

Book Reviews

Liability...The Legal Revolution and its Consequence.
By Peter W. Huber. New York: Basic Books, 1988.

To be informed that a hidden tax has been levied upon each and every consumer of goods and services in the United States may be somewhat of a surprise to most of the individuals who enjoy the benefits of the free market. However, such a surprise will surely pale when compared to the shock almost all will experience when they are confronted with facts and arguments that support the thesis that the tax, in being hidden, has never been voted for, is generally in excess of those taxes that have been voted for, does not clearly promote that for which it is employed, and is chiefly responsible for the elimination of many goods and services which might, arguably, further that purpose for which the tax was initially employed.

The above thesis is forcibly presented with a plethora of case examples and urgent arguments by Professor Huber. Moreover, Huber proffers an alternative approach designed to circumvent those problems alleged to plague the method which brought about the tax while also satisfying the social needs for which the tax was created.

According to Professor Huber, the hidden tax has been created by the perhaps well-intentioned judicial usurpation of contract law by tort law in the area of commercial relations. One would suppose and traditional common law once paid respect to the idea that when one party wished to secure the goods or services of a second party, the law of contract would prevail and dictate the rights and obligations between the parties.

A contract is simply a promise or set thereof between two or more parties, the breach of which the law will offer a remedy. In order to have the sort of promise the law will enforce, there must be both mutuality of assent and mutuality of obligation. Mutuality of assent is satisfied in general by an offer and an acceptance of that

which is offered. Mutuality of obligation is the requirement that consideration obtained between the parties. Thus, for example, one party would make an offer, e.g., to do *A* for *B*, the second party would accept doing *B* for *A*, and each party would perform what was promised in the offer and acceptance and for which neither party suffered a prior legal duty to perform but for their agreement.

Since the party who makes the offer is considered, at law, the master of the offer, i.e., she may make any offer not proscribed by law, and the essence of commercial relations is the contract role's, the party who makes the offer is, generally, the master of the commercial relation. This is not to say that common law failed to protect the party accepting the offer. First, the clause "not proscribed by law" would, for instance, disallow the offer and acceptance of criminal activity from being enforced. Second, in order to have mutuality of assent, the parties had to be referring to the same goods or services. Other than the proscription regarding the making of certain contracts and the necessity of identity of reference within the contract, any further protection derived for a party in an "at arm's length negotiation" was to be secured by that party. After all, nothing at law prevented the second party from rejecting the offer made by the first party and making a counter offer. If the parties enjoy capacity, i.e., are autonomous individuals, the agreement is at arm's length, e.g., there is no overreaching or no undue influence, and the agreement is not already proscribed by the law, then the parties might arguably be said to have a binding contract. Any further legal interference in such a contractual relation might reasonably be argued to be paternalistic.

Nevertheless, as Huber points out, the legal revolution brought about just that further legal interference to ensure the mitigation of the mastery of the offer by the party making the offer. The legal interference came in the form of tort law. As Huber notes, "Tort" means "wrong." Actually the term "tort" is derived from the Latin "Tortus" or "twisted" which is to say 'not straight' or 'crooked'. A tort is an area of civil law which denotes the violation of a publicly-recognized right for which the law will offer a remedy if the right is enforced by the injured private party.

According to Huber, tort law and contract law pose an interesting contrast. Contract law allows autonomous individuals to make binding agreements, while tort law, at least in the appropriate circumstances, allows individuals to recover for harms they suffered at the hands of their own autonomy. When tort law is employed simply in conjunction with old common law notions of contract, since it is the party who accepts the offer who suffers the

obligation or risk of failure to inquire, nothing is altered save a showing of fraud, coercion or other malfeasance. However, if tort law is employed to ameliorate the common law of contract, then as some have argued a more reasonable balance will be secured between one party's claim to protection against damage and the other party's claim to freedom of contract.

This, according to Huber, is what the civil law revolutionaries (or as Huber calls them: 'the Founders') accomplished. One manner of altering contractual relations between the offeror-producer and acceptor-consumer is to grant the consumer the right to information about the product they could not discover upon reasonable inspection. Thus, the obligation to ask the offeror-producer for information was eliminated in favor of a duty suffered by the offeror-producer to warn the consumer of dangers. But the obligation suffered by the producer to disclose dangers to the consumer could be discharged adequately or negligently. The consumer, therefore, acquired a cause of action based upon the producer's failure to warn in a satisfactory fashion or to a sufficient extent.

The shift of obligation was initially based upon dangers not obvious to the consumer. Dangers the consumer could not discover and dangers the consumer would not expect soon became the borders of the producer's liability. That is to say, producers were not only liable for the negligent warning of dangers not expected by the consumer, but producers soon became liable for harms suffered by consumers from products that failed to function as consumers expected. The producer was deemed to warrant the product. With the warrant, the manufacturer is liable for harm that arises from the failure of the product to perform in the manner ordinarily associated with the product.

This did not mean that the producers could not disclaim such warranties but in so far as the obligation fell upon the producer to disclaim, the warranties were obviously implied or obtained unless disclaimed. Moreover, not only did the producers suffer the duty to disclaim but disclaimers were viable only if done under certain formalities.

In the same spirit, the creators of the expanded tort protection realized, according to Huber, that while the consumer did not expect the products placed in the market place to be dangerous, more than an obligation to warn and warrant merchantability could be extracted from the producers. Thus, strict liability arose for injuries suffered by the consumer at the hands of products that were unaltered and used properly, but were dangerous because of a nonnegligently-caused defect. "Unreasonably dangerous" simply

came to mean that the danger was to an extent beyond that which would be contemplated by the ordinary consumer possessed with the knowledge common to the community. Defects are of two types. The first and palpable sort of defect is one caused by mismanufacture. The mismanufacture of a good that subsequently causes injury in the hands of the consumer who employed the product properly and without alteration, has a cause of action against the manufacturer. Nonetheless, what if the product is new and has not yet been subject to mismanufacturing risks? In such an event, a second type of defect may be realized. A product infected with a defective design is one that is simply unreasonably dangerous when employed as prescribed in an unaltered condition.

