THE TORT-LIABILITY INSURANCE SYSTEM AND FEDERALISM: EVERYTHING IN ITS OWN TIME

Roger C. Henderson*

If for a moment we could wipe the slate clean with regard to the present system of state-based tort law and, at the same time, not worry about our current federal system of representative goverment, I would like to pose a question. The question is this: Is there anything inherent in tort law that would prevent, or even significantly work against, our having a national system of tort law in the United States?

In trying to formulate an answer to this question, several things come to mind. The first thing that occurs to me is the origin of tort law in North America. We inherited lots of things, legal and otherwise, from England. Even though not all colonists were from England, as it turns out much of what endures in our legal system is traceable to that country—traceable either because our ancestors embraced the English legal system or rebelled against it. Probably our greatest legacy from the English system is the common law, a system that prevails in every jurisdiction of the United States, save Louisiana. And, of course, it was the common law process that gave birth to and brought to maturity the body of law that passes under the head of American tort law today. Yet, all one has to do is to think about the British Empire in the 18th and 19th centuries to realize that all of the Empire was pretty much subject to the same body of tort law with the London-based House of Lords and Privy Council as the ultimate arbiters. Whether the country was England, Ireland, Scotland, Canada, Australia, or whatever, there was in general one body of jurisprudence governing liability for personal injury and property damage—sort of a *portmanteau* of tort law—for all the subjects of the realm. In fact, it was not until relatively recently that countries such as Canada and Australia opted to end the right to petition the Privy Council to resolve tort and other issues. More importantly, for purposes of my point, one of the legacies of the British system is that today both Canada and Australia have federal systems of tort law, with their respective national courts of last resort, the Supreme Court of Canada and the High Court of Australia, possessing the final common law authority on the subject.

Even though the American colonists revolted and threw off their English yoke and set themselves on a different governmental course, I would submit that there is nothing inherent in tort law or its common law source that would have prevented, or even seriously impeded, the development of a national body

* Professor of Law, University of Arizona, College of Law; B.B.A., University of Texas, 1960; LL.B., University of Texas, 1965; LL.M., Harvard, 1969.

of jurisprudence to deal with personal injury and property damage had our ancestors chosen to do so. As noted above, the British did it under greater difficulties with its far flung Empire. All it would have taken was a few well chosen words in the United States Constitution. In fact, as you no doubt remember, the federal courts promulgated their own brand of common law for tortious injury for almost a century in diversity cases under the doctrine of *Swift v. Tyson*,[1] a decision that no doubt was impacted by the same forces of the Industrial Revolution that were working not only to bring tort law to maturity in the United States but also to homogenize it. Even under the system of limited jurisdiction for federal courts actually adopted in the Constitution, it was not until *Erie R.R. v. Tompkins*[2] that the Supreme Court recognized that there was no authority under that document for a system of federal common law of torts or other areas of "general law." Even then, although the Court did point out the impracticability of having a system that allowed litigants to pick and choose between tribunals enforcing different rules of tort law,[3] there was nothing about the decision that would prohibit a system of exclusive federal jurisdiction for torts. Of course, an exclusive federal system was not to be, except for certain things such as providing for a common defense, and for good reason.

Providing that the state courts would have exclusive jurisdiction over those matters generally left to the common law certainly suited the political mood of the times. After all, the colonists had recently fought a war to oust a government exercising centralized control and there most definitely was little sentiment to install another to replace it, albeit one far more democratic in form. Nonetheless, the reservation of tort law to the states was purely a political decision exercised by the drafters and ratifiers of the Constitution. Had the colonists and British been able to reach a settlement short of war, who knows what form of government the Americans would have set up or how their court system would have been configured. We might only look to Canada, our neighbor to the north, for a hint. In any event, there certainly was nothing to prevent the American colonists from having a national or federal system of tort law had they so desired.

