

Book Reviews

David M. Engel, *The Myth of the Litigious Society: Why We Don't Sue* (Chicago: University of Chicago Press, 2016) pp 232. Hardcover: \$24.00.

doi:10.1017/als.2017.14

First published online 18 August 2017

Engel's thought-inspiring book sets out to debunk the commonly held myth about the culture of compensation in the US. Contrary to popular belief, America is not a hyper-litigious society, for, in fact, most injury victims do not seek legal redress, but rather "lump it." Lumping, as opposed to claiming, refers to the notion that injury victims "make no determined effort to shift any of the injury costs to the injurers or hold the injurers responsible for the harm. Instead, the victims rely on whatever resources—financial, psychological, and spiritual—they can muster on their own" (p. 21). Why don't injury victims seek compensation? Engel suggests that we should take a step back and investigate "the mystery of the missing plaintiff" (p. 14).

It is important to examine this mystery because the foundation of tort law is dependent on the victim coming forward. Engel argues that the debates about reforming tort law to limit personal injury claims are misguided. All of the objectives of tort law, whether providing compensation to those who were wronged, deterring those who make risky choices and put others in harm's way, sanctioning wrongdoers, or spreading the loss distribution across the broader population, cannot be achieved without the willingness of the plaintiff to pursue a claim. To solve the case of the missing plaintiff, Engel does not bring up common arguments about the expense of litigations or restrictions on access to justice—arguments usually brought forth by legal scholars and the legal profession. Rather, he focuses on the psychology of injury victims, using real-life examples to demonstrate that there is a greater tendency to lump than to claim.

Looking at injury victims, Engel debunks another myth—that injury victims are rational actors who carefully deliberate and take strategic steps to file and win a lawsuit. Engel points out that researchers tend to examine the decision-making process of potential plaintiffs through a decision tree model, which suggests that injury victims go through a step-by-step unidirectional decision-making process leading toward litigation. Engel's examples illustrate how injury victims are often traumatized physically, experiencing great pain, and also traumatized emotionally. An injury takes centre stage and daily routines are shaken as a result. Life becomes filled with physical pain and visits to doctors' offices. The suffering may be difficult to express and the victim may feel isolated from friends and family. Under these circumstances, injury victims can hardly be counted on to take the role of the rational actor.

An alternative model is proposed. Under this model, the decisions of injury victims are multidirectional and are "organically embedded in their physical and social environment, not separated from it" (p. 70). This new model takes into account the interconnectedness of non-conscious cognition and conscious decision-making together with the influences of the individual's physical, social, and cultural context. In other words, it is unrealistic to think of someone suffering from physical pain as a detached rational actor who carefully scrutinizes

the causes of their injuries and who is at fault, and then makes sensible legal responses. This alternative model offers a more realistic framework for understanding why so many injury victims do not pursue a lawsuit.

Subsequent chapters of the book dive into these various aspects of the alternative model in greater detail. Examining the concept of causation, one of the most crucial elements of tort claims, Engel applies his model to show that it is up to the subjective judgments of the victim to determine whether there is causal connection to a culpable defendant. In a lot of cases, this actually results in the decision of victims to lump. For instance, the causal source of the injury may be unknown to the victim, and therefore a culpable defendant is never identified. In other situations, victims conflate causation with moral responsibility, and perceptions of causality are influenced by perceptions of the wrongfulness of the actions of others. Tort claims are not launched against those whom the victims sees as not morally blameworthy even when a causal link is evident.

One intriguing chapter focuses on our physical environments. The argument is that physical environments also play a role in victims' reluctance to take legal action. Everyday objects and environments reinforce the notion that injuries are natural and that when they do occur, there is no one to blame for them. In the case of stairways, for example, people accept that it is natural for the elderly to slip and fall, as opposed to blaming architects for not coming up with better and safer designs. It is suggested that this is more so in situations where the injury is gradual and not resulting from a single fatal incident. For instance, we would be unlikely to think of chairs (which may lead to spinal problems) and keyboards (which may cause cumulative trauma disorder) as culpable and blameworthy. For many people, to litigate, as in the notorious case of the McDonald's coffee cup, seems absurd. On closer examination of the case (where the victim won), however, the claim is revealed to be much more legitimate. The victim's injury was deemed to have been caused by a deliberately risky decision by the restaurant to sell coffee at a much hotter temperature than other restaurants and far above temperatures of home-brewed coffee.

Indeed, Engel correctly notes that how others perceive victims' injuries matters in their decision to sue or not. The cultural context matters. It is argued that defendants in tort cases are usually those with means and power (i.e. the "haves") and they, along with the mass media in America, constantly emphasize the virtues of personal responsibility and self-sufficiency. Hence, plaintiffs who seek compensation are regarded as greedy and as "social outsiders, troublemakers, or misfits" (p. 159). These cultural norms are internalized by victims, and their interactions with others reinforce the idea that the right attitude is to rely on oneself when tragedy strikes, instead of blaming others for their misfortunes.

Overall, Engel challenges conventional narratives and offers an alternative perspective on why people do not sue. There may be those who disagree with Engel's model and conclusions but, at the very least, Engel's work encourages us to ask different questions and examine different issues related to tort law—as the author puts it: "... like an early explorer, I have tried to map the terrain and have returned with indications that future expeditions will discover many treasures ... In the process, I hope it has encouraged others to ask new and better questions" (p. 171).

Kevin Kwok-yin CHENG
Faculty of Law, Chinese University of Hong Kong