implications of the justification-defense requirements of necessity and proportionality, on the meaning and significance of retaliation and preemptive strike, and on the reasons and operation of the hearsay rule and its important exceptions.

Because Fletcher's pedagogy is exceedingly subtle, the reader prepares for trial along with the participants. And when Chapter Six arrives, with the opening of the trial, the reader is spellbound.

But the lessons are not perfectly drawn. The text is sometimes a bit pretentious. "As Maimonides said about God, it is easier to postulate what reason is not than to conclude what it is. Reason is not passion, not prejudice, not the drive for pleasure. As God transcends the material world, reason transcends these impulses of human condition."

And the documentation style is not overwhelming. (The McPaper *USA Today* may not be the most authoritative source for statistics on gun permits.) The theory is sometimes too pure, too much like a treatise, albeit Fletcher's provocative treatise, "Rethinking Criminal Law." His more typical presentation, which is rethinking in street clothes, works much better.

Finally, the text sometimes misstates the law. Much time is spent discussing the profound implications of what is presented as the universal imminent-threat requirement for self-defense. But only about a third of the states retain this common law requirement. New York is in a shrinking minority on this point.

But then, this book is not intended to be a scholarly work. It is a book designed to help us think about crime, criminals, and justice, in the context of the Goetz case and elsewhere.

In a statement to police Goetz says:

"You decide. I became a vicious animal and if you think that is so terrible, I just wish anyone could have been there in my place. Anyone who is going to judge me, fine, I was vicious. My intent was to kill 'em, and, and you just decide what's right and wrong."

Perhaps the greatest achievement of Fletcher's book is to show us how complex the question is and how the answers may lie on a continuum rather than in separate boxes. If Fletcher overintellectualizes events, it is only to help us see the subtle issues that are sometimes central to our intuitive notions of justice.

HOLDING DOWN THE TORT

THE PRODUCT LIABILITY MESS: How Business Can Be Rescued From State Court Politics

By Richard Neely
The Free Press
New York, N.Y.
181 pages; $24.95
Reviewed by Stephen D. Sugarman

Addressing the business community, West Virginia Supreme Court Justice Richard Neely offers this picture of modern tort law: local judges and juries relentlessly sticking it to out-of-state manufacturers, ignoring their legitimate interests. Because of this irresistible "home cooking," we are trapped in "The Product Liability Mess," the title of Neely's new book.

The "mess" won't be solved by state court judges, claims Neely, because their political sensibilities encourage them to transfer wealth out of distant deep pockets into the hands of local victims. Nor should business waste its time and money seeking relief from Congress, which he thinks is both structurally an unpromising source of help and, in any case, institutionally incompetent to fashion the fine-tuned remedy required.

The solution lies, rather, in a new "national common law" of product liability that he'd like to see adopted by the U.S. Supreme Court. The doctrinal basis upon which the high Court is supposed to act is of no real concern to Neely (although he hints at the availability of the "commerce clause"). Instead, his role is to "propagandize" the desirability of his solution to a majority of the Court.

Just what this new "national common law" of product liability would look like isn't spelled out. But if you buy Neely's argument, then almost by definition what the Court imposes will be an improvement for

both business and society at large. The whole point, after all, is that the high Court will take a balanced stance on a problem that Neely believes is now precluded by the inherent parochialism of our present system.

Neely's diagnosis and prescription draw mainly on two analogies. First, he argues, defamation law also used to suffer from unacceptable provincialism until the Supreme Court stepped in with the First Amendment to force local judges and juries to give fair weight to national interests in freedom of speech. Remember that *New York Times v. Sullivan*, by which the Court launched modern defamation law, is widely seen as playing a key role in overturning the efforts of local segregationists to keep the nosy national press from fully reporting on the battle to deny blacks racial equality.

Second, the Court has, as Neely sees it, effectively used the Constitution to thwart selfish, local efforts to unfairly tax and otherwise burden enterprises engaged in interstate commerce. In short, while the individual states are drawn into a "competitive race to the bottom," the Supreme Court is able to protect out-of-state interests whose activities benefit Americans as a whole.

The solution lies in a new 'national common law.'

That is "The Product Liability Mess" in a nutshell. Much of the rest of the book contains autobiographical material and asides on an enormous number of matters that readers are likely to find amusing, irritating or both.

THE WRONG WINDMILL

On the merits, I fear that Judge Neely's solution is premised on an unproved, and probably incorrect, diagnosis, with the result that he is tilting at the wrong windmill. I am not convinced that "enterprise liability" has taken hold of tort law because it is a way to capture out-of-state wealth for local voters. It may just as well reflect personal injury law's increasing concern with compensating plaintiffs out of any deep pockets it can find, regardless of the state of the defendant's residency.

