

REVIEW

Reformulating Tort Reform

Peter W. Huber. *Liability: The Legal Revolution and Its Consequences*. Basic Books, New York, New York. 1988. Pp x, 260. \$19.95.

Alan O. Sykes†

Peter Huber's *Liability* is both a chronicle and a critique of the modern tort system, written principally for an audience of lay readers. The book does not break new ground theoretically, nor does it contain much factual information that will be unfamiliar to torts scholars. Rather, its objective is to explain to the uninitiated how modern doctrinal innovations increasingly favor plaintiffs over defendants, and to argue generally that the ensuing growth of tort liability has imposed a variety of costs on the economy that far exceed its benefits.

As a chronicle, the book succeeds nicely, introducing the lay reader in witty and entertaining fashion to most of the important innovations in tort doctrine during the twentieth century. Huber begins with the "death of contract,"¹ discussing the demise of privity as a limitation on the scope of duty, the growth of implied warranty law, and the increasing rejection of express contractual disclaimers as a limitation upon liability. He then considers the movement from negligence to strict liability in products actions and the general refusal of the courts to accept compliance with industry custom or regulatory standards as a defense to tort claims. The growth of toxic tort actions receives considerable attention throughout the book, with emphasis upon the relaxation of stand-

† Assistant Professor of Law, The University of Chicago.

¹ The seminal work is Grant Gilmore, *The Death of Contract* (Ohio State, 1974).

ards for proof of causation, the artful interpretation of statutes of limitations to permit claims for exposure years earlier, and the questionable techniques of statistical proof devised by plaintiff's lawyers. Other topics include the movement from the traditional contributory negligence defense to comparative fault, the increasing importance of joint and several liability in various areas, and the increasing incidence and magnitude of punitive damages and damages for pain and suffering.

Although the exposition of modern doctrine is informative, the accompanying critique is less successful. Huber's analysis is often one-sided, offering no exposition of sensible opposing viewpoints and largely ignoring the perceived deficiencies in prior law that spurred doctrinal evolution. More importantly, Huber's proposed reforms, principally a greater reliance upon contract and government regulation, are undeveloped and subject to a number of obvious criticisms that Huber does not address. In the end, one suspects that much of the critique of existing law is right-headed on balance and that some manner of reform is in order on many issues. But as Huber himself at times acknowledges, a return to the good old days is not the answer. The other options for reform warrant far more thorough and critical discussion than Huber provides.

I.

Huber begins his critique of the tort system with a listing of various products and services that have become more, and in some cases prohibitively, expensive as a result of the tort system. (p 4)² He culminates this listing with the claim that tort liability "costs American individuals, businesses, municipalities and other government bodies at least \$80 billion a year," (p 4) as if to suggest that the sheer magnitude of that figure is evidence of a system gone awry.³ But one cannot draw that inference from a statistic about the aggregate value of tort awards and settlements. Accidents impose considerable costs on society, particularly accidents that kill or maim, and there are many such accidents each year. Any system that provides compensation to a substantial number of these accident victims and their families inevitably entails a considerable transfer of resources.

² All parenthetical page references are to Peter W. Huber, *Liability: The Legal Revolution and Its Consequences* (Basic, 1988).

³ Note that Huber's figure is not a net cost to the economy, but is in considerable part a transfer from defendants to plaintiffs and lawyers.

But as Huber correctly argues, tort judgments (or settlements in lieu thereof) are hardly the only way to compensate the injured, and assuredly not the most efficient way. Huber's statistics suggest that for every dollar actually received by tort plaintiffs, one or two dollars are consumed in legal fees, witness fees, administrative costs, and the like, at least for certain categories of tort actions. (p 151) Hence, if the societal goal is simply to provide compensation to the injured, or to promote "loss spreading," a closely related notion, then the tort system is almost certainly inferior to alternative public or private insurance arrangements. Defenders of the tort system must reach beyond its compensatory function if they are to craft a persuasive defense.

An arguable advantage of the tort system over alternative compensation arrangements is its superior ability to indulge the vindictive or retributive instincts of injured parties. Accident victims no doubt receive a certain amount of psychic gratification from the imposition of a monetary penalty upon the party at fault, even if the lawyers and experts walk away with half of it. But this argument is at best a bit unseemly. Further, even where the party at fault is nominally liable, the loss is often shifted in the end to an insurance pool and the party at fault suffers no more than a prospective increase in premiums. Finally, many recent extensions of tort liability allow plaintiffs to reach defendants who do not appear morally culpable.⁴ For these reasons, the retributive function of tort, like the compensatory function, provides at best an uncomfortable defense of the tort system.

