

2002

Modern Tort Law Demystified

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Recommended Citation

Carl Tobias, *Modern Tort Law Demystified*, 3 Nev. L.J. 188 (2002) (reviewing f Peter Bell & Jeffery O'Connell, *Accidental Justice: The Dilemmas of Tory Law* (1997))

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BOOK REVIEW

MODERN TORT LAW DEMYSTIFIED

Carl Tobias*

PETER BELL & JEFFERY O'CONNELL, *ACCIDENTAL JUSTICE: THE DILEMMAS OF TORT LAW* (Yale University Press 1997).

ACCIDENTAL JUSTICE: THE DILEMMAS OF TORT LAW (*ACCIDENTAL JUSTICE*), by Professors Peter Bell and Jeffrey O'Connell, is a pellucid, balanced *tour de force* of modern tort law in the United States. Bell and O'Connell speak intelligently to a broad spectrum of readers who may possess varying degrees of understanding of the relevant issues. *ACCIDENTAL JUSTICE* is sophisticated, yet eminently accessible, and the book never condescends, even to readers not trained in the law. The volume's publication is propitious because the tort field has become increasingly controversial, while tort law has been at the center of ongoing, intense public policy debates within the three branches of the federal and state governments as the twenty-first century opens. Few books on tort law can claim to achieve so much within such a compact compass. These attributes indicate that the work by Professors Bell and O'Connell warrants analysis. This book review undertakes that effort.

I. DESCRIPTIVE ANALYSIS

ACCIDENTAL JUSTICE comprises nine chapters, which thoroughly explore the origins and the development, the substance and the process, and the theory and the practice of tort law in America today. The authors place particular emphasis on the public policy purposes, such as compensation, deterrence and punishment, that tort law serves. The clearly-organized, interrelated chapters have deceptively simple titles, under which the authors explore virtually all of the controversial issues that involve torts at the outset of the twenty-first century: *How Tort Law Works*; *Legal Rules That Bend, Not Break*; *Helping the Needy or Greedy?*; *Making a Safer World*; *Flawed Transactions*; *Just Proceedings?*; *Human Transactions*; and *Context and Changes*. Bell and O'Connell employ the device of a fictitious lawsuit involving an attorney whose promising career is ruined when a commuter train injures him, partly due to the lawyer's own fault. This story of an accident victim seems real and is not stilted or contrived.

* Professor of Law, University of Nevada, Las Vegas. I wish to thank Peggy Sanner for valuable suggestions, Cecelia Palmer and Charlotte Wilmerton for processing this piece, and the Harris Trust and Jim Rogers for generous, continuing support. Errors that remain are mine.

II. CONTRIBUTIONS

ACCIDENTAL JUSTICE makes numerous insightful contributions to the understanding of current American tort law. Bell and O'Connell apparently went to extraordinary lengths to provide comprehensive coverage and to be balanced in their approach. The writers substantially succeed in affording an account that presents most relevant sides of highly controversial, sharply contested issues, even though this is an area, which is fraught with difficulty.

ACCIDENTAL JUSTICE is not apolitical or devoid of politics – quite the opposite. One of the book's great strengths is its illustration of exactly how political the various features of torts can be. For example, Bell and O'Connell demonstrate that torts has recently evolved from a regime governed almost exclusively by case law/common law into one increasingly dominated by statutory requirements.

ACCIDENTAL JUSTICE makes closely related contributions to ongoing public policy debate, involving the substance and process of torts. Numerous aspects of this continuing policy discussion have been characterized by considerably more heat, in the form of cosmic anecdotes and unsupported assertions, than by light in terms of systematically collected, analyzed, and synthesized empirical data. Bell and O'Connell apply much empirical information and pragmatic common sense while bringing sanity and balance to controversies that have profited too little from these attributes.

The authors also show more by implication than expressly how tort law was formerly a rather sleepy little backwater of the law, attended by minimal theory, policy, interest, or intellectual challenge. The writers illustrate that law and economics, critical legal theory and feminist theory, as well as most of the other modern jurisprudential movements, have discovered or invaded the fertile ground which torts affords.

