

TORT LAW AS OMBUDSMAN

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Introduction

These are turbulent times. People everywhere are refusing to submit docilely to the rule of distant bureaucrats and managers. Because of a longing for more control over their own lives citizens are demanding that governmental institutions and private organizations be more responsive to their wishes. Undoubtedly this struggle will continue during the coming decades and may well intensify.

Many techniques are being employed to render institutions more considerate of human needs. One weapon Canadians have deployed effectively is the vote; in the last few years, eight provincial governments have been turned out of office and the federal government has been severely rebuked. Citizen groups have sprung up everywhere and, on occasion, as in the Spadina Expressway battle, have met with astonishing success. Protest marches, consumer boycotts, mass meetings and publicity campaigns are being used to pressure mass institutions into being more attuned to the aspirations of ordinary people.

To assuage this insatiable appetite for justice, some modern governments have turned to an old Swedish institution—the ombudsman.¹ The five provinces of Nova Scotia, New Brunswick, Quebec, Manitoba and Alberta have already established such an office, and the federal government is considering following suit. The primary function of the ombudsman is to protect ordinary people from the abuse of governmental power. An individual who feels ill-treated by some government department may complain to the ombudsman, who may investigate his complaint and suggest a remedy, if that is warranted. This is a useful instrument for supervising governmental activity, one that deserves our support. One problem with it, however, is that, like all bureaucracies, it will eventually become overworked and insensitive. Another shortcoming of the ombudsman is its unavailability as a check on private power.

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¹ See generally Gellhorn, *Ombudsmen and Others* (1966).

There is no need to despair, however, because tort law may serve society in much the same way as an ombudsman.² In fact, tort law may sometimes be more effective in this watchdog role than the ombudsman. The resources available to tort law are almost limitless, for every court and lawyer in the land may be called upon to participate in this noble work. Moreover, tort law may be used against private as well as public institutions.

Despite this, some authors are singing a requiem for tort law.³ They allege that it is obsolescent. Social insurance, they claim, can provide swifter, more efficient and more universal coverage for those who are injured as a result of the inevitable accidents of the industrial world. They denigrate the deterrent force of tort law and suggest that the abuse of power should be curbed by criminal law and administrative regulations. They contend that, because insurance covers most of these activities, there is rarely any sting left in tort liability.

It is true that the compensation function of tort law is waning in importance. New social welfare schemes are gradually rendering superfluous the need for tort reparation, at least for economic losses. Criminal and administrative law *can* curb deviant conduct more effectively than civil sanctions. Widespread insurance *does* diminish the deterrent force of civil liability. However, this does not necessarily doom tort law to extinction.

The law of torts may still serve in the years ahead as an instrument of social pressure upon centres of governmental, financial and intellectual power.⁴ The financial damages awarded against transgressors are no longer the only deterrent. Bad publicity may be more important. When a tort suit is launched, the glare of publicity may be focused upon it. The officials of the defendant government or company are drawn into the litigation. They are publicly under attack and are required to justify their conduct and their methods of operation to the judge and the jury. This can have a salutary effect, even though the amount of damages they must actually pay is insignificant.

I. *The Tort Action and the Publicity Sanction.*

By means of a tort suit, an injured individual may be able to direct unfavourable publicity against a tortfeasor.⁵ The use of this pub-

² See generally Linden, *Canadian Negligence Law* (1972), p. 493.

³ For example, see Atiyah, *Accidents, Compensation and the Law* (1970); Ison, *The Forensic Lottery* (1967).

⁴ See generally Shapo, *Changing Frontiers in Torts: Vistas for the 70's* (1970), 22 *Stan. L. Rev.* 330.