A second thought may require even more imagination. It involves the proposition that it is probably only fortuitious that we have a common law system of tort law. We might just as well have a civil law system, with the result that today we might have more integration of tort and social insurance programs such as you see in European countries like France and Germany. Things might have taken a different turn if it had not been for the peculiar cultural mix of Norman conquest and some of the ramifications of Anglo-Saxon perseverance in 11th-century England. Or, perhaps the French or even the Spanish could have been victorious in later wars with England. Had it not been for Elizabeth I, Sir Frances Drake, and a little help from the weather, we might be eating a lot more paella today than we do. If so, would we have inherited a common law adversarial judicial system or would the system be more like what

1. 41 U.S. (16 Pet.) 1, 18 (1842) (holding that federal courts exercising jurisdiction on the grounds of diversity of citizenship need not, in matters of general jurisprudence, apply the unwritten law of the State as declared by its highest court; that they are free to exercise an independent judgment as to what the common law of the State is—or should be).
2. Erie R.R. v. Tompkins, 304 U.S. 64 (1938).
3. *Id.* at 74–75.

we find in European countries today. I do not want to dwell on this point because that is not how things turned out, but it is useful to remind ourselves when we are asked to think about federalism and tort law that our system is not premised on an eternal verity, but is largely the product of happenstance. Thus, when an individual asserts that the American fault-based tort system can be traced back to the Code of Hammurabi or that it is rooted in the natural order of things, we, at the very least, should be very skeptical of the person's sense of history and be mindful of the role that human foibles have played in making things what they are today.

Things are the way they are because of the many quirks and vicissitudes that often not only defy reason, but that clearly would not have come out the same if the forces of change had converged a little differently in time or manner. Some things may be indispensable to our particular form of democratic government—such as the right to vote, freedom of the press, and the writ of habeas corpus—but the tort system that we have today surely is not one of them. There are reasonable alternatives for compensating accident victims and others who suffer harm at the hands of third parties.

The last thought regarding the question posed at the outset is more practical. Is there anything about the makeup—geographical, cultural, or otherwise—of the United States that requires, for fairness' sake, that each state develop its own set of tort rules to accommodate any unique conditions that might exist in the jurisdiction? First, what was the situation regarding "tort law" around 1776? The answer is, not much. There was no body of discrete rules or case law even referred to as the law of torts.[4] To be sure, there were various actions for trespass to property and to the person, actions for trover and conversion, fraud and deceit, and defamation, but nothing like what we have today. Actions for bodily injury almost always concerned acts of violence or what were known as direct injuries. The concept of fault, as we know it today, was not a prominent element in these actions. In fact, the concept of negligence had not been articulated as a distinct basis of liability, and would not be established in the United States for at least another seventy-five years. Moreover, not only did the limited forms of action appear to be all that was needed for the times, but there is little to indicate that they were not uniformly adopted in the various colonies even though there were other differences among the early settlers.

By the time of the revolution there is little evidence that tort law, such as it was, needed to be different, or for that matter was different, from one jurisdiction to another. As time passed and the nation expanded westward, the settlers simply took the law that was familiar to their new surroundings. In fact, it is not uncommon to find a provision in the constitution of each new state admitted to the Union expressly adopting the common law of England as the rule of law insofar as it is practicable to do so. Even in the absence of an express provision, it was assumed that the common law would prevail absent legislation. This was natural enough since the common law already prevailed in the state or territory from which the new state was carved. Thus, perhaps a good way of testing whether different locales need different tort rules is to think about any significant differences that may have developed in the common law, say, between the eastern states and the rest of the country. I can think of

4. *See* G. EDWARD WHITE, TORT LAW IN AMERICA 3–19 (1980).

only one tort rule that was dramatically different depending on where in the country one needed to address the issue. That rule has to do with trespassing livestock.

The New England states pretty much followed the English rule that a landowner had to keep his or her livestock enclosed. If not, and the livestock wandered on the land of another, the livestock owner, subject to certain exceptions, was liable for the trespass and ensuing harm to the property. Now anyone who lives in the West, with its large expanses, knows that this is a rule that would be highly impractical if adopted, say, in Texas or Montana. Accordingly, the courts of many western states refused to follow it. Instead, the so-called open range rule was adopted under which there is no liability for wandering livestock. If your neighbor was concerned, she could fence out the cattle or whatever. Although the law has been changed in some ways, for example by leaving it to the option of the county whether to have an open range rule, many western states still have open range laws. The rule works quite well as far as ranchers are concerned. If some vacationing motorist from Massachusetts happens to have an unhappy encounter with a cow standing in the middle of the road on a dark night, the rule is simple—the motorist buys the cow! And, under western conditions, the corollary is equally fair—the rancher owes nothing for the damage to the vehicle.

Try as I might, I cannot think of many other local conditions requiring different rules of tort law. Perhaps there are some examples regarding the use of explosives. Texas does not recognize strict liability (or at least it did not when I was in practice there in the 1960s) for damages from the use of dynamite. The courts explicitly refused to adopt the rule of *Rylands v. Fletcher*[5] because they did not feel strict liability was justified for the use of explosives in seismograph operations involving explorations for oil and gas. Consequently, they refused to impose strict liability for explosives, regardless of the purpose for which they were employed. Other states have their own peculiar rules regarding explosives, depending, for example, on whether a farmer is blasting out stumps in a rural area or the use takes place in an urban area. In any event, good examples are few and far between and, for all practical purposes, nonexistent in the area of bodily injury.

