

COMMENT ON *EMPIRICISM AND TORT LAW*

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In its 2002 volume, the University of Illinois Law Review published posthumously an unfinished symposium article by Professor Gary Schwartz entitled Empiricism and Tort Law. In that piece, Professor Schwartz discussed the work of, among others, Professor Michael Saks. Professor Saks, seeking the opportunity to respond to Professor Schwartz's piece, has authored the brief comment that follows below. The University of Illinois Law Review is committed to the principles of open discussion and scholarly debate; and it is to meet those ends that we have chosen to publish Professor Saks's response even though the original author cannot reply. Although this situation is not ideal, we believe it important to continue the dialogue that Professor Schwartz began with Empiricism and Tort Law.

Gary Schwartz's *Empiricism and Tort Law*¹ (*ETL*) refers to a "meta-review" of empirical research on the behavior of the tort litigation system that I wrote.² *ETL* contains several statements about my article that are in error. I am writing to correct the record.

ETL purports to offer an example of how some of those who have written about the empirical data describing the tort system "sometimes mischaracterize the relevant empirical writings."³ In speaking of my article (and of an earlier article by Marc Galanter)⁴ it says:

For example, both the meta-reviews prepared by Saks and Galanter suggest in a significant way that the tort system, rather than being marked by an excessive number of bogus claims, exhibits a significant underenforcement of legally valid claims. In making this point,

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1. Gary T. Schwartz, *Empiricism and Tort Law*, 2002 U. ILL. L. REV. 1067.

2. *Id.* at 1067 ("I can observe at the outset that there is an abundance of studies—indeed, an entire industry of studies—that have focused on the actual operation of the tort litigation system. Such studies were subjected to a meta-review by Michael Saks in a 100-page article in the early 1990s . . ."). The article Schwartz refers to is Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System—And Why Not?*, 140 U. PA. L. REV. 1147 (1992), which, with apologies to the trees, ran for considerably longer than 100 pages.

3. Schwartz, *supra* note 1, at 1076.

4. Marc Galanter, *Real World Torts: An Antidote to Anecdotes*, 55 MD. L. REV. 1093 (1996).

both Saks and Galanter rely on an important study conducted by the RAND Corporation's Institute for Civil Justice. That study finds that only 10% of all accident victims recover any damages at all from the tort system. One empirical study of the resolution of medical malpractice claims concludes that "unjustified payments are probably uncommon."

This is, indeed, an important finding that the RAND system generates. But that finding is evidently misinterpreted by both Saks and Galanter, insofar as they seemingly conclude that the RAND finding shows that the tort system exhibits an underenforcement of legally valid claims. The RAND study, while finding a 10% rate of tort recoveries by accident victims, is utterly silent on the issue of what percentage of all injuries are indeed caused by the tortious conduct of one or more parties. Certainly, the RAND study does show that Americans are not simply suing at the metaphorical drop of a hat; to this extent, the study challenges the alarmist view, at least in its most outlandish statements. But the RAND study says nothing at all about the extent to which those victimized by tortious conduct are declining to bring or enforce valid tort claims. That scholars as shrewd as Saks and Galanter would misread the RAND study in this way suggests to me an ideological predisposition on their part towards the conclusion of underutilization that they derive.⁵

However, the two sentences in my article immediately following the summary of the data to which *ETL* refers made exactly the point *ETL* says I failed to take account of: "Clearly, the tort system is not intended to compensate the costs of all accidental injuries. Many, perhaps most, of these injuries may not be the result of tortious conduct by potential defendants."⁶ And my article's very next sentence draws from the data precisely the same conclusion that *ETL* says the data justify: "But the very gap between the losses suffered and the liability system's contribution to paying these losses is contrary to much of what is popularly believed about that system."⁷

On those points, then, *ETL* reflects a reading of the data and their relation to the tort system that is in complete agreement with my own reading (and writing) on those questions.⁸

5. Schwartz, *supra* note 1, at 1076-77 (footnotes omitted).

6. Saks, *supra* note 2, at 1284. A smaller error in Professor Schwartz's characterization is that I did not present the data at issue as part of a discussion about "a significant underenforcement of legally valid claims," Schwartz, *supra* note 1, at 1076, but in a discussion about "The Cost of Accidents," Saks, *supra* note 2, at 1283.

7. Saks, *supra* note 2, at 1284.

8. And, therefore, Professor Schwartz's assertions and related speculations about "misreading," "misinterpretation," and "mischaracterization" of research findings, *see* Schwartz, *supra* note 1, at 1076-77, have been resolved.