⁵ See Fisse, *The Use of Publicity as a Criminal Sanction Against Business Corporations* (1971), 8 *Melb. U. L. Rev.* 107; Rourke, *Law Enforcement Through Publicity* (1957), 24 *U. Chi. L. Rev.* 225.

licity sanction may have three effects. First, the adverse publicity can cost the defendant money. The amount involved may be far in excess of any possible damage award. For example, when Coca-cola is sued as a result of an exploding coke bottle, this fact may be broadcast to millions of potential customers, some of whom may switch to Pepsi-cola or orange juice. Sales of coke and other soft drinks will shrink and profits may sink. Even if the impact of this unfavourable publicity is only temporary, the cost to the company can be substantial. When Air Canada is sued because of an air crash, some passengers may choose to travel on other airlines or go by train. When an action is launched against a particular doctor or hospital, some patients may turn to other doctors or hospitals for their medical care.

Another way in which negative publicity causes financial loss is through diminution in the value of corporate shares. For example, when Richardson-Merrell, the producer of thalidomide and Mer/29, was sued by hundreds of people injured by these products, the value of its stock, which had been selling at twenty-five to thirty-five times its earnings, plunged to fifteen to twenty times its earnings. In other words, the paper value of the shares fell to almost half. The shareholders suffered enormous financial losses, largely because investors feared that the numerous law suits against the company might bankrupt it. Actually, these law suits hardly impaired the financial security of the company. Indeed, some stockbrokers, at the height of the scare, were suggesting to their clients that they would be wise to buy Richardson-Merrell stocks at the abnormally low prices.

The second effect of the publicity sanction is that it brings about a loss of prestige. Of course, this may also result in monetary loss, but it is important for its own sake. Even the managers of modern corporations are anxious to be held high in public esteem. They want to be proud of their company. Businesses spend millions on public relations campaigns to shine their corporate images. A much-publicized civil suit may tarnish a company's reputation for quality goods and service. It is, therefore, to be avoided at all costs. The repair of a damaged corporate reputation may require a great deal of money, time and effort, that might be used more profitably elsewhere.

Third, harmful publicity may also induce governmental intervention. This is something that most businesses and enterprises would prefer to avoid, if they possibly could. Nevertheless, if an action is brought against an organization engaged in some dangerous activity, the attention of governmental officials may be attracted to it. This may trigger a criminal prosecution or an administrative sanction. If the government agency has no authority to do anything, public opinion may be stirred up to such an extent

that the politicians may be forced to enact new legislation to control the perceived abuse. Thus, a tort action may lead to the creation of new regulatory schemes.

It is difficult to measure the power of the publicity sanction. It depends for its impact upon the reaction of individuals to information, something that is difficult to fathom. This is both a weakness and a strength. It is a weakness because there is no way of insuring that a tort suit will receive any media attention at all. In fact, most ordinary law suits do not attract any publicity. Moreover, the public may not think that the challenged conduct is very reprehensible. If this is the case, no one's conduct will be affected and public officials will not be spurred to action. Furthermore, some defendants, like a monopoly or a governmental agency, may be able to withstand some bad publicity, without being badly mauled. Other defendants may minimize the force of negative publicity by launching a counter-publicity campaign. Such a manoeuvre was employed by General Motors after the much-publicized United States Senate hearings about automobile safety in the mid-1960's. After it was shown how neglectful they were about auto safety, General Motors tried to convince the public, with their "Mark of Excellence" advertising, that their products were unimpeachable.

In some ways the indefinite nature of the publicity sanction may render it more powerful than a criminal prosecution or a civil suit. This is so because the amount of penal fines and damage awards are often easy to forecast, whereas the result of bad publicity is nearly impossible to prophesy. Some civil trials may drag on for weeks or even months under the glare of publicity. Newspapers, magazines, radio and television may give great coverage to the story. Politicians may be drawn into the fray. The defendant may be put out of business. It is no small wonder that corporate managers seem more concerned with the effect of negative publicity arising from law suits against them than they are about the actual penalties provided for by the law.