The dearth of examples listed above does not mean that there are not differences in tort law across the country because there certainly are. For example, the law regarding comparative fault varies from those states that have "pure" systems to those that have "modified" systems, and even the "modified" systems differ within that category. There also are differences regarding product liability, particularly with regard to strict liability for design defects. Nonetheless, with the exception of the trespassing livestock and blasting cases, these differences are the natural product of courts taking different, but reasonable positions on fairly debatable issues. The decisions do not really turn on local needs or conditions, such as the impracticability of fencing large areas of range land. Rather, the courts have come out one way or the other largely because of the inclinations of the particular jurists.

Does the lack of fundamental difference in tort law across the country tell us anything about the need for each state to develop its own body of tort

5. L.R. 3 H.L. 330 (1868).

law? I submit that it does and in thinking about the matter further, I was struck this morning by Mark Tushnet's remarks that, whatever may have been the differences among Americans at the outset in this country, over time they have diminished rather than increased. I agree with Mark at least to this extent: If you happen to wake up some morning in New York, Iowa, or California and are injured that day, the chance of your being treated differently as a result of some unique rule of tort law by virtue of your geographical location is very unlikely. But even if you were to be treated differently for some reason, it is even more unlikely that the reason will be because of some local condition or need. Moreover, any claim of unfairness because you would have fared better under the tort law of one of the other states should not carry much weight for several reasons. First, it is doubtful that any rule about which you might complain will be unreasonable, much less inherently unjust. Secondly, you really have no vested interest in the rule, as tort rules come and go over time. As long as the rule does not run afoul of some constitutional provision, it may slightly favor claimants one day and defendants the next, but for the most part it will embody a balanced approach. In addition, you never know whether you will be a claimant or a defendant and how the rule might be applied by a jury in any particular case. Finally, given the peripatetic nature of our society, an individual may expect to live in any number of jurisdictions during his or her lifetime and to remain oblivious of any particular tort rules unless and until unfortunate enough to be in an accident. Except for my colleague Dan Dobbs, I doubt that any person ever thinks twice about tort rules in making a decision to move from one state to another (and the only reason he might think about it is that he is the only person who knows all the rules). Thus, no prudent person should ever depend on the vagaries of the tort system to compensate (or, for that matter, to protect against claims) for accidental losses. If you want to rely on something, buy insurance.

So what does all this have to do with federalism and tort law? I conclude that there is nothing inherent in tort law or its common law source that makes it a subject better for state courts than federal courts. If any court system has a steady diet of legal matters to chew on, it will respond to the task. The reason the state courts in general do a better job now of dealing with tort issues is because they handle most of the cases. If it were the other way around, I am sure the federal courts would do equally well. However, judges are no more fungible than trial lawyers, or professors for that matter, and some courts are more able than others. Would anyone dispute that Learned Hand, a federal judge, made very significant contributions to tort law, just as state jurists like Cardozo and Traynor did. Think what Hand might have done had he had their field to run on.

Before closing, it is important in thinking about federalism and tort law to make one more observation. Analysis of the tort system without an understanding of the role of insurance renders an incomplete and misleading perception. The tort system does not stand alone. It is a hybrid system—a tort-liability insurance system. When viewed as a hybrid system, the role of the federal government and the issue of federalism looks quite different. The states, through the common law system, may be the proper venue for tort law if all you are talking about is tort law. But we no longer should be talking *just* about tort law. Ask yourself this: Would modern juries return the verdicts they do if they thought the defendants would have to pay the damages from their own

assets and not be able to shift the loss through some risk distribution system? In the absence of insurance, it would be rare for a jury not to consider the economic dislocation visited on a defendant, corporate or individual, by a large award of damages. Not only would juries probably act differently—particulary with regard to noneconomic losses—but I would submit that even judges might act differently in developing the rules of liability and damages if liability insurance was not readily available. But there is liability insurance and other risk spreading mechanisms, so what is the point?

