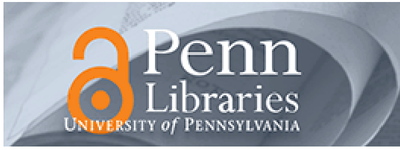

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Review of Peter W. Huber, *Liability: The Legal Revolution and Its Consequences*

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Review of Peter W. Huber, *Liability: The Legal Revolution and Its Consequences*

Abstract

Legal costs are now a major factor for U.S. firms to consider when marketing products and services. For example, they represent 95% of the price of childhood vaccines. Product liability is so important that many useful products, such as the IUD for birth control, have been removed from the market. Certain services, such as day care centers, are provided at high prices to cover liability exposure. Why have legal costs associated with products risen so rapidly since the early 1960s?

Comments

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Review of
Peter W. Huber, *Liability: The Legal Revolution and Its Consequences*,
New York: Basic Books, Inc., 1988

Q. What do you have when you have a lawyer up to his neck in sand?
A. Not enough sand.

Legal costs are now a major factor for U.S. firms to consider when marketing products and services. For example, they represent 95% of the price of childhood vaccines. Product liability is so important that many useful products, such as the IUD for birth control, have been removed from the market. Certain services, such as day care centers, are provided at high prices to cover liability exposure. Why have legal costs associated with products risen so rapidly since the early 1960s?

Huber, who has an engineering degree from MIT and a law degree from Harvard, presents a simple yet compelling explanation: Contract law was abandoned. Willing parties can no longer agree to set limits on the liability associated with the use of a product or service. Instead, tort law, the law of wrongdoing, is followed.

Contract law was abandoned as a result of progressive thinking by the best legal scholars in the U.S. The revolution proceeded in steps. First, it was determined that "buyer beware" was not fair because the customer lacked sufficient information. Firms responded by providing much more informative product warranties (e.g., smoking can cause death by cancer) which let the customer know precisely what was involved in the contract. However, the courts often ignored these warranties on the basis that it is easier to engineer safety into the product than to repair the damage once done. Furthermore, the manufacturer can better afford to pay for the damage Manufacturers are now successfully sued because they have money. For example, a manufacturer was sued successfully for installing a telephone booth in a place where a drunk driver crashed into it and injured an occupant. Another example is the manufacturer who was sued successfully by a contestant in a refrigerator-carrying race who injured his back.

There are many victims in this legal revolution. Many sellers have been harmed. U.S. manufacturers are at a serious disadvantage in relation to foreign manufacturers. Insurance companies cannot issue product liability insurance in many cases because they cannot determine who is covered, for how long, and for what. Huber estimates that almost 40% of damage claims are for psychic injury and the percentage is rising over time.

According to the arguments of the progressive lawyers who founded this revolution, consumers would be much better off under this system. It now appears that the consumers have suffered greatly. New. safer products are kept off the market because to introduce them would be an admission that everything already sold is not safe. Furthermore, in light of high prices to cover the liability tax, lower income consumers are likely to turn to substitutes. For example, the price of ladders is raised 30% for liability coverage; as a result more people climb on (and fall off) chairs. Finally, though everyone must pay this liability tax, the richer victims get the largest legal awards.

Huber describes an intriguing solution. It is motivated by asking who has benefited from this revolution. The answer, obviously, is lawyers. The solution, then, is more sand. It can be accomplished by reinstating con-

tract law, but without lawyers. Huber refers to it as "neocontractual law." Here is how it works. The seller would offer products and services with built-in insurance. (This could be a major selling point.) For example, Ferguson Airlines could offer an insurance policy with a value of $1,000,000 to the victim's family in case of death. Assume now that the customer (victim) is killed. Perhaps the victim's family will renege on the contract and ask a lawyer to sue. Not to worry. They would be given the opportunity to renege (another selling point!). A reasonable firm would make the insurance contract appealing enough that the beneficiary would be unlikely to renege. That is, the insurance contract can provide for a much higher; expected payoff .than the lawsuit. (This is possible because the lawyers' fees are eliminated.) The victim's family can take an immediate payment on the policy, or can get a lawyer and spend a few unpleasant years trying to win a settlement. If successful, the family will probably give the lawyers, courts, and experts witnesses well over half of the settlement – assuming that they can collect the award.

Will neocontractual law work? Huber describes its successful use by the State of Washington for its public high school athletes. Each student paid $1.40 per year and the policy provided a schedule of payments for injuries. Of the 24 serious injuries since the program started in 1981, no liability case has gone to court.

This book is exciting and well written. It provides fascinating details for the preceding arguments. The organization of the book follows the reasoning outlined here. The content is shown by a sampling of the chapter titles: "The Death of Contract," "A Search for New Rules," "Knowledge of the Law Is No Excuse," "Sentence Without Verdict, "Insurance in Retreat," "What Is Deterred?," and "Choosing Safety." These chapter titles also illustrate the forceful style of writing.

My complaints are minor: the documentation could be better and the index is not great. But, hey, we are talking about a new revolution! Some U.S. firms are going to use neocontractual insurance schemes and they are going to earn much profit from this strategy.

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