Perhaps the most advantageous aspect of the publicity sanction is that it is in the hands of ordinary citizens. It is both triggered by ordinary citizens and imposed by them. Thus anyone who feels injured by someone else may institute civil proceedings. He does not have to wait for some prosecutor or civil servant to take up his cause. Too often such public servants are reluctant to move. They may have only limited resources at their command. Politics may be involved. An aggrieved individual, however, labours under no such burden; he can unilaterally commence proceedings at any time, even if his case is by no means iron-clad.

Because of the ease with which civil litigation may be started, there is a danger of unfounded legal attacks upon innocent defendants. This hazard is minimized in several ways. First, totally

unfounded actions may be struck out at the pleading stage. Moreover, an action properly pleaded may be dismissed at the trial before the defendant actually has to call evidence, if the plaintiff's evidence does not support the facts he has pleaded. Second, the technique of awarding costs against the losing side in litigation is a deterrent to spurious claims. Most claimants will not lightly undertake a law suit because, if they lose, it could cost them dearly. Third, the vexatious proceedings legislation may be used to deny access to the courts to some irresponsible persons. These measures do not remove the problem altogether, of course, but they do reduce it.

The application of the publicity sanction is also in the hands of ordinary citizens. Offenders are not jailed, nor do they lose their licences. If the people are repulsed by the conduct of the defendant they will change their purchasing habits and their attitudes. If they do not feel that anything seriously wrong has been done, they will not alter their conduct and the publicity sanction will be no sanction at all.

II. *The Watchdog Function in Operation.*

A tort suit can challenge the decision-making power of the omnipotent and omnipresent managers of modern society. In a world dominated increasingly by distant, elite decision-makers, this watchdog role is becoming more and more necessary. What has happened in the field of products liability is worth examining in this context.⁶ Ordinary citizens have rendered accountable many manufacturers of shoddy goods, particularly in the United States, where thousands of tort suits are brought every year. For example, as a result of tort litigation, the producers of the thalidomide drug paid millions of dollars to the children their drug deformed. Although most claims never actually came to a trial on the merits, there was much public discussion of them. Many of the executive officers of the company had to spend many hours examining their practices, engaging in discussions with lawyers, and justifying their stewardship to their shareholders. It was tort law, not the administrative or the criminal process, that challenged the conduct of the drug company. In the same way, food processers and home builders may be called to account.

Similarly, the manufacturers of defective automobiles have had to compensate thousands of motorists injured by their substandard products over the last few years. When someone is injured as a result of a wheel flying off or as a result of a steering failure, the manufacturers of the substandard vehicle may be required to explain why this happened in a tort suit. A spotlight may be directed

⁶ See generally Linden, *op. cit.*, footnote 2, p. 382.

at their production methods and their testing procedures. Not only the negligent *production* but the negligent *design* of an automobile may come under judicial scrutiny. If the roof of an automobile collapses in a collision, if a gas tank ruptures causing a fire, or if a steering assembly is not crash worthy, a person injured thereby may commence a tort claim in a court of law against those who were responsible. A recent Canadian case, *Phillips v. Ford Motor Company*,⁷ has indicated that liability may be imposed for a defective fail-safe system in a set of car brakes. One American court has criticized auto makers for producing cars that crumple like papier maché on impact. It has even been argued, albeit unsuccessfully, that a car manufacturer should be liable for building an automobile that can travel at 115 miles per hour. Although no damages were awarded the point was seriously considered by the court in public view. One day someone may try again and meet with success. Thus, pressure may be applied upon automobile manufacturers to reconsider their conduct and to justify themselves to the public.

All professional groups come under the aegis of tort law. The expertise of doctors, lawyers, engineers and accountants may be impugned in a tort suit. Of course, negligence law normally adopts as its own the standards that the professions require of themselves. But this does not make negligence law redundant, because professional groups are less than zealous in policing themselves. Hardly ever does a doctor, for example, lose his licence to practice medicine because of his incompetence or professional misconduct. It is far more common for a physician to be sued by a patient injured by his malpractice. Consequently, it is the judges, not the College of Physicians and Surgeons, who by default become regulators of the quality of medical practice.