Economic theory provides a more appealing defense, at least up to a point. The economic perspective emphasizes the incentive effects of tort liability—in particular, the effects of liability upon the incentives for accident-avoidance behavior. At its heart, this incentives-based justification for tort liability is simple indeed. Accidents are avoidable, but only at a cost, and measures to reduce the likelihood of accidents should be undertaken only to the degree that their marginal benefits exceed their marginal costs. Further, if accident-avoidance behavior is to reflect a proper balancing of costs and benefits, individuals whose behavior can affect the probability or seriousness of accidents must somehow *perceive* the costs and benefits of that behavior. A potential injurer who can cause harm to another with impunity, for example, will perceive

⁴ For example, product manufacturers are strictly liable for products with manufacturing "defects," even when the defect could not have been detected before sale through the exercise of reasonable care.

the costs of greater care but not the benefits, and will thus behave too carelessly. By contrast, potential injurers who must pay for the injuries that they cause to others will perceive both the costs and benefits of careful behavior and behave accordingly. Here enters the tort system: To ensure that potential injurers balance the pertinent costs and benefits in deciding how to behave, the tort system forces injurers to bear the costs of the harms that they cause to others,⁵ at least if they fail to behave properly.⁶

To be sure, the observation that tort liability may favorably affect accident-avoidance incentives cannot justify unbounded liability. Indeed, on their face, the remarks above justify liability only for "compensatory" damages, which confront injurers with the actual costs of the harms that they cause.⁷ Likewise, one must always inquire whether the imposition of tort liability will generate transaction costs or error costs that exceed any attendant benefits, will create perverse incentives that reduce the level of safety, or will produce unacceptable redistribution of wealth.

Huber's critique of the tort system crystallizes on these concerns. As noted, he observes that the cost of administering the system—lawyers' fees, witness fees, the costs of courts and jurors, and so forth—may equal or exceed the amount of money received by successful plaintiffs. (p 151) Standing alone, this fact does not weaken the incentives-based justification for tort law, because the effect of liability upon injurers' incentives turns not on the amount *received* by victims, but on the amount *paid* by injurers. No incentive is lost when the lawyers and expert witnesses collect a share.⁸

⁵ Even if potential injurers are insured, the beneficial incentives created by tort liability survive as long as insured parties expect their insurance premiums to adjust to reflect the actuarial value of the risks that they create.

⁶ Obviously, this exposition ignores many complicating factors, such as the possibility that victims as well as injurers can exercise care, the notion that only strict liability induces injurers to adjust their "activity levels," and so on. A far more comprehensive and general exposition of the economic framework may be found in William H. Landes and Richard A. Posner, *The Economic Structure of Tort Law* (Harvard, 1987), and Steven Shavell, *Economic Analysis of Accident Law* (Harvard, 1987). The pioneering work of Guido Calabresi, *The Costs of Accidents* (Yale, 1970), also provides much useful material.

⁷ Supracompensatory or "punitive" damages may induce excessive caution on the part of injurers, although a negligence rule can avoid this danger if administered without error. For a discussion of the proper (and quite limited) case for "punitive" damages under an incentives based theory of tort law, see Landes & Posner, *The Economic Structure of Tort Law*, especially ch 6 (intentional torts) (cited in note 6).

⁸ That lawyers and other costs swallow up a large portion of plaintiffs' compensation may, however, affect the incentives of potential plaintiffs. If they know that they will not be fully compensated if injured by someone else (because of lawyers' fees, etc.), they may adopt socially inefficient accident-avoidance measures. These incentives for prospective plaintiffs to overprotect may be offset by juries' penchant for awarding excessive damages (although

Huber nonetheless raises an important concern—the operation of the tort system entails a considerable resource cost. The lawyers, judges, jurors, experts, and even the plaintiffs and defendants themselves could devote their efforts to other pursuits. The courtrooms could be used for the prompt resolution of other disputes. Although Huber provides nothing that might approximate an accurate estimate of the social costs of running the tort system, his data on the magnitude of legal fees,⁹ witness fees, and the like suggest that these costs aggregate to billions of dollars annually. If the incentives-based justification for tort is to carry the day, we must be convinced that the value of the incentives created by the system exceeds the cost of the system itself. Huber is correct to remind us of the issue.

