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the editor's corner

Tort is Not a Dessert

Unless you have been in a coma for the past two years, you are acutely aware of the liability crisis in dentistry. Plaintiff attorneys seem overjoyed to have discovered this new mother lode of litigation. And some of the more successful lawyers are now offering courses and writing books to inform their colleagues about how to sue dentists—and never accept less than six figures. No one is sure how \$100,000 became the magic figure, but I doubt that it has much to do with normal market forces.

Along with me, you've probably wondered why there were more medical malpractice suits filed from 1977 to 1987 than in the entire previous history of American tort law. Peter Huber, a Senior Fellow of the Manhattan Institute, answers this question and hundreds more in a splendid new book, *Liability, The Legal Revolution and Its Consequences* (260 pages, \$19.95, 1988, Basic Books, New York).

Huber is convincing when he tells us that this change in the law of torts or civil wrongs didn't just happen, but that it was purposefully programmed by a group he labels the "Founders"—well-intentioned, politically liberal legal theorists from academia and the courtroom—who began to use the courts as an instrument to bring about more social equity and protection for the injured. In little more than 20 years, these Founders repudiated six centuries of contract law, which had been based on the ability of individuals to manage their own risks, and replaced it with a collective tort liability. Ostensibly, this new law was designed for the ordinary worker, the hapless accident victim, the ubiquitous "little guy"—the same person social engineers and tyrants are always trying to "help".

The "Founders" saw their new courts as places where past wrongs could be righted by coolly and fairly matching compensation to injuries.

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Insurance companies would spread the cost among all consumers, and manufacturers would have more incentive to make safer products. The Founders obviously thought they had seen utopia.

They couldn't have been more wrong, and the present liability mess shows by how far they missed their target. Instead of making our world safer, more predictable, and more equitable, the new tort law has made it less so. While consumers have acquired an expanded right to sue, they have lost the more important and older right to contract.

What the Founders failed to grasp was that much of our social havoc is wreaked by the uninsured, and because of that there was no way to fairly compensate the injured without reaching for "deep pockets". So if an uninsured, drunk motorist killed someone in an auto accident, it wasn't the driver's fault alone, but also that of the company that failed to make a perfectly safe vehicle.

Insurance companies could put up with some of this nonsense. However, for some high-risk enterprises such as disposal of hazardous waste and manufacture of vaccines, they simply stopped writing policies. The result has been U.S. government intervention. Now all taxpayers get to share in the cost of, say, the burial of toxic wastes via the Superfund.

American drug companies have almost stopped developing vaccines, and no sane pharmaceutical CEO would now advocate the manufacture of a drug or device for pregnant women or for contraception. We now have the national disgrace of 5000 "orphan" diseases that remain untreated because companies can't buy insurance. Thousands of physicians have stopped delivering babies rather than pay \$80,000 yearly in liability premiums. Blaming the product instead of the people who use

it has slowed all kinds of research and development, since manufacturers prefer the tried and unsued to pioneering new territory.

While the United States stands paralyzed by liability, other countries that are not challenge our competitiveness and productivity. After reading Huber's book, you will wonder why the trade deficit isn't worse and R&D budgets haven't diminished further.

As long ago as 1942 the Austrian economist, Joseph A. Schumpeter, predicted that capitalism would be destroyed by its own success because it would create a new class of bureaucrats, intellectuals, professors, lawyers, journalists—all of them beneficiaries of capitalism's economic rewards, even parasites of capitalism, yet contemptuous of the ethos of wealth production, of saving, and of allocating resources to economic productivity.

The new tort law is more than a legal nuisance; it is an assault upon the foundation of this republic. In a democracy there are legal, effective, and nonviolent ways of redressing unwarranted legal privileges—but citizens must stop sitting on the sidelines and join in the fray. Texas voters recently turned out four of the five state supreme court justices who had accepted thousands of dollars in campaign contributions from plaintiff attorneys.

Huber's remedy is to return to contract law, but given the vested interests involved, that won't be easy. As Charles Dickens said in *Bleak House*, "The one great principle of English law is to make business for itself". It is at least encouraging to know that there are able and articulate counselors such as Huber who recognize the problem and are offering remedies. Do yourself a favor: add his book to your required reading list. LWW