The courts can encourage the medical profession to develop safer procedures. In *Chasney v. Anderson*⁸ an action was brought because a child suffocated on a sponge left behind in its throat after a tonsillectomy. No sponge count had been done. Nor were strings attached to the sponges that were used. Still worse, the search that had been conducted did not discover anything. Liability was imposed. Following this decision, two articles were written in the *Canadian Medical Association Journal* warning doctors about the need for special precautions in relation to sponges.⁹ It is not unlikely that these articles, coupled with the publicity in the daily press at the time, had some impact on the habits of medical men.

There is reason to suspect that, when malpractice actions are

⁷ [1970] 2 O.R. 714, rev'd on other grounds, [1971] 2 O.R. 637.

⁸ [1950] 4 D.L.R. 223 (S.C.C.).

⁹ Fisher, *The Counting of Sponges* (1951), 64 C.M.A.J. 165; *Lost Instruments* (1952), 66 C.M.A.J. 399.

successfully brought against doctors for negligently performing an operation, administering an anaesthetic or putting on a cast, other physicians are alerted to the dangers involved in those medical procedures and the need for utmost care. The impact of these decisions is amplified because reports of them are published in the annual report of the Canadian Medical Protective Association, something that is received by almost every doctor in Canada. Even if the law suit is not successful, it will still be reported and will serve to remind doctors of the wisdom of caution.

Thus, medical malpractice actions serve a useful function, despite the fact that doctors do not pay the awards personally. It is the publicity that carries the sting. However, this sanction is not as severe on the individual doctor as might be expected. His practice generally survives the litigation. In fact, so small a threat is the civil action to the profession that the Ontario Committee on the Healing Arts dismissed it as almost useless in controlling the quality of medical practice. This body, however, failed to appreciate the educational value of malpractice litigation. No doubt malpractice actions are a costly and cumbersome way of dramatizing the risks of medical practice, but they should provide incentives to care. True, the medical profession could do a much better job of regulating the quality of medical practice if it would exert itself more in this area. True, a medical ombudsman would assist greatly in exposing some acts of wrongdoing. In their absence, however, the malpractice action stands as a temporary ombudsman, constantly reminding doctors of the risks involved in their acts. Other professional groups are in much the same position as doctors, and stand to learn in the same way.

Tort law is a useful mechanism for the control of the police.¹⁰ There are, of course, many provisions of the criminal law that regulate police officers in their relations with citizens. These undoubtedly provide some control. However, criminal prosecutions against police officers are remarkably infrequent. I doubt whether sufficient supervision of the police is provided by penal sanctions. To fill in part the vacuum in police control, a tort action is available to any individual injured by wrongful police conduct. Thus, when police officers use firearms during a chase and injure someone, a civil suit may be launched against them. In one case,¹¹ a thief was shot while being chased by a policeman when the gun he was carrying went off accidentally. Liability was imposed. In another case¹²

¹⁰ See generally Weiler, *The Control of Police Arrest Practices: Reflections of a Tort Lawyer*, in *Studies in Canadian Tort Law* (1968), p. 416.

¹¹ *Beim v. Goyer* (1966), 57 D.L.R. (2d) 253 (S.C.C.); See McDonald, *Use of Force by Police to Effect Lawful Arrest* (1966-67), 9 *Crim. L. Q.* 435.

¹² *Smythson v. Priestman*, [1959] S.C.R. 615.

a gun was discharged by a policeman during an automobile chase. This act injured the driver and ended up in the death of two young women. Tort suits by the families of the deceased went all the way to the Supreme Court of Canada before they were ultimately dismissed as against the police officers. However, following the incident, new, stricter rules for gun use were promulgated. Consequently, it may be that the tort suit, although not yielding any civil liability, may have helped in spurring police officialdom to supervise more closely the employment of firearms.