Huber also contends that the tort system generates sizeable error costs. Juries, he suggests, and even judges, lack the competence to resolve the complicated scientific and engineering issues that they must often confront. (pp 109-12) Juries, especially, indulge their compassion for the injured plaintiff by awarding generous damages even when the plaintiff's case on the law is flimsy or nonexistent. (pp 119-20) Likewise, juries award excessive damages for pain and suffering and all too often tack on inappropriate punitive awards. (pp 127-32) The unfortunate consequences of these errors, according to Huber, are manifest in many categories of cases. Pharmaceutical companies incur liability for "defective" drugs merely because a low probability side effect materializes during a prudent course of treatment or because an unfortunate medical condition develops coincidentally after ingestion of the drug. (pp 102-03) Chemical companies and others incur liability for toxic wastes on the basis of fallacious statistical evidence. (pp 110-12) Comparatively safe contraceptives are driven from the market, and vaccine manufacturers are afraid to sell their wares. (pp 155-56) Manufacturers of many types of products shy away from innovations in product design that might enhance safety but invite liability on the basis of their novelty. (pp 153-71) In the end, Huber argues, the cost of many products and services increases substantially, with no accompanying improvement in, and sometimes a worsening of the incentives for safety. (pp 169-71)

Unfortunately, Huber's method of proof as to the existence of error and its consequences is sometimes bald assertion, though to

this merely shifts the incentive to overprotect to prospective defendants).

⁹ However, many would argue (some facetiously) that the social opportunity cost of the typical lawyer's time is quite low.

be sure such assertions have been made by others.¹⁰ His critique of the toxic tort settlements involving Love Canal, Times Beach, and other localities, for example, cries out for more thoughtful and balanced exposition of the arguments on both sides. The same might be said for his analysis of the DES cases, the Bendectin cases, the asbestos cases, the cases imposing liability on the manufacturers of Saturday night specials, and many others. Likewise, he tends to sweep under the rug the cases that most commentators would find correctly decided—for instance, the Dalkon Shield cases. Huber thus creates the impression of rampant error by emphasizing only the cases in which the arguments for the defense are comparatively persuasive. Finally, Huber's claim that safety often *suffers* because manufacturers are afraid to innovate or to market certain types of products would benefit from some careful comparative analysis to explore how conditions in the United States differ from those in other developed countries.

Huber also exaggerates the extent to which juries may err or indulge their whimsy. Trial judges can set a verdict aside or trim the damages award. Multiple levels of appeal are usually available as well, although to be sure they are costly. Where serious errors arise, therefore, they must be the product of "error" at multiple levels of the judicial process (perhaps in the form of an overly deferential standard of review), or must be insignificant enough that appeal is not cost-justified.

Nonetheless, Huber is no doubt accurate in his claim that liability is imposed with some regularity where, on balance, theory suggests it should not be. And, in those circumstances, the beneficial incentives that liability can provide do not arise, and in fact liability may become counterproductive. Again, Huber is correct to raise the issue.

Another consequence of the growth in tort liability, Huber suggests, is the "insurance crisis." (pp 133-52) Undeniably, many types of liability insurance have, in recent years, become considerably more expensive per dollar of coverage, and some forms of coverage have become altogether unavailable, at least temporarily. The increasing magnitude and uncertainty of tort liability has no

¹⁰ I do not mean to suggest that Huber never makes his case. His criticism of decisions imposing liability for the low probability side effects of vaccines, for example, is telling, and indeed these cases have been roundly criticized for some time. Consensus on the need for action in this area has already resulted in the National Childhood Vaccine Injury Act of 1986, 42 USCA §§ 300aa-1 et seq (Supp 1988). A summary of the Act's provisions may be found in Allen M. Lenchek, *A Shot in the Arm*, 3 Wash Law 24 (March/April 1989).

doubt had some considerable bearing upon these developments.¹¹ Thus, Huber argues, the growth of tort liability has become antithetical to the twin "goals" of compensation and loss-spreading—fewer defendants have insurance, and those who do often have less coverage. This point is less telling under the incentives-based justification for tort, as compensation per se is peripheral to the rationale for liability. But an increase in cost or a reduction in the availability of insurance will impose economic costs if they are symptomatic of imperfections in the insurance market that impede an efficient allocation of risk within the economy. And to the extent that the tort system causes or exacerbates these imperfections, Huber has identified another cost that must be weighed against the benefits of liability.¹²

Finally, Huber contends that the tort system has adverse redistributive consequences. For example, he observes that the cost of the "insurance" that accompanies the purchase of a product under strict products liability is the same to each consumer—poor consumers pay the same price for the product as rich consumers. Yet, in the event of an accident, rich consumers will be more generously compensated because their lost income stream is larger. In this sense, poor consumers "subsidize" insurance for rich consumers. (p 151) Although Huber offers no estimate of the magnitude of this subsidy, one cannot deny its existence.