The point is that once you focus on the tort-liability insurance system, there is a need to follow through and ask some tough questions about costs, efficiency, allocation of resources, and related matters. For example, would it make sense to allow accident victims to sue in tort for medical expenses if we did adopt some type of national health-care system. Even if there is some value to preserving fault as a criteria for loss shifting—which is debatable—that does not mean that the tort victim necessarily is the one to exercise that right. This is particularly true if the victim's loss has already been compensated through health insurance. Loss shifting can be accomplished among insurers and other institutions behind the scenes through arbitration or other arrangements in a more cost-efficient manner than under the tort system. If this would make sense under a true national health-care system, why does it not make sense under the quasi-national health-care system that we presently enjoy through group health insurance, health maintenance organizations, and government programs such as Medicare and Medicaid?

Sometimes I get rather perplexed when I think about the tort system and how in some areas it has been impacted, if not completely subverted, by the prevalence of liability insurance. The tort system and the tort-liability insurance system, each in its own time and way, have played important roles in our society as it has progressed, but today they are antiquated in some situations. For example, in the area of auto accidents, the tort-liability insurance system best serves lawyers and insurance companies because both groups make a profit from it, while accident victims seldom are even made whole. It has been demonstrated over and over again that the benefits flowing to auto accident victims are distributed in a very uneven manner. The people with minor injuries collect a disproportionate amount of the benefits in relation to their losses while the seriously injured rarely are fully compensated for their out-of-pocket losses, much less for any noneconomic loss. It is clear that a well designed first-party insurance program that compensates auto accident victims for bodily injuries without regard to fault would better serve the public than the present system and, in my opinion, would be a good candidate for federal legislation. In fact, there was a time that such a plan received serious attention at the national level, attention from a very interesting group of individuals indeed.

This morning I retrieved from my files Senate Bill 354 that was introduced in the Second Session of the 93rd Congress.[6] The bill, which is entitled the "National No-Fault Motor Vehicle Insurance Act," not only was introduced, but it actually passed the Senate in May of 1974. The lead sponsor was Senator Warren Magnuson, the powerful Democratic chair of the Senate Commerce Committee. At the time, the President of the United States was none

6. S. 354, 93d Cong., 2d Sess. (1974).

other than Richard M. Nixon, a man who, despite his misdeeds, achieved some great accomplishments while in office.

When Nixon took office in January of 1969, he appointed John Volpe to the office of Secretary of Transportation. John Volpe was the Governor of Massachusetts during the time a young and little known Representative—at least little known outside his Brookline district—to the Massachusetts Legislature introduced the first no-fault act in the country, an act that ultimately passed in 1970 and went into effect on January 1, 1971. That man was Michael Dukakis and, of course, he was working with then Harvard Law Professor Robert E. Keeton in achieving this milestone. Professor Keeton and Professor Jeffrey O'Connell had recently published their book entitled *Basic Protection for the Traffic Victim.*[7] If you look in the preface to the book you will see that in 1965, Governor Volpe and Lieutenant Governor Elliot Richardson appointed a member of Richardson's staff to serve as their liaison representative to the study that resulted in the book. Although Governor Volpe actually opposed the adoption of the Massachusetts no-fault bill introduced by Dukakis, he apparently viewed things differently once in Washington.

While John Volpe was Secretary of Transportation the Department undertook the most massive and thorough study of the auto accident system in the United States, concluding that no-fault was preferable to the existing system. It is hardly likely that this study was undertaken without the approval of Volpe and the Nixon administration. Moreover, it was this study and support from the Department of Transportation that was instrumental in leading the National Conference of Commissioners on Uniform State Laws to draft the Uniform Motor Vehicle Accident Reparations Act which was completed in 1972. And in turn, the Uniform Act served in many ways as the blueprint for the federal standards that the states would have to meet and that were contained in the National No-Fault Motor Vehicle Insurance Act.

Had the National No-Fault Act also passed the House of Representatives, is there any evidence that President Nixon would have signed it? Although one can only speculate about the answer, it is interesting that Richard Nixon, while a law student at Duke University in 1936, authored a piece regarding tort liability for auto accidents[8] for the influential journal, *Law and Contemporary Problems.* His article appeared as part of a symposium discussing, among other things, the sociology of compensation and the pros and cons of a no-fault system for auto accidents.[9] Whatever influence this may have had on him as President, as fate would have it, the Nixon Adminstration was awash in scandal by 1974 and he resigned in August of that year, just a little over three months after the Senate passed Senate Bill 354. Oh what might have been if it were not for a bunch of second-rate burglars at some office building called the Watergate!

