

ON MISFORTUNE: ITS CONSEQUENCES AND THEIR MITIGATION

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Donald Harris, Mavis Maclean, Hazel Genn, Sally Lloyd-Bostock, Paul Fenn, Peter Corfield, and Yvonne Brittan. *Compensation and Support for Illness and Injury*. (Oxford: Clarendon Press, 1984). xix + 412 pp. Bibliography, index. \$39.95.

The staff of the Oxford Centre for Socio-Legal Studies has made a major contribution to our knowledge of the consequences of misfortune—occasions of illness and accidents—and the operation of systems intended to mitigate them. This work falls into the tradition represented in the United States by, among others, Conrad *et al.* (1964) and the United States Department of Transportation (1970). However, it is a much more significant contribution than a mere replication and updating of findings in a different nation would have been. Donald Harris and his colleagues, quite properly in my opinion, view the need for and function of compensation systems in the context of misfortune generally, not just automobile or other accidents in total. Indeed, one of the important findings of their study is that illness far eclipses accidents as a source of misery and need for compensation. The broader viewpoint also extends beyond the individual victims to the households of which they are a part and, in the more unfortunate cases, often the chief breadwinners. The book exhibits a skillful use of information from lawyers as well as their disabled clients. It offers novel and illuminating discussions of both old and new issues, such as the functions of tort apart from compensation, the proper and actual relationship between compensation and employment status, and the role of informal care and support in the alleviation of the consequences of misfortune.

The bulk of the book is an extensive report of a study of 2,142 victims of misfortune gathered from a sample of those who reported accidents and injuries in a screening survey. The presentation is sophisticated and detailed yet accessible to the social science lay person.

The first part of the book reviews the functioning of the tort system in compensating victims of misfortune. Given the broad population of victims, it is perhaps not too surprising that very few receive any payments from this system. However, even looking at subgroups in which ideas of fault and damages are traditional, few

victims find compensation in tort claims. For accident victims as a group, the proportion is 12 percent, and for victims of road accidents (the best-compensated subgroup), the figure is still less than a third. A major barrier to recovery is the failure of victims to make claims; the survey found that about three-fourths of all accident victims say they never even considered claiming damages. Of those who did consider such action, most failed to follow up to the point of seeking legal advice, without which damages were apparently never adequately paid.

The failure to claim is related to a variety of factors in addition to the ostensibly legitimate considerations of fault or seriousness of injury. The authors find that attribution of fault seems to be more a rationalization for than an explanation of claims.

Once legal counsel has been obtained, damages are fairly frequently paid; the success rate of solicitors is 72 percent. However, the payments appear trivial in light of the losses experienced. The median payment is only five hundred pounds. The small size of payments is analyzed in the light of restrictions on claimant bargaining power due to myriad uncertainties, including the ability to prove negligence and damages, to avoid allegations of contributory negligence, to obtain prompt payment, and to handle legal expenses. The party claimed against, generally an insurance company, can treat these uncertainties in the mass and is therefore not risk-averse (Galanter, 1975). The risk-averse party tends to yield discounts to the other party in negotiation of this sort (Ross, 1980). Furthermore, the tort system is not only stingy but also slow. The average delay in the cases studied was more than nineteen months.

The second part of the book discusses the role of other compensation systems in the alleviation of misery. Foremost among the formal systems are social security programs, which made payments to 38 percent of the respondents. However, the majority were obviously not paid, and this was particularly true for women, 80 percent of whom received nothing from these sources. The respondents and the research team are critical of those programs with complex award criteria and those that condition payment on medical examinations.

Among other nontort compensation systems, sick pay is important for those victims who were employed at the time of their disability, especially those with long employment records. The majority of those with over five years' tenure in their jobs have received some sick pay. In contrast, private insurance makes a trivial contribution, both in numbers and amounts of claims paid; a major barrier lies in the limited numbers of people covered by relevant policies. The system of compensation for those injured in crimes likewise founders partly on its highly limited applicability, although even in cases that seem to lie in its scope many victims fail to claim out of ignorance.

One of the most impressive findings of the survey is the exten-

sive role of “social care” programs—those that give in-kind services such as medical care. Especially notable in terms of scope is informal support from relatives and neighbors, which reaches more than half of victims and is thus the most important single source of the mitigation of misfortune.

A third part of the book analyzes the effects of misfortune on employment and household income. The results show that illness, rather than accidents, is the source of the greatest losses. The impact of misfortune is considerable, and it is more a function of the length of disablement than the degree of health impairment. The effect of misfortune on household income is greatest when the victim has been the chief wage earner and is unable to maintain her position. The array of compensation systems is particularly deficient in maintaining income under these circumstances.

On the basis of these empirical results, Harris and his colleagues conclude that compensation for victims of misfortune in Britain is unsuccessful in relation to any of the goals informing its component systems. For numerous reasons, they are particularly critical of tort. Few accident victims and virtually no illness victims recover anything from the tort system, and the payments actually made are trivial in relation to the losses. The cost of administration is high and payment is subject to delay and uncertainty. It favors the risk-indifferent party to negotiation, generally an insurance company rather than a victim of misfortune. It is deficient even in its own terms, as payment seems to have little to do with apparent fault.

Their recommendations for reform are typically British, focusing on coordinating and improving a variety of existing programs rather than reconstituting the entire system. The major principles underlying their suggestions are to sever the relationship between payments and the cause or nature of the misfortune as well as the source of funding. They propose that existing programs be assigned responsibilities in meeting problems in various time frames—short, middle, and long-range—with priority accorded to compensating the urgent losses experienced in the long range.

The book is well integrated, despite having been written by a committee. Conclusions are clearly based on the data, which are well marshaled. It is perhaps most illuminating in its discussion of the bargaining process. Through a separate survey of solicitors, the authors describe the pattern of offers and acceptances in negotiating tort claims that I believe has no parallel in the existing literature. The discussion of the relative bargaining power of the parties in a tort claim is equally convincing. Finally, their investigation of how people actually use the sums recovered in tort is illuminating and meaningful for continuing the discussion on how the system fulfills its own objectives.

The book’s most bothersome defect is an occasional failure to produce even speculative explanations for intriguing and paradoxical

cal findings. Why, for instance, are so many insurance companies' first offers accepted in cases of severe impairment? Why do middle-class people in this sample not collect more in tort than working-class ones? Also, as in any multiauthored work, the parts differ in elegance and felicity of style. Some of the chapters are hard reading, but most are stylistically impressive, given the task of presenting complex statistical information in a simple way.

This book makes an important contribution to scientific knowledge and political discussion. It amply demonstrates the excellence of the Oxford Centre for Socio-Legal Studies and the staff that has gathered there.

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