In short, Huber persuasively argues that the tort system is imperfect, indeed highly imperfect. He is right to question those who develop the theoretical case for liability in a frictionless, errorless model that ignores the costs of adjudication and the practical constraints upon the operation of legal institutions.¹³

But the observation that the system is imperfect does not suffice to make the case for reform. While Huber argues that present tort doctrine leads systematically to excessive liability, he ignores countervailing factors that tend to produce undercompensation.¹⁴

¹¹ See, for example, George L. Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 Yale L J 1521 (1987).

¹² Academic debate on the origins of the "insurance crisis" continues. Much of the "crisis" is likely to be transitory, as it reflects the temporary inability of actuaries to assess liability with confidence, a problem that should abate with time as the insurance companies accumulate experience. For a theoretical and empirical analysis of how increased uncertainty about the scope of liability may affect the price and availability of coverage, see J. David Cummins and Patricia M. Danzon, *Product Liability Insurance: What Caused the Shocks in Price and Availability* (Unpublished, University of Chicago, 1989).

¹³ Much the same point is made in David Friedman, Book Review: *Economic Analysis of Accident Law*, by Steven Shavell, 97 J Pol Econ 497 (1989).

¹⁴ For the view that tort liability systematically undercompensates from the perspective

The transaction costs of legal actions will dissuade considerable numbers of injured parties with relatively modest injuries from filing suit, for example, and damages for fatal accidents are often understated by the failure of the law to compensate for "death" itself.¹⁵ Indeed, one of Huber's proposed reforms—abolition of the collateral source rule (p 193)—would greatly compound the problem by allowing injurers to escape liability for the harms they cause to the extent that victims are covered by first-party insurance.¹⁶

More importantly, any case for reform must ultimately rest upon the identification of superior alternatives. It is here that Huber's analysis falls considerably short.

II.

Torts instructors often draw a distinction between "stranger" cases and "consensual" cases. Roughly, a "stranger" case arises when the injury bears no relation to any contractual relation between the defendant and the plaintiff. The classic stranger example is a collision between two vehicles on the highway. Many injuries, however, follow a consensual exchange of goods or services between the defendant and the plaintiff, and such consensual relationships are invariably accompanied by some form of contract. Products liability cases, medical malpractice cases, air crash cases, workplace injury cases, and many others share this consensual characteristic.

In stranger cases, the cause of action inevitably sounds in tort (or some body of law other than contract), as any legal obligation running from the defendant to the plaintiff must arise by statute

of creating adequate incentives for safety, see W. Kip Viscusi, *Product Liability and Regulation: Establishing the Appropriate Institutional Division of Labor*, 78 Am Econ Rev Papers & Proceedings 300, 303 (1988).

¹⁵ In wrongful death actions, damages are often limited to those sustained by the decedents' survivors and provide no compensation for the harm done to the decedent himself. Some jurisdictions do allow the decedent's estate to recover for such losses as the present value of lifetime earnings, but even in those jurisdictions, no compensation is provided for the decedents' loss of utility in being deprived of the joys of life. This policy leads, in an economic sense, to systematic undercompensation in wrongful death actions. See Landes & Posner, *The Economic Structure of Tort Law* at 186-89 (cited in note 6).

¹⁶ As noted, the incentives-based justification for tort liability suggests that injurers will make cost-effective investments in safety only if they confront the prospect of liability for the actual harms they cause. The abolition of the collateral source rule, which provides that injurers must pay the full amount of compensatory damages even when victims have been partially compensated by insurance, would reduce the liability of many injurers to an amount below the level that in theory is necessary to create proper incentives.

or at common law. But in the consensual cases, the plaintiff will often have rights of action arising by contract. Indeed, one may reasonably inquire whether contractual rights of action ought to afford the exclusive remedy in a consensual case for whatever injury the plaintiff has suffered. At one point in the history of Anglo-American common law, the courts at least came close to embracing such a principle.¹⁷ But over the last century or so, rights of action in tort have become increasingly important in many consensual cases, even to the point where contracting parties sometimes have considerable difficulty creating an enforceable agreement to curtail those rights of action.

If a single theme dominates Huber's critique of tort doctrine, it is that the courts have erred grievously by eviscerating contract as an effective limitation upon the scope of liability in consensual cases. His proposals for reform are dominated by "neocontractual solutions" (for example, p 195) and a "return to contract, built on open warning and informed consent." (p 216)

The proposition that the courts have in some respects gone too far in supplementing rights of action in contract with rights of action in tort is no doubt correct.¹⁸ But as Huber recognizes, blind faith in contract to govern the rights of parties in consensual cases also has serious failings. The task is to sort cases into two categories—cases in which the market (i.e., contract) may be expected to provide adequate incentives for safety, and cases of serious "market failure" in which the market is unlikely to provide adequate incentives for safety. In the latter group, some movement from contract to tort has considerable theoretical appeal, though, again, transaction costs or error costs may exceed the prospective benefits, and this issue must be thoughtfully evaluated.

