Intersections of Common Law Doctrine and the New Multiculturalism

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In 2007 I published an article that looked at the intersection of common law principles and Canada’s pursuit as a pluralistic multicultural country (“Accommodation of Ethnic and Cultural Factors in Damages for Personal Injury”, (2007) 40 University of British Columbia Law Review 1). In that article I noted a number of cases dealing with the assessment of personal injuries in which claimants argued that damages should be increased to reflect a particular important cultural value to the claimant. For example, a Somalian women, bringing a suit against a doctor for medical negligence that resulted in her being unable to conceive any more children, argued that damages for non-pecuniary loss should be increased as a result of the fact that her ability to find a husband (she had separated from her previous husband) was severely compromised, because in the Somalian community the ability to bear children is all important to forming a stable marriage bond.

This paper takes this research further. Recently an article in the Globe & Mail questioned the Canadian notion of multiculturalism (Doug Saunders, “Immigrants’ children find multiculturalism obsolete” G&M Saturday 26, January, 2013). The article claimed that the children of immigrants born in Canada have no difficulty with the ‘multi’ part of the doctrine, and that Canada is a polyglot of ethnicities. However, what is objectionable is the idea that the ‘cultural’ aspect of the policy is determined by a subset, or elite, of a particular ethnic group, often drawn from the temple or mosque. Thus, the policy creates ‘ethnic and cultural boxes’ or ‘plural monculturalism’.

My paper explores the extent to which common law doctrine accommodates multiculturalism, and more importantly, what form does the ‘cultural’ take. A claimant is entitled to all compensable losses. How does a court take cognizance or evidence of cultural issues? Should the common law perform an assimilation approach? Does a common law claim become a site to further the policy of multiculturalism? In Canada, parallels can be drawn with constitutional developments and the Supreme Court of Canada’s imperative that common law principles should reflect constitutional values. My paper makes these linkages.