Police arrests may also be supervised by tort law. The landmark case of *Christie v. Leachinsky*,¹³ for example, remains a model for civil libertarians. It held that the police are not allowed to use a phony charge to detain someone. They must tell him the true reason for his detention and, if they fail to do so, they can be held civilly responsible. Similarly, a policeman cannot just stop and question anybody he feels like. If a policeman has no reasonable grounds upon which to base a decision to restrain him, a citizen has the right to resist arrest and may be awarded damages for false imprisonment in a tort suit. Also, the police must take care that there is sufficient evidence before they arrest a suspected shoplifter. An occasional tort suit serves to remind the police that they are being watched constantly and that, if they do anything wrong, they may have to answer for it in court. This cannot help but render the police more sensitive to the interests of individuals.

Tort law is also becoming important in overseeing governmental administrators. Governments are intruding into our lives more than ever before. Power is being delegated to civil servants to conduct the multifarious activities of the modern state. One of the major problems of our time is, who is going to protect us from our protectors? Of course, if they do not do a good job they can be fired or denied advancement. Too often, however, this is an illusory sanction. Again we must fall back on the civil suit as *one* technique of checking the competence of public officials. For example, when a municipal licence inspector negligently informed the plaintiff that a certain location was suitable for a car business, when in fact the zoning regulation prohibited this use of land, he was rendered civilly liable to the plaintiff who relied on his advice, rented the land, and conducted the business profitably for a time until he was forced to move with resulting financial losses.¹⁴ Similarly, when a clerk at a Registry Office negligently prepares a certificate for a purchaser which causes economic loss to an encumbrancer, lia-

¹³ [1947] A.C. 573.

¹⁴ *Windsor Motors Ltd. v. Corp. of Powell River* (1969), 4 D.L.R. (3d) 155, 68 W.W.R. 173 (B.C.C.A.).

bility may be imposed.¹⁵ In a recent Ontario case, *Collins v. Haldiburton Kawartha Pine Ridge Health Unit*,¹⁶ the defendant authority negligently gave the plaintiff notice that his operation constituted an "offensive trade" under the Public Health Act. When this notice became public knowledge and ruined the plaintiff's business, he was held entitled to reimbursement in a tort action against the defendant. In an English case,¹⁷ damages were granted to a home-owner in an action against a building inspector of a local council who negligently approved the house without detecting that it was being built on an old rubbish tip. Similarly, a negligent inspector of a gas furnace was held responsible for failing to detect a defect in the equipment in violation of a statute.¹⁸

This area of supervision by tort law of administrative and municipal officials has been considered by the Supreme Court of Canada in *Welbridge Holdings v. Metropolitan Corporation of Greater Winnipeg*.¹⁹ A municipality passed a by-law upon which a builder relied and spent money to prepare plans for an apartment building. When the by-law was declared invalid after an attack by some rate-payers, the builder had to abandon its plans, with consequent financial loss. The builder's action against the municipality, on the ground that its loss was suffered as a result of the negligent passage of the by-law, was ultimately dismissed. Mr. Justice Laskin observed that a municipality could incur liability both in contract and in tort during its exercise of "administrative or ministerial, or perhaps better categorized as business powers".²⁰ However, where a municipality errs while exercising its "legislative capacity" or its "quasi-judicial duty", it is immune from civil liability, even though it acts improperly, in the same way as is a provincial legislature or the Parliament of Canada. No duty of care is owed in such circumstances.

The different roles of tort law and administrative law are delineated in the *Welbridge Holdings* case. The function of tort law is to be limited primarily to the review of lesser officials and the way in which they conduct ordinary business. It will have little impact upon the discretionary or quasi-judicial functions of the more senior civil servants, who will remain subject only to the usual administrative remedies. In support of this view, Mr. Justice Laskin suggested that "the risk of loss from the exercise of legislative and adjudicative authority is a general public risk and not one for which compensation can be supported on the basis of a private

¹⁵ *Ministry of Housing v. Sharp*, [1970] 2 Q.B. 223 (C.A.).