Unfortunately, nowhere does Huber provide serious discussion of the problems of market failure, or offer any guidance to the courts regarding the identification of cases in which market failure is likely to be more or less acute.¹⁹ And nowhere does he provide any theoretical or empirical basis to suppose that market failures

¹⁷ See, for example, *Winterbottom v Wright*, 152 Eng Rep 402 (Ex 1842).

¹⁸ Indeed, I have put forth such arguments elsewhere. See, for example, Alan O. Sykes, *The Boundaries of Vicarious Liability: An Economic Analysis of the Scope of Employment Rule and Related Legal Doctrines*, 101 Harv L Rev 563, 600-03 (1988).

¹⁹ A number of considerations spring to mind. For example, in the products area, the more obvious or well known the risk to the consumer, the less likely that serious market failure will arise. The absence of air bags in a new automobile, for example, and the risks of smoking, are relatively obvious and well known. Latent design characteristics, and latent manufacturing defects, are of potentially greater concern.

are sufficiently infrequent or insignificant that they may safely be ignored. As a consequence, his proposals for a return to contract appear naive and seriously overbroad.

What are the important sources of market failure?²⁰ The most obvious cases involve injuries to persons not party to the market transaction. When a product poses risks not only to purchasers but to others in the vicinity of the purchaser, an externality arises that market participants will ignore.²¹

The market may also fail to provide adequate incentives for safety if parties to the bargain are ill-informed, or otherwise severely constrained in their ability to evaluate the merits of the bargain due to the costs of doing so or due to some systematic cognitive limitation.²² If consumers are ill-informed about attributes of products that affect their own safety, for example, they will not adjust their willingness-to-pay for products in accordance with the value of the safety-enhancing design changes or quality control measures instituted by manufacturers. Moreover, even when information about product safety is accessible to the consumer, consumer willingness-to-pay may not accurately reflect it. It is not costless to process information, and consumers may rationally ignore information about low probability harms if the time and energy required to evaluate its implications and respond to them is sufficiently great.²³ Likewise, consumers may err in their evaluation

²⁰ One largely wrongheaded basis for rejecting contract in favor of tort is the proposition that disparities in bargaining power between consumers and manufacturers will lead the manufacturers to offer inefficiently unsafe products. Consider, for example, a perfect price discriminating monopolist who is the only source of some product that the consumer desperately wants and is willing to purchase for a tidy sum even if it is inefficiently unsafe. Suppose further that a design change that costs the monopolist \$5,000 would enhance safety by avoiding accidents with an expected cost of \$10,000 to the consumer. Consumer willingness to pay for the product should then rise by \$10,000 if the design change is made and the consumer is informed of it. Even a monopolist will gladly invest \$5,000 if it enables him to extract an additional \$10,000 from the consumer. Thus, it is simply not the case that bargaining power disparities systematically destroy the economic incentive to provide cost-effective safety enhancements in a market populated by well-informed consumers. Rather, bargaining power will generally be exploited through price.

The existence of market power can pose interesting "second-best" problems for the tort system, however, because of the monopoly distortion of consumption. For an exposition of such issues, see A. Mitchell Polinsky and William P. Rogerson, *Products Liability, Consumer Misperceptions, and Market Power*, 14 Bell J Econ 581 (1983).

²¹ See Richard A. Epstein, *The Political Economy of Product Liability Reform*, 78 Am Econ Rev Papers & Proceedings 311 (1988).

²² A useful survey of the theoretical issues, applied specifically to products liability, may be found in Alan Schwartz, *Proposals for Products Liability Reform: A Theoretical Synthesis*, 97 Yale L J 353 (1988).

²³ See, for example, Herbert A. Simon, *Models of Man* (John Wiley & Sons, 1957).

of information due to cognitive limitations upon their ability to process it accurately. A considerable literature exists regarding the question whether consumers, workers, homeowners, and others can properly evaluate the low probability hazards to which they are exposed. The evidence suggests that in some, though not all, settings, systematic errors are made in the perception and evaluation of low level risks.²⁴

The consequences of poor information and misperception are potentially serious. If willingness-to-pay does not respond to safety enhancement measures by, say, a product manufacturer, then the manufacturer will lack a market incentive to provide them. Their omission reduces the costs of production but does not reduce the number of customers forthcoming at a given price. For the same reason, manufacturers may lack the incentive to offer cost-effective warranty provisions.²⁵ Finally, if consumers misperceive the risks associated with a product, they will tend to overconsume it or underconsume it²⁶—overconsume if they underestimate risks, underconsume if they overestimate risks. Thus, the terms of the contract between the manufacturer and the consumer will not in general reflect an efficient bargain. Incentives for safety will be compromised, and the consumption decision will be distorted.

