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Book Review [Liability: The Legal Revolution and its Consequences]

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BOOK REVIEW

LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES, By Peter W. Huber. New York, NY: Basic Books, Inc. 1988. Pp. 260. Paperback. $10.95.

Reviewed by **William J. Monahan***

A revolution occurred during the last thirty years in tort liability law. It transformed the legal landscape by proclaiming sweeping new rights to sue. Peter Huber's book, *Liability: The Legal Revolution and its Consequences*, describes the transformation of modern tort law and how the dramatic increase in liability lawsuits has had an adverse effect on health, safety, insurance, and individual rights.

The founders of this revolution are well known. They include the late William Prosser, who taught law at Hastings College; John Wade, who taught law at Vanderbilt University; and California Supreme Court Justice Roger Traynor. They were followed by a sophisticated group of legal economists, including Guido Calabresi, now Dean of Yale Law School and Richard Posner of the University of Chicago and now a federal judge on the Seventh Circuit Court of Appeals. Collectively, their ideas profoundly changed the common law.

The revolution began with a wholesale repudiation of the law of contract. In the past, we relied primarily on agreement before the fact to settle responsibilities for most accidents. Today, we emphasize litigation after the fact. Paralleling this was a shift from individual to group responsibility. This was followed by an explosion in emotional distress, anti-discrimination, privacy, defamation, and libel claims. There has been a ceaseless expansion in tort liability and an enormous growth in the number of cases, the probability of winning, and the size of awards.

The immediate impact of the increase in liability has been

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a marked increase in price and a decline in the availability of goods and services. As our right to sue has grown, our freedom to make purchases in the first place has declined. Insurance has become more expensive and difficult to obtain. Innovation has come under attack because it is new, different and unfamiliar.

The author traces the law's development away from contracts toward theories of implied warranty, contracts of adhesion, and strict liability. The law now focuses on the product, rather than on the contract or the people. As the law began to focus on the product alone, the once broad defense of contributory negligence was abandoned and products were found to be defective if they failed to warn or protect against foreseeable consumer negligence. Warnings now go into excruciating detail and overstate actual risks. Often, the really crucial information is likely to go unread because it is buried in useless, but legally-compelled detail.

Class actions in environmental and toxic tort litigation became commonplace as the courts began to find that chemical manufacturing, waste disposal, nuclear power and the transport of hazardous materials were ultrahazardous activities and, therefore, liability for any damages was imposed regardless of whether or not there was any negligence.

The principles of privity of contract and proximate cause gave way to joint and several liability and comparative negligence. Statutes of limitation were relaxed and often swept aside. The courts increased the ability to recover for emotional distress, and the anxiety a person may feel in anticipation of future harm became the basis for an immediate legal claim. Punitive damages have become routinely awarded but impossible to predict.

The author notes further that the current system assumes and requires at least one external human cause for almost every misadventure, and preferably more than one to increase the chances of finding a solvent defendant. The amount of insurance needed is uncertain because of the lottery-like mechanics of litigation and the huge overhead costs of courts and lawyers. The courts, not scientists or regulatory agencies, have taken control over medicine, drugs, contraceptives, vaccines, chemicals, and many other aspects of our lives.

All this has led to a vast increase in the opportunities for litigation and the probability of success. Most cases now end in

settlement, with the plaintiffs cashing in on emotion, and the defendants paying to escape from the high-stakes legal uncertainty regardless of the merits of the claim.

The changes in modern tort law have also had an adverse effect on the availability of insurance. The development of joint and several liability was a devastating blow to the insurance market because it allowed the full cost of an accident to be channeled to the best-insured defendant, regardless of relative fault. The new rules which allow an indeterminate amount to be awarded for pain and suffering has made it impossible to accurately predetermine the amount of insurance needed.

The courts began to effectively rewrite insurance contracts in an attempt to expand their coverage. Insurers reacted by exercising their freedom not to contract. Some courts raised the stakes. If an insurer refused to pay a claim that a court declared was covered, the insurer could be assessed punitive damages on top of its direct liability under the insurance contract.

In response to the expansion of the law, insuring such things as environmental engineers, day care centers, contraceptives, orthopedics, and neurosurgery quickly became prohibitively expensive. The end result of the increase in liability has been that insurers now sell considerably less insurance at sharply higher prices.

As the tort system expanded, innovation was suppressed, not encouraged. Since innovation starts without an established market, it is often condemned to start without insurance as well. For the prudent business person, rather than starting without insurance, there may be no start at all. Safety itself is one of the largest casualties of modern tort law. The threat of liability postpones radical innovation and change, concentrating instead on trivial and marginal change.

The author goes on to offer his own solutions to the problems created by modern tort law. He argues that the law of contract should be modernized and expanded. Informed deliberate choice made before an accident should count for everything. Of course, full disclosure would be an ordinary and essential part of fair dealing.

The author advocates greater reliance on regulatory agencies. When a regulatory agency has addressed the question of the content of a warning and spelled out the language in detail, that should put an end to the matter for tort purposes. At

a minimum, complete compliance with a regulatory agency's comprehensive licensing order should provide liability protection against punitive damages.

Joint and several liability should be reserved for the relatively rare case of concerted action where the separate defendants are truly indistinguishable in their degree of culpability. In all other cases, individual liability should be sharply tailored to individual fault.

We should protect ourselves by relying on first-party insurance for known risks. This would reduce legal costs and the uncertainty associated with tort litigation. As first-party insurance is encouraged to expand, third-party insurance should be reduced to the core minimum needed to deal with accidents between strangers who collide with no other insurance in the background.

Simply put, the author argues that the answer is to modernize contract law and increase the freedom to make considered, binding choices in advance. Security lies in prudent planning aimed at avoiding misadventure if possible, and obtaining direct, first-party insurance against any remaining risk with the knowledge that some level of risk is unavoidable. Advance agreement with other individuals or the community as a whole to provide for our mutual benefit should be encouraged.

In sum, the author provides provocative insights into the current state of tort liability law, its historical development, and its consequences. He also proposes many innovative solutions to deal with the adverse effects of the tort liability explosion. His focus is on the development of a legal regime in which people can adequately and efficiently protect themselves from accidents, while ensuring that innovation is not stifled by unpredictable tort liability. The book is recommended to law students and lawyers who should find its many insights entertaining and thought provoking.