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Book Review: Accidents, Compensation and the Law, by Patrick S. Atiyah

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BOOK REVIEWS
REVUE DES LIVRES

Accidents, Compensation and the Law. By PATRICK S. ATIYAH. London, England: Weidenfeld and Nicholson. 1970. Pp. xxviii, 633. (£6.50)

Professor P. S. Atiyah's new book is an impressive and important work. It is not an ordinary law book; it is a "law book with a difference", the first of a new series of such books. It places the law in its social as well as historical context; it assesses the legal system as a functioning organism as well as a set of rules; it considers costs as well as logic and it contains statistics as well as cases. The book is brightly written, well structured and glitters with insights not only about tort and accident law, but about legal education, the judiciary, the bar and society generally in the 1970's. It could trigger a revolution not only in our approach to accident law, but also in legal scholarship and legal education.

One major thrust of the book is a withering yet measured attack on the present law of torts. Picking up from such critics as Maurice Milner,[1] Terence Ison[2] and R. Dale Gibson,[3] Professor Atiyah aims his rifle at many of the sacred cows of tort law. The duty concept, he argues, adds nothing to the concept of negligence and may obscure the substance of the law.[4] The distinction between "misfeasance" and "nonfeasance" is rejected after an illuminating discussion of the conflicting policies involved in the "no liability for nonfeasance" rule.[5] Even the "reasonable man" falls victim to Professor Atiyah's blistering analysis. It is a fiction, he contends, invented to "obscure the role of the judge as policymaker"[6] and it is "not very helpful" in any event.[7] He is no friend of foresight. In his discussion of causation and remoteness, he heaps scorn on the illusory nature of this currently fashionable test to limit liability for negligent conduct. The author administers lashes to several other aspects of tort law, including the

[1] Negligence in Modern Law (1967).
[2] The Forensic Lottery: A Critique on Tort Liability as a System of Personal Injury Compensation (1967).
[3] A New Alphabet of Negligence, in Studies in Canadian Tort Law (1968), p. 189.
[4] P. 48.
[5] P. 84.
[6] P. 99.
[7] P. 96.

lump sum method of computing damages, before concluding his outline.

One of the major contributions of the book is his description of the tort system in operation. Too seldom have lawyers sought to go behind the expressed purposes of tort law to discover what really happens. In recent years there has been some research in the United States,[8] Canada[9] and the United Kingdom.[10] Professor Atiyah assembles some of the major findings of these studies and discloses that many injured are not compensated, that most claims are not litigated but settled, that they take a long time to conclude, that the system is expensive to operate, and seems to have little impact on the defendants involved. For lawyers who have not yet informed themselves of these statistical findings, this book provides a fine summary of the salient items.

Professor Atiyah does not stop here. He undertakes to describe and evaluate the other compensation systems in existence in the United Kingdom—the rivals to the tort regime—such as personal insurance and social welfare programmes. The criminal injuries compensation plan is thoroughly discussed, both from the legal and statistical point of view. The industrial injuries system, he concludes, after his review of its operation, is a "superior and more up-to-date model of a compensation system" than the tort system on "almost every count".[11] The social security system and the other methods of reparation like taxation, sick pay and social services are outlined and placed in context. He concludes this thorough analysis by blasting the waste engendered by a "plethora of systems", their lack of coherence, double compensation and subrogation (of which the insurance companies are the main beneficiaries).

As Professor Atiyah begins to move toward the climax of his book, he issues an indictment[12] of the fault principle composed of six counts: (1) The compensation payable bears no relation to the degree of fault, (2) the compensation payable bears no relation to the means of the defendant, (3) the fault principle is not a moral principle because a defendant may be negligent without being morally culpable, (4) the fault principle pays insufficient attention to the conduct or needs of the plaintiff, (5) justice may require payment of compensation without fault and (6) fault is an unsatisfactory criterion for liability because of the difficulties

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[8] Conard *et al.*, Automobile Accident Costs and Payments (1964); Ross, Settled Out of Court (1970).

