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Torts Are No Piece of Cake

By Alex Kozinski

Peter W. Huber's absorbing work explains in crisp, elegant terms what happened, starting about 30 years ago, when a small but influential group of activist judges and academics—the Founders, as Mr. Huber calls them—took it upon themselves to transform the tort system into a social insurance program.

"Liability: The Legal Revolution and Its Consequences" (Basic, 260 pages, $19.95) is a tale of hubris and greed: hubris on the part of the Founders, who unhesitatingly swept aside legal rules distilled through the collected wisdom of generations of common law jurists; greed in abundance on the part of the tort lawyers who eagerly pressed the frontiers of liability outward. Legal principles such as duty and proximate cause, which precluded lawsuits altogether or carefully channeled the jury's deliberations, gave way to concepts such as wrongful life and negligent infliction of emotional distress, which encouraged jurors to be guided by their natural sympathy for injured plaintiffs.

Finding consumers no longer competent to protect their own interests, the Founders launched a particularly ferocious assault on the sanctity of contract: Agreements that stood in the way of compensating plaintiffs were crushed underfoot like empty beer cans.

As Mr. Huber recognizes, the Founders' intentions were pure: They envisioned a world in which courts would justly and dispassionately match compensation to injury. Insurance would spread the modest cost among all consumers; manufacturers would have an incentive to produce safer products. Everyone would be better off.

But something went terribly wrong on the road to this legal Shangri-La. Modest compensation awards became the springboard for astronomical punitive damages; damages for physical injuries were soon eclipsed by those for hard to identify—or disprove—psychological injuries; joint liability rules pinned relatively blameless institutional defendants with the whole tab. The hunt for the deep pocket was on: Plaintiffs and their contingency-fee lawyers began descending upon solvent defendants like swarms of African bees. Insurers withdrew from some markets and reduced coverage in many others; London reinsurers departed our shores, declaring America "now as unpredictable from an underwriter's point of view as a banana republic."

The basic problem with a tort-based system of social insurance, Mr. Huber argues, is that it can never get to yes—that is, conclusively establish that a product is safe. Ten juries in a row may deny liability but an 11th is free to disagree and saddle the manufacturer with crippling punitive damages. Ironically, the newest and most innovative products are the most vulnerable to jury speculation about potentially harmful effects and the first to lose insurance coverage. Lack of insurance and the fear of crushing liability make producers very hesitant to experiment, sapping our economy of enterprise and creativity.

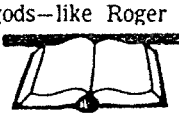
In a bone-chilling chapter entitled "What Is Deterred?" Mr. Huber catalogs the insidious and perverse way in which the liability crisis deprives the public of safe, effective products that help make life easier, healthier, longer. Vaccine research, an area in which the U.S. was once a world leader, has slowed to a trickle; American research and development for products relating to contraception and reproduction have stalled while other countries have witnessed major advances. "Who in his right mind," Mr. Huber quotes a major pharmaceutical company president as asking, "would work on a product today that would be used by pregnant women?"

With irreverent wit, Mr. Huber, a senior fellow at the Manhattan Institute, does to tort law what Tom Wolfe does to New York City in "The Bonfire of the Vanities." He not only exposes the mumbo jumbo that has clouded legal thinking for three decades, he takes the legal profession's demi-gods—like Roger Traynor, former chief justice of California and grand pooh-bah of the Founders—down a notch or two. Mr. Huber also develops a clever vocabulary that, I predict, will set the terms of debate on this subject: We are introduced to "the Founders," men with a mission, and to "contorts," a term originally coined by legal scholar Grant Gilmore to describe the muddle of contracts and torts misbegotten by the Founders in molding the common law to their purposes.

Mr. Huber also introduces us to the individual—if he can be called such—the Founders sought to protect: the "cookie cutter consumer," a person with uniform needs, preferences and sensitivities who has absolutely no stomach for risk and is totally incapable of judging his own self-interest. Finally, in opening our eyes to the need for a legal system that provides fair compensation to those who are injured while keeping producers from being suffocated by unjust and unlimited tort liability, Mr. Huber gives new meaning to "getting to yes."

Mr. Huber is a man of clear vision and extraordinary talent. Along with Richard Willard, George Priest and Richard Epstein, he is destined to become a major player in the developing battle for the soul and sanity of our legal system. His book is a timely warning about what happens when judges try to enshrine their notions of social policy into law. It should be required reading for anyone who wears the judicial robe.

Mr. Kozinski is a judge on the U.S. Court of Appeals for the Ninth Circuit.



Bookshelf

"Liability: The Legal Revolution and Its Consequences"

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