The imposition of tort liability, notwithstanding any contractual disclaimers of such liability, may in theory provide at least a partial solution. Consider further the example of manufacturers and consumers. On the premise that manufacturers *are* well-informed about the safety attributes of their products, they can forecast accurately the effects of safety enhancement measures upon the likelihood and severity of accidents, and thus upon the incidence of injuries for which they bear liability. If damages are also reasonably easy to forecast, manufacturers can then compute a reasonable estimate of the benefits to them of greater safety. Finally, if damages are equal to the social cost of injuries,²⁷ manufacturers' pursuit of profit will lead them to adopt safety measures

²⁴ See generally Daniel Kahneman, Paul Slovic and Amos Tversky, eds, *Judgment Under Uncertainty: Heuristics and Biases* (Cambridge, 1982); Peter Asch, *Consumer Safety Regulation* at 88-100 (Oxford, 1988); Cass R. Sunstein, *Legal Interference with Private Preferences*, 53 U Chi L Rev 1129, 1166-69 (1986). To be sure, some studies of the issue find that people do a reasonably good job at assessing and evaluating certain low level risks. See Schwartz, 97 Yale L J at 378-84 (cited in note 22), and sources cited therein.

²⁵ For the view that warranty terms are generally efficient in practice, see George L. Priest, *A Theory of the Consumer Product Warranty*, 90 Yale L J 1297 (1981).

²⁶ That is, inefficiency will arise because price will not equal social marginal cost.

²⁷ Again, the emphasis is on what the manufacturer pays, not what the consumer receives.

that are cost-effective from a societal standpoint.

The question whether tort liability will ameliorate the distortion of the consumption decision is more difficult. A variety of considerations suggest that the tort system cannot possibly optimize the consumption decision in a first-best sense, but it is equally clear that a movement from contract to tort can ameliorate the consumption distortion under certain conditions. Suppose that under "strict liability," the consumer knows that he will receive full compensation for any harm that occurs. He can then ignore the risk of injury in formulating his willingness-to-pay. But for the existence of transaction costs that drive a wedge between what the manufacturer pays and what the consumer receives, the manufacturer would charge a price that included a premium equal to the expected value of compensation for injuries to consumers. If all consumers were alike, and if the market were competitive, the resulting equilibrium would reflect the economically proper consumption decision—price would equal social marginal cost, including the expected cost of injuries to consumers.

The analysis of "negligence" differs slightly, because negligence leaves certain risks on the consumer (those that arise even though the manufacturer exercises due care). If the consumer misperceives those risks, some distortion of the consumption decision remains, although negligence may still be superior to exclusive reliance on contract.²⁸

Of course, the observation that markets may "fail," and that tort liability may in theory ameliorate the attendant problems, hardly suffices to support a blanket rejection of contract in favor of tort. First, it is important not to exaggerate the degree of market failure. If the problem lies with an initial dearth of information, the market may offer powerful incentives to provide more. Con-

²⁸ These results may be found in Steven Shavell, *Strict Liability versus Negligence*, 9 J Legal Stud 1, 17 (Table 1), 21 (Table 2) (1980). Shavell also considers the case of "durable goods," which require optimization at yet another margin—frequency of use. See *id* at 22 (Table 3).

Obviously, many complicating factors arise. The market may not be competitive, in which case the consumption distortion attributable to consumer misperception may aggravate or offset the consumption distortion attributable to market power. See Polinsky & Rogerson, 14 Bell J Econ 581 (cited in note 20). Further, consumers will generally differ as to the probability that they will have an accident, or the damages that they will suffer in the event of an accident. If all consumers pay the same price for the product, those who are more accident prone or whose accidents are more costly will tend to overconsume, while other consumers will underconsume. Finally, because the consumer receives less in compensation than the manufacturer pays in damages, it is impossible to provide full compensation to the consumer without requiring the manufacturer to bear more than the social cost of accidents.

