

## Books for Lawyers

panded anonymous testing and counseling, and adoption of anti-discrimination laws to create an atmosphere of trust between those infected and public authorities.

While Bayer is correct that effective public-health measures to stem HIV transmission do not threaten individual liberty, vigilance is needed to oppose repressive measures motivated by public fear and ignorance that do little or nothing to stem the AIDS epidemic.

### **DAMAGE CONTROL**

#### **LIABILITY: The Legal Revolution And its Consequences**

By Peter W. Huber  
Basic Books  
New York, N.Y.  
260 pages; \$19.95

*Reviewed by Stephen Sugarman*

"In 1958 Chester Vandermark bought a new car from the Maywood Bell Ford dealership near Los Angeles. Six weeks and 1,500 miles later ..." So begins Chapter Two of "Liability: The Legal Revolution and its Consequences." By informally sketching the facts of many leading cases from law-school torts books and the newspapers, Peter Huber tells the story of the dazzling expansion of victims' rights that has occurred in the past quarter-century.

If you haven't been watching the details of tort-law development, Huber's book makes for fascinating reading on this score alone. Shorn of their doctrinal complexities, Huber's cases portray a dramatically different world than existed in 1963, when the California Supreme Court first embraced the principle of strict manufacturer liability in tort.

One of his many nice touches is to show how the law now treats the public something like idiot savants—fools who need protection when they buy products, but geniuses when they are called as jurors to judge the engineering specifications of those same products.

Huber believes the revolutionary growth in tort law's substantive

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reach has been a disaster. Seeking to use liability insurance as a fund for spiraling victim compensation, the judiciary has wound up doing the public a great deal more harm than good. It wasn't supposed to be that way. Spurred on by a group he calls "the founders" (including Justice Roger Traynor and Torts Restatement Reporter William Prosser), the new tort law was meant to give us both greater safety and wider loss-sharing. Instead, Huber argues, it has yielded less of both.

Many critics of modern tort law focus on the shockingly wasteful cost of running the system. While Huber makes that point, his case primarily rests on the perverse impact tort law has on human conduct. Most importantly, he says, modern tort law gravely impedes innovation, and most alarmingly in those very high-tech fields where new breakthroughs promise large social gains. Ask the American vaccine and birth-control industries what new products they are working on, suggests Huber, and you will find that research has nearly ground to a halt because of lawsuit blues. Nor will you find major American enterprises working hard on hazardous-waste disposal problems or new light-airplane technology, charges Huber, because they have

been driven away by liability fears. By specially taxing progress, tort law increasingly leaves us with older and, on balance, less safe technologies.

Safety is also sacrificed, Huber says, when liability drives up the costs of some products (like home ladders), and people then substitute more dangerous alternatives (like standing on chairs) that are immune from suit. Liability also goads those in positions of discretion to exercise it in detrimental ways—for example, by causing obstetricians to perform more expensive, unwanted and unnecessary Caesarean sections, since that method of delivery better protects the doctors against the risk of malpractice suits.

But why can't potential defendants just roll the risk of legal exposure into the price of their products and services through liability insurance, as the founders taught? To this Huber replies, endorsing the argument of Professor George Priest, that the undifferentiated expansion of enterprise liability by courts has made liability insurance increasingly unavailable or insufficient to protect against the enormous blows that an enterprise takes when mired in the mass-tort morass.

Higher deductibles, lower limits, specific exclusions (such as pollution

Fuselage of 747 after cargo door blew off, killing nine people.



damage), shorter coverage (as in "claims made" policies) and the like aren't features of insurance contracts that the industry would like to sell; rather, they reflect the desperate attempt of the property-casualty industry to stay in business.

I find Huber's portrayal pretty convincing, if occasionally overdone. Since his case depends upon a factual

assessment of the impact of tort law, we now need defenders of the system to paint a contrasting picture.

#### BRING BACK CONTRACT

If Huber is right, what is to be done? First, and most importantly, bring back contract, says Huber. Not old, bad contract law where befuddled consumers were held to have accepted complete disclaimers of responsibility by their injurers. But rather, modern contract law that should uphold tort waivers, but only so long as people are assured of sensible insurance protection in case of an accident.

For example, Huber argues that if the airlines could be freed from tort claims, they would happily agree to provide (and passengers would prefer to have) prompt payment of far more life insurance to the heirs of air-crash victims than those same heirs, on average, are eventually able to extract (after payment of their legal fees) through the existing system. All that blocks the industry and its customers from making this mutually advantageous deal is confidence that the courts would uphold it.

Following Professor Jeffrey O'Connell's lead, Huber calls for the widespread adoption (and judicial validation) of similar arrangements wherever possible. O'Connell's idea is already largely in place and seemingly working well for seriously in-

jured high school athletes who, in return for giving up their tort claims, are provided with very generous first-party medical, rehabilitation and income-replacement insurance.

While this is a promising idea, a piecemeal approach will leave much of the tort system in place or many victims uncompensated.

So when Huber also argues, for example, that defendant compliance with federal-agency testing, safety design or warning requirements should be a complete defense in a torts case, he is opting to leave those victims unprotected.

I believe he is right when he argues that "we must gradually uncouple compensation from deterrence," and I don't object to leaving safety regulation to the market and the regulators. But then we must make provision for compensation outside of tort law, and that, I fear, may not be achievable through contract.

A network of employee benefits and social insurance like that long in place in much of western Europe might do the trick.

Indeed, had such a network been in place here in the 1960s, the American liability revolution that has not yet reached Europe may never have occurred.

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## NOTED IN BRIEF

### Yuppie love

**"The Last Billable Hour." By Susan Wolfe. St. Martin's Press; New York. 229 pages. \$15.95.**

As new associates go, Howard Rickover is a dud. He bills his time accurately, can't get the hang of massaging his clients, is bullied by his secretary and repelled by his partners' backstabbing and philandering.

Nor is he particularly thrilled with his status as the extra body in the litigation department—the man most likely to be stuck with a weekend research project. He finds his work hypertechical and unstimu-

lating, and longs for the day when he can leave law and open a nouvelle-ish restaurant. As one of his partners puts it, in a firm filled with sharks, Howard is a tuna.

As odd man out, however, Howard is well-suited to assist detective Sarah Nelson in solving the murder of senior partner Leo Slyde, who built Tweedmore & Slyde into one of Silicon Valley's hottest boutiques, and who, it seems, gave everyone a motive to kill him. Slyde, an inveterate rainmaker, is also a paragon of sleaze, leaving behind an untidy love life and business dealings that would embarrass Ivan Boesky.

Howard tries to unravel the mystery of who killed Slyde, partly as a distraction from work, but mostly to get closer to Sarah, a Brown University dropout who escaped a life of

preppydom by becoming a cop.

A first novel by lawyer Susan Wolfe, "The Last Billable Hour" is an amiable whodunit with satiric asides at law-firm life that are right on target. The heart of the novel is not so much finding the killer as figuring out what sorts of reptilian personality disorders motivate Tweedmore's lawyers—such as the perennial associate who is not allowed to go to court alone because he can't conceal his contempt for dim-witted judges.

By contrast, Howard seems refreshingly sane and un-macho, a man for whom "workout" means whipping up a raspberry sorbet with Julia Child. Though the writing wobbles a bit in spots, "The Last Billable Hour" is wryly observed—a look at the paper chase with more humor than anger.

—Stephanie Goldberg