that when accidents happen, they are “accidents” (not predictable results of hazardous situations).
Furthermore, to the extent that workers’ compensation is seen as a source of income which does not cost either the employer or the workers in a company, the no fault regime permits (and maybe promotes) abuse by workers. Lacking any test beyond the basic adjudication of an accident, an injury and some medical evidence of impairment, the workers’ compensation system is recognized almost universally as being too lax, particularly with prolonged claims connected to soft-tissue and other hard-to-diagnose injuries. Absent an employer with sufficient reason to defend or police abuse, some workers have been well-positioned to systematically draw benefits during periods of seasonal unemployment, or to facilitate career changes, or simply to finance timeoff required to address other compelling personal issues. Beyond failing to make employers confront their culpability for an accident, the system invites and rewards workers who feign or exaggerate their claims of injury. Neither outcome promotes a general societal value of honesty, or of accountability.

Certain caveats are important: employers and their managers are human beings too, and many govern their affairs not only from the standpoint of material gain but also with a moral compass. Most claimants are recognizably honest and anxious only to recover and resume work. Further, workers - in and out of trade unions - have had the right to refuse unsafe work in most jurisdictions and as a practical matter have managed to stay alive, and uninjured, most of the time. Just as important, all Canadian provinces and all U.S. jurisdictions adumbrate and enforce (to varying degrees) safety regimes in the workplace. Finally, it is banal but true to say that life is full of risks, many of which simply cannot be sponged away from the world at any reasonable cost.

This being said, it is still true that the workers’ compensation system itself for most of this century offered few incentives to employers or workers to eliminate risks rather than avoid or exploit them. This culture met no serious counter, and faced no moral check, until workers’ compensation administrators began to confront the looming prospects of unfunded liabilities accruing from systems which paid more out to claimants than they took in from employers.
Since the mid-1980s, Canadian workers’ compensation jurisdictions have embarked on tentative steps towards enhancing direct employer accountability and liability for the effects of workplace injury. Ontario, with its more aggressive experience rating system and recent benefit reforms (1990’s re-employment and vocational rehabilitation systems, 1998’s introduction of substantial fines for employer failures to co-operate with worker reintegration into the labour market) leads the way, but other provinces such as British Columbia have setup milder forms of experience rating as well.

The purpose of these plans was to *enhance justice among employers*, by distributing liability according to responsibility for cost (effectively introducing a cousin of “fault” to an otherwise no fault regime). The further purpose was to *deter hazardous behaviour*, by making it more costly to continue unsafe practices than to eliminate them. In these cautious ways, the WC system has begun to borrow from the tort system in terms of achieving more, and different forms, of justice.

The clear outcome, in terms of justice to workers, should be a deepening investment in efforts to prevent injury rather than to compensate it; for workers, that is a substantial economic and moral victory (remembering that it is *workers* who shoulder most of the real cost of injury, not only through uncompensated losses but also through wage reductions sustained through indirect employer allocations of WC costs).

This victory is tainted, to some extent, by recent efforts to reduce rates of compensation payable to claimants who have been found to have suffered work-related injuries. Under pressure from employers, various legislatures have taken steps to reduce benefit levels and to tighten entitlement rules (American jurisdictions stepped up to this in the early 1990s, with remarkable effects on overall system costs and unfunded liabilities; Ontario recently followed-suit with reforms this year). What is happening is that employers, confronting greater direct liability in the form of premium increases or new rules governing worker re-employment, have succeeded in persuading governments to shift some of the new cost back onto workers. These are not, to most observers, gross injustices, but they underscore the general attitude towards workers’ compensation
systems in this country - that it is not to inflict serious liability upon the employer, nor significantly affect the governance of the workplace.

On the other hand, the WC regime stands as a lasting example of remedial legislation and of society’s preparedness to use the law to redress palpable injustices suffered by people with poor bargaining power and few realizable rights. To that extent, workers’ compensation is a vehicle for another form of justice, a certain redistribution of power, if not of income. This is not insignificant to the injured party, who comes to the public agency for assistance and has the claim taken-up by “society” as whole, rather than having to pursue the matter alone before the judiciary. There is likely substantial value to claimants in knowing that public institutions operate to assist them, and to somewhat equalize the distribution of power between worker and employer, at least in this domain.

**Conclusions**

Workers’ compensation is primarily an instrument of functional justice - achieving an end which is generally perceived to be preferable to the system which preceded it. While offering a remedy to some of the health care and financial problems sustained by injured workers, it does little or nothing to promote cultural changes which might eliminate workplace hazards. To that extent, it is a weaker instrument than tort for the achievement of deterrence and the assignment of culpability, but a far better one for sustaining the injured party through losses of income.