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7. ROBERT E. KEETON & JEFFREY O'CONNELL, BASIC PROTECTION FOR THE TRAFFIC VICTIM (1965). This book is the product of a study conducted by Robert E. Keeton and Jeffrey O'Connell regarding ways of handling claims arising from automobile accidents. The study was funded by the Walter E. Myer Research Institute of Law, Inc., and the book was published by Little, Brown & Co.

8. Richard M. Nixon, *Changing Rules of Liability in Automobile Accident Litigation*, 3 LAW & CONTEMP. PROBS. 476 (1936).

9. Emma Corstvet, *Financial Protection for the Motor Accident Victim*, 3 LAW & CONTEMP. PROBS. 466 (1936).

Much has changed since 1974, not the least of which is the electorate's attitude toward federal programs. The tide has definitely turned and I take it that is what has brought us all here today. Yet, even with the anti-Washington feeling pervading the country, I think someday things may occur at the federal level that could have a dramatic impact on state tort law. I do not foresee that any frontal assault on the present tort-liability insurance system will be mounted, at least in the near future, at the federal level, or if it is mounted, that it will succeed. In the past decade, we have witnessed repeated efforts by manufacturers and insurers to federalize all or parts of tort liability for products, only to fail at every turn. In fact, the latest proposals have been so scaled back in comparison with the earlier attempts that it hardly seems worth the effort. We also have witnessed attempts to change the law of punitive damages and some rather innocuous attempts to deal with medical malpractice at the federal level, all to no avail. I seriously doubt whether similar efforts will ever succeed.

There is so much money available—money that is generated by the tort-liability insurance system itself—which translates into political clout that it simply is not possible to make significant changes in the status quo through legislation. This is particularly true at the federal level because tort law has traditionally been the province of the states and there is little sentiment to move power from the states to the federal government. In fact, the trend is just the opposite. In addition, although the courts have continued to expand tort liability in ways that further remove it from its fault foundation, this movement may be ebbing too as we see the political process work its will in judicial elections and appointments at the state level—perhaps most notably in California and Texas. Although I believe all of these factors will continue to work against any direct reforms at the federal level, there is another—somewhat more stealthy development—that could dramatically change the tort-liability insurance system. This may well result indirectly from action at the federal level.

I believe I will live to see the day when we will have some type of national health-care system, de facto or otherwise. Whether this occurs through some type of federal effort, like the plan proposed by the Clinton Administration or some derivation, it will happen because times have changed. Prior to and even for some time after World War II, there was no real expectation in this country that a person was entitled to health care. If you could pay for it, you could get the best, but if you could not, you got only what you could afford or whatever the medical profession would provide for free. (And I should be quick to say that many, many doctors literally worked themselves to death in trying to care for those who needed their help, often without regard to whether they could pay.) Health insurance coverage did not exist, at least as we know it today. Kaiser had only recently begun—mainly in the wartime shipyards—what we would today call a health maintenance organization or managed care. Employer-sponsored health insurance plans were yet to emerge in large numbers. In short, there was no general feeling that health care was a basic human right on the same level as food. That is not the case today and it will probably never be the case again, at least in this country. People have definite expectations about their need for and right to health care and these expectations are growing, not diminishing. So what does this have to do with tort law and federalism?

The answer is simply this—once health care is accepted as an inalienable, guaranteed right, it is going to make less and less sense to permit tort victims to sue third parties for their medical bills. It ultimately will be viewed as a "right" that everyone but the personal injury bar and liability insurers can well do without. I do not have time, nor is this the place, to pursue it here, but I assure you that we would lose nothing of real importance and gain a great deal in the way of efficiency and benefits if we eliminated what can only be accurately categorized as the waste resulting from the overlapping nature of the tort-liability insurance insurance system and other insurance programs.

If one is no longer allowed to sue in tort for medical expenses otherwise compensated, it may follow that it is not worth fighting over who was at fault with regard to work loss either, particularly if the loss arises from an auto accident. In addition, one might observe that if most of the tort award for noneconomic loss goes to compensate the claimant's attorney anyway, we may as well quit fighting over fault in a lot of situations and utilize a first-party insurance system for all out-of-pocket or economic losses. Not only could more people be compensated and to a greater degree for the same cost, but it could be accomplished faster and in a less aggravating manner. Thus, it is entirely possible that the movement for universal health care could significantly impact the tort-liability insurance system over the long haul and that the federal goverment could play an important role in the process. So, in conclusion, that is the way tort law and federalism looks from the perspective of at least one person who teaches both torts and insurance law. Everything in its own time.