Bell and O'Connell are also keenly aware of, and sensitive to, the advantages and flaws of the torts system which they describe in such consummate detail. For example, the authors demonstrate how the process enables injured parties to have their day in court, pursuing compensation and retribution, even as individualized decision making imposes expense in the form of the substantial transaction costs that are incurred in arguing over fault and the uncertain value of intangible loss. The writers forthrightly confront certain perversities that seem to inhere in tort law. For example, they show that jury awards for plaintiffs may be premised more on sympathy than logic and can reward the attorneys more than the individuals who suffered harm. Bell and O'Connell also find that tort litigation affords greater efficacy than regulation in deterring risky conduct and is fairer than administrative schemes, such as workers compensation. The authors concomitantly explore certain alternatives, such as no-fault schemes, to the tort law system and demonstrate how these options involve analogous trade-offs. For instance, no-fault programs eliminate the difficulties entailed in proving fault but deprive plaintiffs of the opportunity to tell their stories in open court and confront their alleged tortfeasors.

After thoroughly canvassing the benefits and detriments of the traditional tort system and its alternatives, Bell and O'Connell ultimately conclude that the conventional tort regime, for all of its flaws, may well be the best scheme. The

writers' survey and final resolution may remind readers of Winston Churchill's characterization of democracy: fundamentally flawed, but preferable to any other form of government yet devised.

Some of the finest information conveyed in *ACCIDENTAL JUSTICE* implicates the tort law process across a broad spectrum. For example, Bell and O'Connell paint a lavish portrait of tort law as an elegant, baroque, deliberative process by which community notions of fairness are vindicated and tort law is shaped. The authors also have an extraordinary gift for carefully and clearly explaining numerous difficult ideas that are relevant to torts. For instance, they lucidly explicate concepts like repeat players and transaction costs. *ACCIDENTAL JUSTICE* includes considerable public policy, theory, and supporting empirical information. Indeed, Bell and O'Connell so clearly explain some ideas that readers can easily miss the theoretical and empirical information that underlies the writers' thinking; however, the footnotes and bibliography include extensive citations to relevant research.

III. SHORTCOMINGS AND CONSTRUCTIVE CRITICISMS

Notwithstanding all of the valuable contributions enumerated above, *ACCIDENTAL JUSTICE* does have some shortcomings and may warrant certain criticisms, although most of these are rather technical or comparatively insignificant. For example, the writers mention most of the modern jurisprudential trends, but only minimally apply some of these to their analysis. Indeed, the newer a particular theory is, the less exposition it apparently receives. Bell and O'Connell frequently invoke law and economics, even as they include relatively little critical legal, critical race, or feminist legal theory, much less a discussion of work that addresses the influence of class in torts.

I would proffer several additional, albeit minor, criticisms of *ACCIDENTAL JUSTICE*. Readers who seek high theory or grand policy might find the book somewhat disappointing. Moreover, Bell and O'Connell cogently argue that the current tort system may be the best available; however, one fervently hopes that there are better, or perhaps more refined, solutions to the dilemmas of tort law than simply muddling through. Furthermore, certain dimensions of the account seem overstated or overdrawn, and even border on stereotyping. For instance, the composition and behavior of both the plaintiffs' and defense personal injury bars are considerably subtler and more complex than Bell and O'Connell portray them. Finally, some aspects, such as the narrative device of the fictional lawsuit, of *ACCIDENTAL JUSTICE* can appear rather trite or a little too cute.

IV. CONCLUSION

Professor Peter Bell and Professor Jeffrey O'Connell have made numerous valuable contributions to the comprehension of tort law in the United States at the beginning of the twenty-first century. *ACCIDENTAL JUSTICE* surveys much of the substance, theory, and practice of torts in America. Sophisticated and lay audiences will learn much from reading this account of tort law.