[9] Report of The Osgoode Hall Study on Compensation for Victims of Automobile Accidents (1965).

[10] See Ison, *op. cit.*, footnote 2; Professor Donald Harris of Balliol College, Oxford, has conducted a study described in Hartz (1969), 119 New L.J. 492.

[11] P. 386.

[12] Ch. 19.

caused in adjudicating it. The author then urges us to "move away from the particular accident in question and survey the whole field". This he proceeds to do.

First, Professor Atiyah elaborates on the attempts to distinguish between accident and disease and concludes that "it is time to jettison the distinction".[13] He then demonstrates that the administration of the tort system eats up about 50% of the premiums collected, as contrasted to 3% for sickness benefits, 10% for the industrial injuries system, and 9% for the criminal injuries plan.

With this foundation erected, the author turns his mind to the objectives of tort law. He observes that the popular sense of justice, which is so often relied upon to support the tort system, is hard to measure. Nevertheless, even if it were shown that the people wanted it, this cannot be enough for a serious analyst. He explains that compensation not only gives something to someone, it also takes something away from someone else. Professor Atiyah alludes to the wealth of a society as a vital factor in the sophistication of its compensation system—Americans may compensate for ephemeral things such as mental suffering and privacy, whereas less developed nations may not. Compensation may be an equivalent for what is lost, it may be a substitute (or solace) for what is lost or it may be given because of what the victim has never had in comparison with others (equalization compensation). Another goal of tort law is loss distribution and allocation of risks, which enables us to lighten the burden of the injured few by spreading the costs of accidents among the many who benefit from the activity.

But tort law is more than a mere compensator. One of its functions is retribution, something that most people agree is reprehensible. And yet, suggests Professor Atiyah, "retribution in the law of torts is on a modest scale"—it does not administer capital punishment or flogging but merely deprives people of money. "If this sometimes satisfies a desire for vengeance—a desire which if unsatisfied might lead to personal vengeance—must it always be condemned as wrong?"[14] The author outlines the role of torts as a tool of public vindication, comparing it to the Royal Commission Inquiry, and concludes that the "occasional award of damages against a bully or thug . . . or a finding of negligence . . . may sometimes satisfy these desires". He points out, however, that the law does not place much store in it, because if a reasonable offer is made (by payment in), the plaintiff can only proceed to the trial if he pays his own costs as well as those of the defendant.[15]

Tort law is supposed to deter carelessness and thereby curtail accidents. The author advances the familiar arguments (1) that

[13] P. 489.
[14] P. 542.
[15] P. 545.

the defendants often cannot help themselves and (2) that insurance usually pays the judgment in any event. He then states that negligence law does not give much guidance on the precautions people should adopt, except in a few cases. And yet, he agrees, that there are situations where tort law can regulate conduct and cut down the number of accidents, as in cases involving particular professional or industrial practices. He outlines how criminal law and administrative law bear the prime burden of the enforcement of caution and criticises torts for its lack of precise standards. He fails, however, to note that tort law acts as a partner to these other fields of law by adding the threat of a civil liability sanction to the criminal penalty in cases of violation of a statute.[16] He also omits to mention how sporadic and ineffectual is the enforcement of many regulations, something that can be overcome by private suits based on penal infractions. Professor Atiyah minimizes the deterrent force of a rise in insurance premiums, although Professor Fleming has ruminated that this might actually be a *more* effective deterrent than the threat of liability for the entire loss, because the former *must* be paid while the latter *cannot* be in most cases.[17]

