EXPLORING THE DOMAIN OF ACCIDENT LAW: TAKING THE FACTS SERIOUSLY, Don Dewees, David Duff & Michael Trebilcock (New York: Oxford University Press, 1996).

In *Exploring the Domain of Accident Law*,[1] the authors present their thesis that the tort system is an unsatisfactory process for redressing the injuries caused by accidents in a variety of areas. The general conclusion is that a no-fault system is superior and that legislators and policy makers should be taking steps to reduce the availability of tort remedies and to introduce no-fault compensation schemes in several areas. However, unlike many other works in this field, this treatise is supported by an exhaustive review of the empirical research in the area and offers what the authors feel is a fundamental basis for their conclusions.

While an empirical approach, as contrasted with a theoretical one, is welcome, it is not without its own problems. The volume of data presented is daunting, but is effectively organized and reviewed. Nonetheless, as the authors note, much of the empirical research reviewed is flawed or inconclusive, making it difficult to apply in practice. It is easy to see why this is so; most research directed to assessing, for example, the relationship of damage awards on accident rates will be confounded by countless uncontrollable variables. In addition, and perhaps for the same reason, many of the studies referenced reach inconsistent results. This makes them difficult to reconcile and only underscores the difficulty and complexity of the fault/no-fault debate.

One concern with this empirical approach from a Canadian perspective is that a great deal of the research relied upon is from American sources which evaluate the effectiveness of the American tort system or its no-fault alternative. While much of this research is interesting, it is unclear how easily it may transport to the Canadian context where different liability and damages rules may apply. Sadly, the authors do not really address this issue in any meaningful way. Indeed, it is often unclear just who the audience is for this book. Many of the comments and conclusions, particularly in the areas of product liability and environmental issues, are directed at the American experience and may have little relevance to Canadian readers.

The book is handicapped to some degree by the turgid and academic writing style used by these authors which often detracts from the message which is being presented. For example, in discussing the deterrent effect of tort law in a product liability context, the authors offer this conclusion:

> In sum, in a world of imperfect consumer information, where consumers of a product underestimate product-related injury costs, strict liability enjoys an advantage over a negligence regime since it impounds expected nonnegligently caused injury costs into the price of the product. This induces efficient quantities of the product to be demanded and supplied, although it leaves open the possibility

[1] D. Dewees, D. Duff & M. Trebilcock, *Exploring the Domain of Accident Law: Taking the Facts Seriously* (New York: Oxford University Press, 1996).

> of inefficiently intense levels of product usage by consumers. Thus, the empirical question of whether consumers do in fact underestimate product-related health risks becomes central.[2]

Later in that chapter, when evaluating the effects of penal and regulatory alternatives to the tort system, the authors provide the following discussion:

> In evaluating the decision-making process of a regulatory agency, it is common to assume that regulators are *exclusively* motivated by a desire to maximize aggregate welfare. However, it is plausible to hypothesize that regulators act in a manner designed to maximize their personal utility. This raises a principal-agent problem — that is, a situation in which the actions of the agent (regulator) are not readily observable by the principal (consumer). An attempt to solve this conundrum by imposing a supervisory body leads to Juvenal's infinite regress: "Who will guard the guardians?"[3]

This ponderous and unwieldy prose peppered with expressions like "maximum utility" and "competing normative perspectives" often leaves the reader reeling and only makes the authors' analysis and conclusions difficult to appreciate and understand.

The analysis and arguments on the effectiveness of the tort system and its alternatives are presented in a very structured and useful framework. The field of accident law is examined in five broad areas: automobile accidents, medical accidents, product related accidents, environmental injuries and workplace injuries. For each of these five fields, the efficacy of the tort system is analyzed to see whether the tort system fulfills its theoretical goals of determining the behaviour which caused the accident, adequately or efficiently compensating victims and achieving "corrective justice," or the assigning of fault upon negligent or guilty parties. These goals are in turn examined from a variety of perspectives. Alternatives to the tort system are reviewed and analyzed in the same fashion.

