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COLLOQUE SUR L'AVENIR DE L'INDEMNISATION DU PRÉJUDICE CORPOREL

SÉANCE INAUGURALE

Les perspectives du gouvernement fédéral canadien — The Future of Personal Injury Compensation

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Sous-ministre
au ministère de la Justice fédéral

Il faut féliciter la Faculté de droit de l'Université d'Ottawa pour la pertinence du sujet choisi pour ce colloque. L'avenir de l'indemnisation du préjudice corporel, compte tenu en particulier des coûts élevés de l'assurance-responsabilité, est une question qui nous intéresse tous, à titre de citoyens et dans nos rôles respectifs d'avocats, de juges, de médecins, de professeurs d'université et de fonctionnaires. Je suis heureux de constater que des représentants de toutes ces professions sont là pour étudier ce problème.

Ces dernières semaines, j'ai reçu diverses annonces de conférences et de publications nouvelles portant sur l'évaluation du préjudice corporel et sur ce que l'on appelle souvent la crise de l'industrie de l'assurance-responsabilité. À mon avis, ce colloque sera un succès dans la mesure où il nous incitera à poursuivre l'examen des questions en jeu et à y trouver des solutions.

Legislative responsibility for much of the subject matter to be discussed over the next two days falls within the competence of provincial legislatures. Although the *Crown Liability Act* was passed to enable the federal Crown to be sued in tort for damages caused by its employees, you will appreciate that there is no unique federal government perspective on the assessment of personal injury damages *per se*, inasmuch as the Federal Court employs and develops the applicable common law principles as do other courts of competent jurisdiction within Canada. Nonetheless, developments in all areas of the

law are carefully monitored by the Department of Justice on behalf of the federal government.

We have all no doubt become aware that over time other vehicles for compensation are being utilized in addition to the courts themselves. In her recent book titled *Compensation and Government Torts*, Professor Carol Harlow has remarked that in the United Kingdom :

> Statutory compensation schemes are rapidly overtaking the legal process as the normal machinery for distributing compensation.

His Honour Mr. Justice Allen Linden, Chairman of the Law Reform Commission of Canada, who will be sharing his insight at this conference, has written about :

> [...] the numerous developments in Canadian social welfare that furnish compensation to injured people on a no-fault basis [...] These legislative compensation schemes render superfluous any consideration of tort theory in the areas where they operate. They were enacted fundamentally to replace or to supplement the segments of the tort compensation system which provided inadequate reparation, such as workmen's compensation, victims of crime, no-fault auto insurance and the like.

At the far end of the spectrum may be found the New Zealand *Compensation Act* of 1972 which has abolished the right to sue in tort for the majority of the population in that country. In return, a social insurance solution to the problem of personal injury compensation has been implemented. This scheme is administered by the Accident Compensation Corporation established pursuant to the legislation in 1974 with appeals to the courts still available in some circumstances.

While we in Canada appear to be groping instead for a balance between tort and social welfare in our system, and an appropriate role for private liability insurance, the New Zealand experiment is one which has been observed with interest by many who are with us today and I know we all look forward to their contributions in this regard. I would also recommend a recent article by Professor Philip Osborne of the University of Manitoba titled "Accident Compensation in Manitoba : Reflections After a Decade of No-Fault in New Zealand", which thoroughly canvasses the experience under New Zealand's unique universal no-fault system. I believe that this article is available through the Manitoba Law Reform Commission.

Je crois que ce colloque portera tout autant sur l'avenir de la responsabilité délictuelle et de l'assurance-responsabilité que sur l'avenir de l'indemnisation du préjudice corporel. Ces sujets méritent un examen attentif afin que nous puissions répondre efficacement à la question fondamentale suivante : le Canada doit-il chercher à adopter un régime universel d'indemnisation sans égard à la faute ou un système mixte?

It is useful to place in context the arguments for and against the retention of tortious liability as a vehicle to deliver compensation for bodily injury. On the one hand, Professor Atiyah has argued forcefully for the abolition of tort suits in England for personal injury cases. In his book titled *Accidents, Compensation and the Law* he wrote that :

> It is difficult to resist the conclusion that the right path for reform is to abolish the tort system so far as personal injury and disabilities are concerned and to use the moneys at present being poured into the tort system to improve social security benefits, and the social services generally [...].
>
> And finally there is the difficulty of justifying the different treatment accorded by the law at present to the victims of disease, and the victims of accidents, and among the latter class as between the victims of fault caused and non-fault caused accidents [...].

As an advocate for a mixed system, Mr. Justice Linden has suggested that in addition to a reformed compensation structure, the tort should continue to be available for those individuals who wish to employ it.

> It is after all a mechanism whereby an individual may secure full compensation for his own unique losses. It is also a method whereby a citizen may challenge the power of industry, the professions and government in a peaceful way in order to influence them toward more responsiveness and compassion. It is a technique for educating people about many of the humane values of our society and for teaching them about the need for caution in all their activities. It is a device that permits orderly and bloodless revenge to be taken against wrong-doers, for whatever that is worth. It is a way of making risky activities more costly so that some market deterrence may be achieved. Indeed, tort law may not prove to be obsolete or irrelevant at all. We may discover that tort law is a significant segment of our legal system and of our culture generally, and that Canadians would be wise to preserve it for many decades to come.

Of course every one of us must examine the opposing positions carefully to arrive at his or her own conclusions.