Huber notes, in addition, that tort expansion enlarges the scope of possible plaintiffs by eliminating the requirement of privity, i.e., the legal relation created by the contract.

Huber concludes his castigation of the Founders' program by noting two paradoxes, one that is internal to the program and one that is the result of the program. First, the Founders decided that the average consumer is ill-equipped to negotiate a contract with manufacturers, yet when it comes to judging whether a warning is adequate, whether a contract is tenable, or even more amazingly, whether a product is defective in design, a decision for which the average consumer has absolutely no training, the average consumer, now placed in the jury box, is very well equipped indeed.

The second paradox is that the Founders extended tort protection for the consumer in the area of commercial relations in order to benefit the consumer. Yet what has been accomplished is just the opposite. Rather than serving as an incentive for safer and less-expensive products, litigation and resultant insurance rates, have simply eliminated the products. Thus, a product that, according to the evidence, would be a significant improvement over the previously-accepted prototypes, is either not available on the market or if available, is priced beyond the purchasing power of the consumer. This is all due to extended tort protection for consumers.

What are Professor Huber's proposals for dealing with the lamentable situation? Generally, Huber's suggestions fall into three broad categories. First, as many states have already enacted, there is tort reform. Huber suggests, for instance, abdication of the collateral source rule. The rule forbids informing a jury that a collateral source, e.g., insurance, has already compensated the plaintiff-consumer for the harm suffered. The rule was at least initially thought to disallow penalizing the consumer who was smart enough to purchase insurance. On the other hand it appears

to allow the plaintiff to recover twice for the same injury, once under the insurance policy and once from the defendant-producer. However, not only does the insurer's right of subrogation place the insurer in the legal position of the injured consumer, eliminating the consumer from the suit, but when employed, the result of the rule is reintroduced in a number of suits. Smart attorneys introduce into evidence, where the jury has been made privy to the collateral source, the amount of the insured's premiums and just how long the insured has been making such payments. The insured then asks for the total costs of such insurance premiums payments. Although generally not as high as the award for damages, the cost of premiums need not be miniscule.

Huber's second general suggestion is to extricate damage awards from tort law's appurtenance of 'wrong' and rather model awards on worker's compensation programs. According to such programs, employees are required to purchase insurance for employees. Employees bargain away tort law suits against employers for injuries suffered in the course of employment. Employees bargain away common law defenses, e.g., contributory negligence, the fellow-servant rule and assumption of the risk. The worker's compensation program places a ceiling upon the amount of the award for the injured employee. Such an 'exclusive remedy rule' might also be employed in products' liability, state programs and services.

Finally, Huber argues that the spirit of common law contract ought to be exhumed. Respect for individual autonomy, that respect which gives rise to consumer rights to be fully informed, must be taken seriously. If a knowing consumer purchases a product with a discoverable disclaimer, the consumer ought to be treated as having assumed the risk. It is arguably self-nugatory to allow one to enter into a relationship with presupposes autonomy, and place at each party's disposal a contractual remedy for breach yet also place at each party's disposal, a tort remedy for an injury or damage one contractually assumed. The argued conjunction of contract law and extended tort law appears to be an oxymoron of sorts, an oxymoron that is neither humorous nor inexpensive.

Professor Huber's thesis that the Founders' amelioration of common law contract with an extended form of tort law and that such amelioration has not enhanced the consumer's position is beautifully (and if not excessively) illustrated and almost always cogently argued. Huber's command of the language and law is laudable and very frequently entertaining. The combination renders the book highly informative and eminently readable.

Despite the well-deserved panegyric, there are just a few main minor points one might wish to note. First, the oftentimes noted sensational cases employed to support the thesis are never fully explained. The arguments proffered by the court and never presented but rather, only the holdings of the court. But a court's holding may well seem disjointed and indeed odd when severed from its argumentative justification. (See Fred Strasser. "Tort Tales: Old Stories Never Die", *The National Law Journal*, 2-16-87). A court's ruling, although it enjoys *stare decisis*, is not itself self-justifying.

Second, some of Huber's suggestive paradoxes and analogies beg for immediate retorts. This is not to suggest that Huber could not, with philosophical grace and alacrity, extricate himself from such retorts. Nevertheless, it might have proved beneficial to have considered such responses and then done away with them. For example, as noted above, Huber maintains that the Founders found consumers incapable of understanding and negotiating contracts yet decided that these same individuals were capable of making difficult technological decisions about safe designs for products. The attractiveness of this suggestive comparison notwithstanding, it might reasonably be argued that the analogy fails because in the case of contract, experts are not adversarially presenting the issues and ramifications, whereas just this type of presentation is occurring in court. The better analogy, one might argue, would be between the consumer unable to understand the tortuous language of an adhesive contract and the juror prior to trial or the juror subsequent to trial in which neither attorney employed language or arguments the juror could understand.

Third, although always mellifluous, Huber is wont to employ terms and illustrations that win his case *prior* to and sometimes unaided by argument. In Huber's defense the use of loaded language might be explained in terms of the passion with which the work is written and perhaps the fear that the harm worked by the Founders may not be believed in spite of the arguments he puts forth.

On balance, Professor Huber's work is fantastic and should prove to be thought provoking, and informative. The work is a very nice piece of scholarship.

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