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The Influence of Insurers upon the System of Compensation for Personal Injury

Richard Lewis



Traditional View:
Insurance has had little influence upon tort

Prosser on Torts

- “While liability insurance undoubtedly has had an effect, it is difficult to escape the impression that all this has been very much overstated.
- A dispassionate observer ... might ... conclude that the ‘impact’ of insurance upon the law of torts has been amazingly slight; that most of the changes that have been pointed out are due to other causes”



Traditional View: Insurance has had little influence upon tort

Stapleton – (1995) Modern Law Review 820

- Any causal link between the development of insurance and the expansion of liability must be viewed with caution
- Courts only refer to insurance as a ‘makeweight’ factor after deciding to impose liability for other reasons
- The argument that insurance had had influence has been used selectively to explain certain developments whilst ignoring other areas



Conclusions of Full Report (R. Lewis in G. Wagner (ed) *Tort and Insurance* 2005)

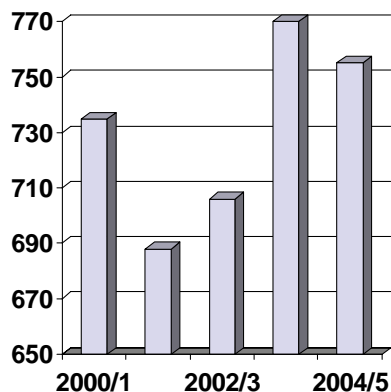
- Agree that insurance has only had a limited influence upon tort liability rules
- But the award of damages more clearly reflects the influence of insurance
- In addition, the findings of fact in tort cases – rather than the making of rules – has been influenced by the “deep pocket” of insurers
- Most importantly, the institutional influence of insurance has profoundly affected the operation of the tort system in each personal injury case

**Outline of Present Paper:
Institutional Influence of Insurance upon:-**

- 1) who makes the claims for damages
- 2) who really defends such claims
- 3) extent that courts and lawyers become involved
- 4) how claims are defended and settled
- 5) the amount of compensation paid
- 6) lobbying and reform of the law

1) Who makes the claims

- If a stadium contained 77,000 spectators – how many would have brought a tort claim in the last year?
- Answer = 1000
- 755,000 claims in 2004/5 = 1 for every 77 people



Thousands of Accident Claims Notified to Compensation Unit

Year	Motor	Work	Public	Medical	Other	Total
00/01	401	97	94	10	7	612
01/02	400	97	100	9	6	614
02/03	398	92	109	7	6	615
03/04	374	79	91	7	4	557
04/05	402	77	86	7	4	579

1) Who makes the claims

- Tort liability insurance is rarely made compulsory except for -
 - employers and
 - motorists
- Road and work accidents constitute 86% of all tort claims
- Accident victims successful in tort:
 - Road = 1 in 4
 - Work = 1 in 10
 - Other = 1 in 67

Importance of insurance as a means of access to compensation

- Legal expenses insurance is offered by 17 million motor policies and 15 million household policies
- Legal expenses insurers control litigation in 80% of motor claims
- Anticipated that road accident cases will be dealt with by only 100 of the 9000 law firms in the UK

2) The Real Defendants

- In 9 out of 10 cases the real defendants are insurance companies
 - the remainder being large self-insured organisations or public bodies
- Insurers pay 94% of the compensation for personal injury

2) The Real Defendants

- Motor insurance - over 350 companies are authorised to issue policies
 - but only 65 do so in practice together with 11 Lloyds syndicates
 - 10 largest insurers control 66% of the market
- General liability market - involves 50 companies
 - but is dominated by only 8 companies

2) The Real Defendants

- Policyholders cede control of case to insurer
- Insurers rarely contest liability
 - liability initially denied in only 20% of cases
- Insurers make at least some payment in the great majority of personal injury claims:
 - 89% of motor claims result in some payment
- Insurers provide structure for processing mass payments of small amounts of compensation
 - only very rarely does tort stage a gladiatorial contest to determine wrongdoing

3) Insurers Use of Courts & Lawyers

- Insurers allow judges to determine only 1% of all claims
- Cases now settle earlier and without resort to the issue of court documents
 - claims issued by County Court fell by 32% in last 5 years
- Insurers have reduced number of lawyers acting for them
 - AXA cut its panel of solicitors by half in 2004

4) How Claims are Defended and Settled

- Ross (*Settled Out Of Court*) – the textbook rules of tort are often transformed when they used in practice in 3 ways:-
 - Rules are simplified
 - Made more liberal
 - Made more inequitable

4) How Claims are Defended and Settled

- Simplification
 - Because of cost and uncertainty rules of thumb are used instead of tort principles
- Liberality
 - More claims result in payment than strict rules of tort would allow
 - Result: “wherever there is insurance there is ... a closer approximation to the objectives of social insurance in fact that the doctrines of tort law would lead one to suppose.”

4) How Claims are Defended and Settled

- Inequality
 - The “one-shotter” claimant against the “repeat player” insurer
 - First offers are accepted in 63% of cases
 - Rewards disproportionately –
 - the less serious injured
 - those with better lawyers
 - the better educated
 - those better able to withstand costs pressures

4) How Claims are Defended and Settled

- Overall Result
 - Rough and ready justice is dispensed
 - much influenced by insurance personnel and procedures and by cost
 - Arbitrary results have only a limited relationship to the portrayal of justice in tort textbooks

5) Amount of Compensation Paid

- Effects of insurance clearly seen in USA where there are limits on the amount recoverable under a policy
 - Reluctance to pursue claims beyond these policy limits to obtain “blood money”
- Size of damages awards clearly reveals influence of insurance
 - Return to the pre-accident position is only attempted because of insurance

6) Lobbying and Reform

- The Association of British Insurers is twice the size of any other trade organisation and has a budget of over £20 million a year
- Its lobbying of Ministries is such that internationally, such institutions “see themselves as governing governments”
- Until 1997 one in ten Members of Parliament declared financial link with the insurance industry
- Regulatory impact assessments enable insurers formally to raise insurability when reform is raised

Conclusion

- Most of the above facts have been proven time and again
 - but tort textbooks pay them little, if any, attention
- Nevertheless insurance must be seen as fundamental to the tort system
 - without insurance the tort system would have collapsed long ago