Après ces observations générales sur le sujet choisi pour ce colloque, permettez-moi de vous faire part des diverses façons dont le gouvernement fédéral règle, dans certaines circonstances, les réclamations d'indemnisation pour préjudice corporel. Naturellement, les exemples que je vous donnerai relèvent de systèmes d'auto-assurance.

First, regulations referred to simply as the *Claims Regulations* have been enacted pursuant to the *Financial Administration Act* to deal with claims by or against the Crown. These regulations apply to every claim for damages for which the Crown is or may be liable under the *Crown Liability Act*. The procedure adopted under the *Claims Regulations* is that where a federal government department, including the RCMP, becomes aware that an incident has occurred that may give rise to a claim for damages against the Crown, the Deputy Attorney

General of Canada is informed and an internal investigation is conducted by the concerned department. Based on this investigation the Department of Justice provides an opinion on liability and in particular whether an officer or servant of the Crown caused the incident by his or her negligence. Although there are certain limitations, the *Claims Regulations* apply to motor vehicle accidents within Canada and personal injury compensation. Provision is made for reimbursement back to the Crown from the individual who has caused the accident.

It should be noted that the *Claims Regulations* do not provide a no-fault system. Nor do they preclude an action in tort as an alternative to proceeding under the *Claims Regulations*. If the claim is rejected under the regulations a civil suit may likewise be started. Their major purpose would appear to be to receive claims from third parties and to allocate compensation in appropriate cases in a fairly summary fashion. In this way, involvement by all concerned in costly and time-consuming court proceedings may be avoided.

The *National Defence Claims Order* operates more or less according to the same principles as the *Claims Regulations* themselves. The Order covers the torts of Department of National Defence employees and members of the Canadian Forces acting within the scope of their duties and employment, including motor vehicle accidents causing death or injury to persons or damage to or loss of property. The public is also protected from the dangerous use and operation of weaponry and aircraft. As in the case of the *Claims Regulations* an opinion as to liability is necessary. The Judge Advocate General or an appointed local authority for purposes of the Order will determine the question of legal liability in some cases but the Deputy Attorney General becomes involved when the claim exceeds $ 10,000 or $ 16,000 in the case of more than one claim arising from the same incident. It should also be emphasized here that it is the choice of the injured party whether to proceed under the Order or in court but clearly not to accumulate double compensation. Again, this is not a no-fault system but instead a method to streamline the provision of compensation that is warranted in particular cases without generating more protracted proceedings.

A slightly different form of regulatory compensation scheme is found in the *Penitentiary Inmates Accident Compensation Regulations* made pursuant to the *Penitentiaries Act* which offers both fault and no-fault payments of compensation to inmate victims of an accident or an occupational disease attributable to their participation in the normal program of a penitentiary. Accident is defined in these regulations to include intentional acts suffered by an inmate as well as chance events occasioned by physical or natural causes. It is also the case here that civil rights of action are not suspended. Indeed separate damage awards may

co-exist with the federal government paying the difference between the court-awarded damages and any higher award under the Regulations.

The *Government Employees Compensation Act* and the *Merchant Seamen Compensation Act* are also examples of statutory regimes that provide both fault and no-fault bases for compensation but unlike the regulatory schemes already referred to they do in fact preclude the institution of civil causes of action arising from the same facts. The *Nuclear Liability Act* imposes absolute liability on the operator of a nuclear installation without proof of fault or negligence in the event of a personal injury or loss of life. Another no-fault example is the *Flying Accident Compensation Regulations* made pursuant to the *Aeronautics Act* which prescribe compensation for bodily injury or death resulting from non-scheduled flights undertaken by federal public servants in the course of duty.

I have not referred to all compensation schemes currently available under statute and regulation at the federal level. My time is limited and you will have to accept my word that the *Pesticide Residue Compensation Act* and regulations and the *Fishermen's Notice of Claim for Loss of Income Owing to Pollutants Regulations* made pursuant to the *Canada Shipping Act* are fascinating documents to read and study. It is apparent, based on this brief analysis, however, that the ability to deal with claims against the federal Crown and to deliver compensation is not restricted to the traditional civil suit in a number of areas where the federal government may find itself in the position to compensate for personal and other injuries. If a comprehensive study of the tort system and methods of compensation for personal injury in Canada is ever undertaken, the various types of federal government compensation arrangements are certainly worthy of study for the assistance they may provide in respect of the problems that are before us today.

Finally, the federal government's compensation to victims of crime policy deserves consideration as an effective means for delivering damage awards to those individuals in our society who have suffered from violent crimes. In all provinces except Prince Edward Island, criminal injuries compensation schemes have been enacted to fill the gap which exists in tort law since offenders are rarely able to pay damages to the victims of their crimes. In 1984-85, the federal government paid approximately $ 2.5 million to nine provinces and the two territories with which it has cost-sharing agreements to demonstrate its commitment in this important area.

En conclusion, permettez-moi de remercier M. Louis Perret et son comité de leur invitation à vous donner ce discours inaugural. J'ai tenté tout d'abord de vous donner le contexte général des sujets qui seront discutés et je crois que les mentions précises que j'ai faites ensuite à des lois, à des règlements et à des initiatives du gouvernement fédéral

constituent des exemples utiles des méthodes existantes pour traiter des réclamations et verser les indemnités pour préjudice corporel ou d'autres formes d'indemnisation de façon adéquate et rapide aux citoyens canadiens qui ont besoin de cette aide. Quels que soient les systèmes qui seront élaborés avec le temps au Canada, l'objectif doit demeurer une indemnisation juste, dans la mesure des moyens de la société, aux personnes qui subissent un préjudice corporel.