¹⁶ [1972] 2 O.R. 508.

¹⁷ *Dutton v. Bognor Regis Bldg. Co.*, [1972] 1 All E.R. 462.

¹⁸ *Ostash v. Sonnenberg* (1968), 67 D.L.R. (2d) 311 (Alta. C.A.).

¹⁹ (1972), 22 D.L.R. (3d) 470.

²⁰ *Ibid.*, at p. 477.

duty of care. The situation is different where a claim for damages for negligence is based on acts done in pursuance or in implementation of legislation or of adjudicative decrees."²¹ Although such a distinction unquestionably reduces the potential power and scope of civil suits against public officials, this may be necessary for the smooth functioning of the bureaucracy.

Tort law can sometimes be used to do the job of civil servants if they fail to do it themselves. In other words, if a violator of a statute is not pursued by those who are in charge of its enforcement, he does not necessarily escape scot free; if he is unlucky enough to injure an individual by his criminal conduct, that person may launch an action for civil damages against him. In presenting the tort claim, the fact of a penal violation may assist the claimant in recovering damages. This is certainly an indirect way of enforcing the criminal law, but it may spur officials to be more diligent in the future. Moreover, it may focus attention on the neglect of public officials to pursue the objectives of the legislature. Perhaps such action may lead to the supply of additional staff to add muscle to the administration of the law. Thus, tort law can be the partner of criminal and administrative law in encouraging compliance with their legislative mandates.

III. *Institutional Problems.*

The use of tort law as an ombudsman is subject to some institutional limitations. It is by no means an ideal instrument for advocating social reform, even though it can serve that noble goal to some extent.

One shortcoming of tort law as a weapon for social progress is that its substantive principles may not yield appropriate solutions to the problems presented to the courts. For example, a law suit concerning a defective product may be dismissed on the ground that no negligence has been proved; a doctor may be held to have made only an error in judgment; and an erroneous arrest by the police may be found to have been reasonable in the circumstances. Such cases may well apply some pressure upon the courts to alter, amend or expand the rules of tort law, but our judiciary is still most reluctant to respond to such invitations. It is an unhappy fact that the common law generally lags behind the popular will.

Paradoxically, the rigidity of the common law may sometimes foster law reform, rather than impede it. A harsh decision in a well-publicized, test case may spur legislative reform, whereas a decision that corresponds with the public's sense of justice may submerge what may be a rather unsatisfactory state of the law in a particular area. Consequently, those progressive scholars, who

²¹ *Ibid.*, at pp. 478-479.

assert that negligence liability is becoming strict liability as a result of the use of *res ipsa loquitur* and such other devices, may be impeding rather than accelerating the movement towards greater control of industry. Legislators may be made to think that all is well, when the actual truth is that all is not well at all. A plaintiff who brings a tort case that he loses may be of more help to future victims of the same conduct than the claimant who is lucky enough to win his case. A judge who says no may actually do more good than the judge who says yes.

Another limitation upon this use of tort law stems from the nature of the judicial process in Canada. Our judges are not free to decide cases in the way that they, personally, would prefer to decide them. *Stare decisis* restricts their creative urges. Their room for manoeuvre is narrowly circumscribed. This is as it should be, for we cannot supplant our system of precedent with a regime that permits judges to do as they wish. No one could forecast the outcome of litigation. People would be hesitant to enter into arrangements with others. Like cases would be decided inconsistently, which, in some ways, is the worst form of injustice. At the higher levels, however, there is no reason why Canadian appeal courts must feel bound forever by the dead hand of the past. The Supreme Court of Canada is able to alter its path and it has done so on occasion. These are fast-changing times and the law, if it is to serve society adequately, must be able to renew itself.