Neither does Professor Atiyah believe that tort law can deter people from injuring themselves. If the fear of the penal sanction and of injury to oneself cannot make people careful, he doubts that denying them reparation, wholly or partially, will succeed any better. He mentions the problem of lack of seat belt use and doubts whether threatening the offenders with reduced awards will make any difference. The fact is that seat belt use could cut dramatically the loss of life on our highways.[18] Governments have not yet had the courage to invoke the criminal sanction to enforce their general use, although they are now mandatory equipment in all vehicles in North America. A few insurers are providing extra coverage for those injured while wearing their belts as a kind of incentive. Some advertising is being done, but it is not nearly enough. Tort law should not stand idly by but should act as an educator and as a catalyst to legislative action, as it has done recently in British Columbia. In *Yuan* v. *Farstad*,[19] the award of a claimant was reduced by 25% because the victim failed to wear an available seat belt. Although this case has not been followed in two other provinces,[20] it has helped to teach motorists to use their

[16] See, for example, Linden, Tort Liability for Criminal Nonfeasance (1966), 44 Can. Bar Rev. 25.

[17] Fleming, The Role of Negligence in Modern Tort Law (1967), 53 Va. L. Rev. 815, at p. 825.

[18] Hodson-Walker, The Value of Safety Belts: A Review (1970), 102 Can. Med. Assoc. J. 391.

[19] (1967), 66 D.L.R. (2d) 295 (B.C.S.C.).

[20] *McDonnell* v. *Kaiser* (1968), 68 D.L.R. (2d) 104 (N.S.S.C.); *Anders* v. *Sim* (1970), 11 D.L.R. (3d) 366 (Alta S.C.).

belts and will eventually force the legislatures to resolve this matter, hopefully by making it an offence to drive without a seat belt.

Professor Atiyah supplies a fine analysis of the beguiling new theory of "general deterrence", pointing out its strengths and weaknesses, and indicating how it might be used in legislative decision-making. This theory, developed by Professor Calabresi of Yale University,[21] explains that by forcing activities to bear the costs of the accidents they generate, society will be able to make a more informed allocation of its resources. Accident-prone activities will cost more because of their high accident rates. Consumers or those who engage in these activities will switch to safer, less costly substitutes. Less involvement in these dangerous activities should mean fewer accidents. Professor Atiyah argues that the general deterrence system is far from precise, is costly, and it discriminates against the poor. Moreover, he expresses his doubt about whether individual market decisions should be given such free reign. Nevertheless, he concludes that it may have some lessons for us.

All this discussion leads the author inexorably to the conclusion that the present personal injuries compensation system is inadequate. He briefly outlines some of the major reform proposals for automobile accident compensation. He dwells on the more recent ones that go all the way to social insurance for all accident victims (New Zealand Royal Commission) or for all accident *and* sickness victims (Professor Ison). Professor Atiyah then throws up his hands and sighs, "it is difficult to resist the conclusion that the right path for reform is to abolish the tort system so far as personal injuries and disabilities are concerned, and to use the money at present being poured into the tort system to improve the social security benefits, and the social services generally".[22] Professor Atiyah advises that "a reasonable working plan would be to bring diseases and natural disabilities and non-industrial accidents under the industrial injuries system", even though he recognizes that it is not a perfect programme. He does not make the mistake of elaborating a detailed scheme of monetary payments, the cost of which might crush the already over-burdened taxpayer, but merely indicates that the cost of a scheme must be carefully studied. In other words, whatever funds are saved by abolishing tort should be transferred to the revamped social security system on some sort of equitable basis. Some priorities are mentioned for a start, but the author does not purport to construct a legislative scheme. Professor Atiyah offers some words of encouragement for the insurance industry which, although it will

[21] See The Costs of Accidents: A Legal and Economic Analysis (1970).
[22] P. 611.

lose the auto insurance business, may increase its property insurance and personal accident insurance business. For the Bar, too, the author suggests diversification of practice and holds out the hope of increased fees for "paper work" and more legal aid work in the social security tribunals.