Were Neely right, why are doctors—plainly local people—bur-

dened by tort law as much as (or more than) business? He tries to explain this by arguing that doctors are insured by national insurance companies. Yet the facts are, first, that doctor's increasingly buy from mutual insurance companies set up by local medical societies, and, second, that those who are still insured by national companies almost always have their premiums based on the malpractice claims experience of their locality. So socking it to doctors is indeed socking it to the home team.

In the same vein, why are municipal governments complaining about tort law just as loudly as the business community? Under Neely's thesis, one might expect states with the least amount of manufacturing industry to be the most vigorously pro-plaintiff. But, in fact, many of the most pro-victim courts, California's being the best example, are in the most important manufacturing states; by contrast, some of the least industrialized states have been the slowest to climb aboard the strict liability bandwagon.

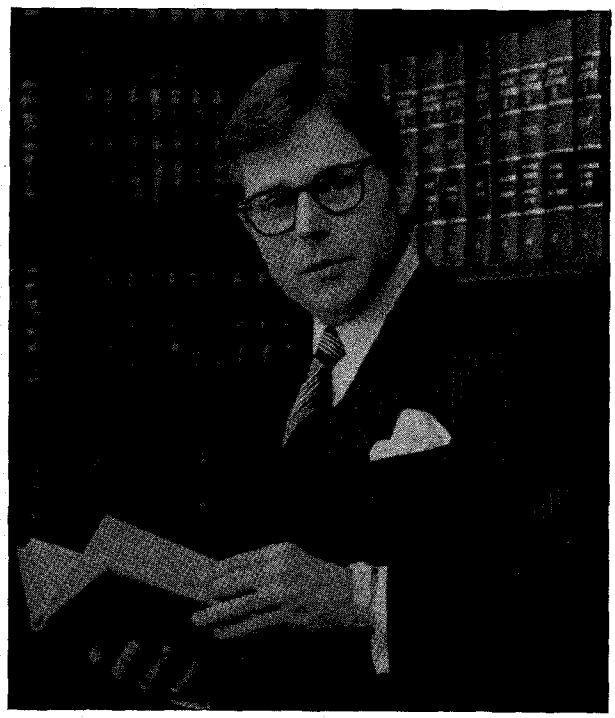
If I am right, then there is no reason to assume a national common law to be any more pro-business than the average state law today. Surely, the California Supreme Court judges who vote pro-plaintiff claim to be taking into account, on balance, the interests of the entire community. So who is to say that enterprise liability thinking wouldn't carry the day with the U.S. Supreme Court as well?

Of course, Neely may believe that business has a better shot with the Supreme Court given its current composition. Yet, I should think that the conservatism represented by Chief Justice Rehnquist is far more likely to make the Court want to keep out of the issue entirely.

Although Judge Neely provides no roadmap for the Court, he does hint at the changes he would like to impose. His basic idea seems to be that, apart from instances of intentional wrongdoing, if the defendant makes a prompt and fair settlement offer (such as payment of the victim's net economic losses and reasonable legal fees), then tort law should be weighted to encourage the plaintiff's acceptance.

For example, those who insist on trial would waive punitive damages or losses already covered by their own

Books for Lawyers



Richard Neely: Lobbying the Supreme Court for tort law reform.

insurance, and perhaps even face ceilings on damages for pain and suffering. Neely also would protect manufacturers from suits when a product has been used beyond its useful life, when the product design has been approved by the relevant governmental agency, and when the product was manufactured with the safest feasible technology then available.

These, of course, are not new ideas. More importantly, it is not clear that their adoption is either in the national interest or a cure for the "product liability mess." (A big part of the problem is that Neely never tells us what the "mess" is.)

The real mess might be seen this way: (1) Most people who are injured while using products aren't compensated at all by the tort system; (2) Of the money now devoted to product liability insurance and the related costs of the personal injury system, more than half goes to administrative expenses and only about 10 percent to replacing victims' out-of-pocket economic losses; (3) The perverse consequences of product liability law (such as withdrawn or never-marketed, reasonably safe products) outweigh any contribution tort law makes to product safety; and (4) Because of who their lawyers are, the availability of evidence, what the victim looks like and so on, the process of awarding damages more closely resembles a lottery than a real system of justice.

On this view, it is pretty clear that Neely's tinkering is not the remedy called for. Indeed, if a central problem is that state court judges are trying to make the tort law do something it cannot do well—that is, serve as a compensation system—they have done so because of legislative failure to tackle the problem properly. The solution thus lies not with judges but with legislators.

But the nature of the solution then must include generous pro-victim compensation mechanisms and not just the roll-back of common law rights that the Reagan administration, much of the defense bar, and now Judge Neely are pushing. Business would be better advised to try to secure a more comprehensive umbrella of employee benefits and social insurance (as part of any tort reform package) than to try to "lobby" the Supreme Court into a new common law. ■

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