There are some who question the capacity of judges to make the expert assessments and the policy decisions that are required in some of these pioneering cases. The evidence they receive may be limited. Their training for this work may be inadequate. There is force in this argument, but this does not mean that the judges can *never* try anything new. It only suggests that they should do so only rarely and with extreme caution. Let us not forget that the legislature is able to undo anything that the judges do, if it disagrees with it. If the judges grappled with some of these complicated problems occasionally, instead of remaining aloof from them, they might be able to act as a catalyst for the legislatures.

The adversary system is probably not the best way to investigate these problems. Even though the two sides of the case are presented effectively, there may be more than two views to be considered. As a result, certain information may be withheld from the court. Some arguments may not be advanced. If tort law is to serve effectively as an ombudsman in the future, we shall have to provide for the representation of the public interest in certain legal disputes of general concern.

The role of the civil jury must be considered in all this. Many commentators denigrate the capacity of the civil jury to decide difficult cases. To me, however, the idea of review of expert de-

cisions by laymen is most alluring. It would be difficult to devise a better way of testing popular support for a legal rule than to require that it be explained to jurors and then asking them to apply it in a case that is before them. Juries help keep the judicial system limber and responsive to the popular will. In describing the law to a jury a judge must reconsider it himself, which is an encouragement to reform if needed. If the law seems too foolish, the jury may well alter it by stealth, while paying lip service to the old rules. This is not necessarily a bad thing although, if it becomes too widespread, the entire legal system would be weakened thereby.

IV. *The Economics of Tort Trials.*

The economics of tort litigation limits the power of tort law as an ombudsman. Litigants usually sue for money, not ideals. Lawyers normally work for fees, not principle. Thus, unless there is a good chance of winning a substantial award, it is unlikely that civil litigation will be undertaken. Moreover, if a sensible offer of settlement is made, it will normally be accepted instead of proceeding to trial. The bother and aggravation of a civil trial also reduces the number of participants. Moreover, if the claimant loses the case he may have to pay legal costs to the other side. Recently, a plaintiff in a medical malpractice case, which was ultimately dismissed by the Supreme Court of Canada, expended in the neighborhood of \$35,000.00 in legal costs. The total amount that he would have won, had he been successful, was only \$8,000.00. It was obvious that he was being motivated by something other than economic advantage to himself. These simple facts thwart assaults on the frontiers of tort law.

It is, of course, possible to overcome these economic restraints, if we wish to do so. One technique that might encourage more test cases is the contingent fee.²² This method of financing litigation is widely used in the United States. Under this system, if the plaintiff wins his case, his lawyer receives a portion of the award, most frequently one-third. If the claimant is unsuccessful in his law suit, the lawyer normally goes without any fee, although he might collect some of the actual expenses. There is reason to believe that the use of the contingent fee has been a factor in the spectacular development of tort law in the United States of America. Conversely, the absence of the contingent fee in most Canadian provinces may well have dampened the crusading ardour of counsel.

I do not advocate the contingent fee as a *replacement* for the fee-for-service system that is in general use in Canada; but it should be available, however, as it is in Manitoba, as an alternative method

²² See Williston, *The Contingent Fee in Canada* (1968), 6 *Alta. L. Rev.* 184; Radin, *Contingent Fees in California* (1940), 28 *Cal. L. Rev.* 587.

of financing difficult claims. If a lawyer is willing to devote his energy and time in preparing a novel case, he should be rewarded with a larger fee than he would receive if he runs no risk and merely bills for his work. If an advocate is willing to risk going without a fee, he should be permitted to run that risk. The client is better off, because he does not have to pay his own lawyer if he loses. Moreover, if the client wins, he is normally happy to share his good fortune with his lawyer.