sider consumer products once again: Manufacturers who can make relatively safe products efficiently have an incentive to "sell" safety to the consumer, either directly through salespersons and advertising or indirectly through signals of product safety (such as the Underwriter's Laboratories seal of approval).²⁹ Publications such as Consumer Reports will find an audience. Further, products that are perceived to have serious safety deficiencies may receive considerable publicity to that effect in the media,³⁰ and the prospect of such publicity may provide manufacturers with a considerable reputational stake in the provision of safety. Finally, it is not necessary that *all* consumers be well informed. As long as a reasonable number of informed consumers engage in thoughtful comparison shopping, safety incentives may be adequate.³¹

Second, tort liability may not be the first-best policy response to market failure. If the government is to intervene in the market, government provision of information (for example, the EPA crash tests for automobiles) may provide a less costly solution with less risk of error.³² Finally, as Huber emphasizes, considerable costs may attend a movement to tort liability. Error costs, uncertainties, and the resource costs of the tort system itself must be weighed carefully in any decision to depart from contract.

In the end, therefore, theory alone can provide no more than a rough first cut at identifying the circumstances in which a movement from contract to tort is an attractive prospect. The desirability of reliance upon the market ultimately turns upon difficult empirical issues, which Huber does little to resolve.

Rather, Huber simply urges a return to contract coupled with an insistence that sellers inform customers of risks: "The old tort law perhaps erred in the other extreme, elevating freedom of contract to the point of enforcing deals that were grounded on blind ignorance all around . . . Full disclosure should be an ordinary and

²⁹ Note further that if manufacturers have reason to believe that consumers overestimate the risks associated with their products, they may have an incentive to contract to compensate the consumer in the event that the risks materialize. If the transaction costs of compensation are small enough, the increase in consumer willingness-to-pay will exceed the total cost of compensation to the manufacturer.

³⁰ To be sure, a spate of successful tort actions will create additional publicity. One may reasonably question whether the Ford Pinto, for example, would have received nearly as much adverse publicity in the absence of the opportunity for injured parties to sue in tort.

³¹ See Alan Schwartz and Louis L. Wilde, *Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis*, 127 U Pa L Rev 630, 636-37 (1979).

³² See, for example, Howard Beales, Richard Craswell, and Steven C. Salop, *The Efficient Regulation of Consumer Information*, 24 J L & Econ 491, 521-31 (1981).

essential part of fair dealing.” (p 211) Yet, what is meant by “full disclosure?” No matter how much sellers disclose, it is almost always possible for them to disclose more. The auto manufacturer who discloses much about the important safety features of the vehicle inevitably omits to mention how certain latent design characteristics (such as the configuration of the gasoline tank in the Ford Pinto) might affect the probability of serious injury. The pharmaceutical manufacturer who discloses the possibility of particular side effects could conceivably disclose additional information about their probability. Huber’s own discussion of modern litigation over the adequacy of product warnings also makes the point nicely—regardless of what a manufacturer discloses, plaintiffs can point with striking regularity to other pertinent information that might have been disclosed but was not, and that plausibly *might* have affected their decision to use the product. (pp 54-58)

Indeed, to a considerable degree, it was just such an insistence by the courts upon “full disclosure” that brought about what Gilmore and now Huber term the “death of contract.”³³ Where the courts at times go awry is in their failure to appreciate that disclosure itself is costly, as is any effort to make use of it, so that genuinely “full disclosure” is economically undesirable when its effect on behavior will be sufficiently small. Likewise, it is foolish to require sellers to “disclose” things that they do not know—liability for “non-disclosure” here can have little systematic impact on incentives for safety or the quality of consumer information. Ultimately, the task is to fashion an acceptable theory of what constitutes *sufficient* disclosure. On this point, the courts thus far have done rather poorly. But Huber does not begin to tackle the difficult doctrinal issues that must be addressed if the problem is to be remedied.

Still other difficulties afflict Huber’s discussion of “neoeconomic” options for tort reform. As a substitute for tort awards, Huber (borrowing from Jeffrey O’Connell (pp 194-204)) advocates the use of “neoeconomic” agreements to provide compensation to the injured. For example, much as Federal Express or UPS provides a fixed indemnity for a lost package absent payment of an additional premium, the seller of a product or service might do the same for personal injuries. An air carrier, for example, might con-

³³ To be sure, concerns about bargaining power and “contracts of adhesion” also made the courts reluctant to respect the terms of the bargain. As noted earlier, however, asymmetries in “bargaining power,” even where they exist by some measure, are not in general a convincing basis for a rejection of contract. See note 20.

tract with passengers to provide a fixed payment upon the death of a passenger in an air crash.