It is this analysis which is the most intriguing and ultimately begs the question of which of these three often inconsistent goals is of the greatest importance in the field of accident law. Broadly speaking, the authors conclude that the tort system, where it succeeds at all, succeeds only in its corrective justice function, of assigning blame to negligent parties. In terms of deterring accidents or compensating victims, the tort system is inadequate. The authors do not assign any of these three goals primary importance but plainly view the goal of compensating victims to be of greatest importance. While no-fault regimes will generally excel at the goal of compensating victims of accidents, they are generally less likely than the tort system to achieve the goals of deterring negligent or accident-causing behaviour and in achieving corrective justice. The authors generally support a no-fault approach to address these problems, implicitly acknowledging that compensation should be the primary goal of an accident law regime.

Probably because of the great number of motor vehicle accidents, the chapter on automobile accidents contains the most thorough review of existing research and the

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2 *Ibid.* at 190.

3 *Ibid.* at 217-18 [emphasis in original].

most convincing comparison of the tort and no-fault alternatives. The authors' view is that compensation of most victims in the motor vehicle field can best be achieved through a no-fault system. One aspect of this analysis is puzzling. The authors recommend that awards of non-pecuniary damages in this area (and others) be eliminated. This seems to be largely justified by the argument that these forms of damages cannot be properly addressed in monetary terms and accordingly such awards overcompensate victims.

This premise is difficult to accept. For the victim of a personal injury his or her non-pecuniary loss is very real. While money is no substitute for a return to pre-accident health, it is the only means presently available to compensate these individuals for these losses. To dismiss these claims as "overcompensation" demeans the suffering experienced by these individuals. If this premise is rejected, the authors' conclusions on the cost benefits of a no-fault system of automobile insurance become less convincing.

The authors also conclude that medical misadventure can be best addressed through a no-fault regime. There is, however, very limited empirical evidence of the effectiveness of such a system in practice and some of the authors' arguments are suspect. For example, based on their own analysis, they conclude that no-fault patient compensation would be expected to compensate between forty-five and ninety-four times as many injured patients as does the existing tort system.[4] Though the authors treat empirical data as the backbone of their text, they discount this empirically-based conclusion by arguing that this monumental increase in program would be unlikely and would be reduced still further if minor cases and claims of non-pecuniary loss were eliminated from the system.

While this may satisfy the most severely injured patients, it will come as cold comfort to the vast majority of victims of medical malpractice who suffer from more minor complications. Moreover, it is unclear how such a program could be funded. Unlike automobile drivers, medical patients can be expected to be less willing or able to insure themselves and it is unlikely that Canadian physicians would accept any program which might further increase their already substantial insurance costs. This leaves only the state to bear this cost, which is untenable in a period of shrinking government budgets and programs.

In the product liability field, the authors conclude that the tort system as a general rule would operate better than some no-fault alternative. It is in this chapter, and that dealing with environmental injuries, that the authors' voice becomes most confused and they seem to speak to an American audience. The authors are critical of the emerging American approach of imposing strict liability on the manufacturers of defective products and urge the implementation of a negligence standard in this field. Of course, Canadian law only imposes liability on the manufacturer of a defective product where negligence in manufacture or design can be demonstrated. Again, when discussing environmental injuries, the authors generally conclude that these are best handled

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[4] *Ibid.* at 143.

through the present (largely regulatory) regime, but this conclusion is based almost entirely on the American litigation and regulatory experience.

The authors conclude that the present workers' compensation approach, a no-fault system adopted throughout North America, is again superior to the tort system. Unfortunately, given the existence of the no-fault approach for most of the last century, there is little useful empirical evidence which the authors can marshall in support of their case. While the tort system was plainly inadequate in addressing the problem of workers' compensation at the turn of the century, the authors are left to hypothesize that those circumstances would still exist without taking into account the likely evolution of the law which would have taken place in the absence of workers' compensation legislation.

The book succeeds best in analyzing the effectiveness of the tort system from a variety of perspectives and using as its basis empirical research rather than theoretical analysis. The empirical focus of this work makes it a useful addition to the tort/no-fault debate and the text is a valuable collection and analysis of this data. The considerable research which has been marshalled and reviewed by the authors should be of interest to policy makers in this area. Nonetheless, the authors' conclusions, though presented as definitive answers to these questions, will likely only stimulate further debate.

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