Financing litigation in this way may create problems. Some lawyers might foment law suits and competition for cases might increase. The cost of litigation may rise. However, these dangers can be combatted by strict enforcement of legal ethics and by full disclosure of any contingent fee agreements. The approval of the court in advance might be required, but, in any event, these accounts should be taxed in the same way as any other legal bills.

Ombudsman-type law suits may also be nurtured by providing legal counsel to those who are interested in bringing one. For example, legal aid may be granted to someone who cannot afford to bring such an action. Neighbourhood law offices are exposing more people to the availability of legal services and its potential. Government may also appoint consumer advocates, who would be available to assist ordinary citizens in their claims against the manufacturers of products. There is a growing number of young lawyers, law teachers and law students who are willing to help prosecute test cases, without fees, in the advancement of worthwhile social causes. It is a safe guess that this type of activity will be increasing in the years ahead.

V. *Ethical Problems.*

Inherent in the use of tort law as an ombudsman are several ethical problems.²³ The lawyer's prime obligation is to his client. He must not exploit his client's interests in order to advance what he perceives to be the public interest.²⁴ His crusading spirit must remain subservient to his client's interests. Thus, he must fully advise his client about the chances of success in any law suit that he prosecutes on his behalf.²⁵ If there is no chance of success, he must inform his client of this. Indeed, if the case is a hopeless one, the lawyer must try to persuade his client not to proceed.²⁶ The client must be warned about his obligation to pay costs, not only to his counsel, but to the other party's counsel if the action is lost. Nevertheless, if the client wishes to proceed, even though his chances of

²³ See generally Orkin, *Legal Ethics* (1957).

²⁴ See Tucker, *Ethics of Activism* (1970), 56 A.B.A.J. 851.

²⁵ Orkin, *op. cit.*, footnote 23, p. 78.

²⁶ *Ibid.*, p. 79.

success are slight, the lawyer is entitled to take the case to court, for the lawyer is not the judge of his client's case.

Counsel owes a duty to the court as well as to the client. He must not abuse its process by prosecuting totally worthless claims and he must try to convince his client to desist from bringing such actions. If he is unsuccessful in dissuading the client, counsel may proceed with the litigation, as long as he is not of the certain and absolute opinion that the case is hopeless, in which case he should not carry on.²⁷

A lawyer must not be guilty of maintenance or champerty. Maintenance is the encouragement of a litigant with money or otherwise by someone who has no interest in the case. Champerty, on the other hand, is a form of maintenance which occurs when the person maintaining the other litigant takes as his reward a portion of the property in dispute, as in a contingent fee contract. It seems that every champerty is a maintenance but not every maintenance is a champerty.²⁸ Lawyers, therefore, cannot enter into speculative actions in which their fees are to be a share of the proceeds of an action, and all such contracts are invalid and unenforceable. It is permissible, however, for a solicitor to agree to take no fee (or only nominal costs) in the event that he loses an action, but to charge his regular costs in the case of success.²⁹ Similarly, it seems proper for a solicitor to advance money for disbursements out of his own pocket or even to take a case without any fee whatsoever on the basis of friendship or charity. Consequently, even the present rules of ethics permit much leeway for lawyers who want to engage in ombudsman-type law suits. We may see some loosening up of these rules in the future to facilitate further public interest litigation.

Conclusion.

Without doubt, this ombudsman role of tort law is a blunt and imperfect tool. Other weapons will also be needed to aid citizens in their struggle for more responsive institutions. But, however many governmental ombudsmen we appoint, however many criminal laws we pass, however many administrative regulations we enact, there will always remain grievances that are unresolved. The private tort suit is at the service of society as *one* way of rectifying some of these wrongs, or at least of exposing them to public view. Canadians would be wise to preserve the historic tort action as they may yet have need of it.

²⁷ *In re Cooke* (1889), 5 T.L.R. 407, at p. 408.

²⁸ Orkin, *op. cit.*, footnote 23, p. 156.

²⁹ *Ibid.*, p. 160.