It is paradoxical to me that the author, after jettisoning the entire tort system in *personal injury* cases, recoils from doing so in the *property* damage cases on the ground that "it is possible that people would find this inequitable in certain circumstances".[23] He offers some compromises in this area to reduce the dissatisfaction of those who would be left to bear part of their own costs while the one at fault goes free. It may just be that Professor Atiyah will find that his *entire* proposal for the abolition of the personal injury suit would be found "inequitable" by most Canadians. It may be that the time has arrived when New Zealanders and Englishmen are prepared to discard the tort suit and to replace it by universal social welfare, but I doubt if that time has yet come in Canada. In this country the federal government encountered massive resistance to such a mild reform measure as a national medicare plan. Our social welfare system is still years behind the United Kingdom, because Canadians are not yet prepared to pay the enormous costs involved.

Despite this apparent callousness, we Canadians have devised a rather attractive plan for the compensation of auto accident victims, that of "peaceful coexistence".[24] In all of our provinces those injured in car crashes receive compensation for their losses up to a certain amount, regardless of fault. Although mandatory only in British Columbia and Saskatchewan, the overwhelming bulk of our motorists have purchased this coverage for a mere $7.00 per vehicle. In addition, the tort action survives for those who are entitled to avail themselves of it. It is strange that Professor Atiyah hardly touched on these exciting developments in Canadian accident law, despite this thoroughness in presenting most other aspects of the material.

There is another gap in the author's discussion. He neglects to mention the new role for tort law that is being developed in North America. Professor Marshall Shapo has argued that tort law can help to control the abuse of economic and intellectual power.[25] Professors Page[26] and Weiler[27] have shown how the police may be

[23] P. 615.

[24] See Linden, Peaceful Coexistence and Automobile Accident Compensation (1966), 9 Can. Bar J. 5; Linden, Automobile Insurance Breakthrough in Canada (1969), 1 Transp. L.J. 171.

[25] Changing Frontiers in Torts: Vistas for the 70's (1970), 22 Stan. L. Rev. 330.

[26] Of Mace and Men: Tort Law as a Means of Controlling Domestic Chemical Warfare (1969), 57 Georgetown L.J. 1238.

[27] The Control of Police Arrest Practices: Reflections of a Tort Lawyer, in Studies in Canadian Tort Law (1968), p. 416.

regulated by tort law. I have argued that tort law fosters the notion of individual dignity and individual responsibility and helps to educate our people.[28] In the hands of a dissatisfied consumer, the tort suit can be a useful weapon in a battle against automobile manufacturers over a defective automobile or a defect in design,[29] especially under the theory of strict liability that has been developed in the United States.[30] Challenges may be made to customary practices of medical men and drug manufacturers by the device of a tort suit.[31] Tort law may serve as a peaceful channel for social protest, something that we sadly lack in these tense days. Now, perhaps such tools are not needed in England. Perhaps the government there offers more protection to its people, but we should hesitate long before abandoning the right to attack publicly in a tort suit anyone who has wrongfully injured another. Consequently, although I agree with almost all of the thoughtful criticisms of tort law made by Professor Atiyah, and although I concur that social welfare should eventually cover all accident and sickness victims, I do not think that tort law must be obliterated. I believe Canada needs *both* tort law *and* better social security and I think we will eventually be able to afford them both.

In any event, Professor Atiyah has produced a remarkable book, some provocative analysis and a challenging proposal. Canadian lawyers and legislators should read the book. If they ignore it, they do so at their peril, for it will undoubtedly influence the course of accident law throughout the world in the years ahead.

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[28] Is Tort Law Relevant to the Automobile Accident Compensation Problem (1969), 47 Texas L. Rev. 1012.

[29] See, for example, the bold decision of Justice E. L. Haines in *Phillips* v. *Ford Motor Co. of Canada* and *Elgin Motors*, [1970] 2 O.R. 712.

[30] See Linden, Products Liability in Canada, in Studies in Canadian Tort Law (1968), p. 216.

[31] See Linden, Custom in Negligence Law (1968), 11 Can. Bar J. 151.

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