“Neocontractual” compensation for personal injuries would indeed avoid various transaction costs of tort litigation. But if the use of such devices is economically desirable, it is at least something of a puzzle why the market never offered them to any extent, even in the days when the courts were much more inclined to respect the bargain than they are presently. Part of the answer no doubt owes to the fact that the economically appropriate payment in the event of a personal injury typically varies across customers, just as individuals differ considerably in the amount of first-party insurance coverage that they wish to purchase. Part of the answer also lies in the observation that “neocontractual” solutions have little appeal except where the seller is prepared to assume “no-fault” liability, and where the injuries that arise do not raise difficult causal issues. The costs of litigating fault (or “defect”) under a fault-based (or “defect”-based) contract for compensation would likely equal the costs of litigating such issues in tort, just as the costs of litigating causation might be much the same in either regime (consider the pharmaceutical cases, for example). One suspects that the set of cases in which it is sensible for sellers to consider assuming no-fault liability, and in which the causal issues are simple, is quite small indeed.

III.

While Huber calls for greater trust in the market, he also advocates greater trust in government regulation. Early on, he laments the fact that “[a]dvance regulatory approval, no matter how thorough, careful, and complete, counts for nothing definite in the subsequent lawsuit.” (p 48) Later, he contends that “[r]egulators, quite simply, are better equipped than any jury to make the systematic risk comparisons on which all progressive choice is based.” (p 215) Hence, much as the violation of a statute or regulatory standard often results in an easy victory for the plaintiff who is injured as a consequence, Huber urges that compliance with applicable safety statutes and regulations ought to insulate defendants from liability.

This suggestion is not novel, and indeed the courts have debated its merits at great length. The usual resolution of that debate, as Huber correctly notes, is the principle that compliance with pertinent statutes or regulations is *evidence* in rebuttal of plaintiff’s prima facie case, but is not dispositive (with some excep-

tions) unless the legislature so provides.³⁴ Thus, juries and judges may find the defendant "negligent," or its product "defective," notwithstanding explicit regulatory approval of the defendant's conduct or product.

The wisdom of this regime turns upon difficult issues of comparative institutional competence. Juries unquestionably lack the technical expertise of regulators. Further, they hear the case only after a serious injury has occurred, and may thus be tempted to indulge compassion for the injured at the expense of sound judgment on the legal merits. Trial judges and appellate courts provide a check on the possibility of error, but only an imperfect check.

Regulators and legislators, however, are hardly above bias and prejudice themselves. Public choice theory teaches how the legislative process responds to special interest pressures—well organized business interests, for example, often triumph over diffuse and poorly organized consumer interests.³⁵ The result may be legislation that promotes the economic interests of well organized groups even when accompanied by a net loss to the community as a whole.³⁶ Likewise, the economic theory of regulation suggests that regulators are often "captured" by the regulated, in part because regulated entities control the information flow to the regulators, and in part because the regulators often aspire to lucrative private sector positions in the regulated entities following their exit from public service.³⁷

Consequently, the proposition that safety legislation or regulation consistently reflects a principled balancing of the costs and benefits of safety measures is, at best, dubious. Likewise, it is by no means clear that legislators and regulators will do a better job of serving the public interest in safety than the courts, even given the courts' comparative lack of expertise.

These observations further explain what Huber regards as an

³⁴ See, for example, W. Page Keeton, Dan B. Dobbs, Robert E. Keeton, and David G. Owen, *Prosser & Keeton on The Law of Torts* at 233 (West, 5th ed 1984).

³⁵ The seminal works on public choice theory include James M. Buchanan & Gordon Tullock, *The Calculus of Consent* (U Mich, 1962); and Mancur Olson, Jr., *The Logic of Collective Action* (Harvard, 1965).

³⁶ Legislation to protect domestic markets from international competition provides a ready set of examples. See, for example, Robert E. Baldwin, *The Political Economy of Protectionism*, in Jagdish N. Bhagwati, ed, *Import Competition and Response* at 263 (Chicago, 1982).

³⁷ The seminal works include George J. Stigler, *The Theory of Economic Regulation*, 2 Bell J Econ 3 (1971); Richard A. Posner, *Theories of Economic Regulation*, 5 Bell J Econ 335 (1974); and Sam Peltzman, *Toward A More General Theory of Regulation*, 19 J L & Econ 211 (1976).

inconsistency in the law—the fact that violations of legislative or regulatory standards are given greater weight by the courts than compliance with those standards. (p 214) In the products area, for example, if well organized special interests dominate the legislative process or “capture” the regulators, legislative and regulatory safety standards are likely to be too lax.³⁸ Then, although violation of a legislative or regulatory standard is strong evidence of the defendant’s failure to undertake cost-effective safety measures, compliance with that standard by no means establishes the opposite.

This is not to suggest that courts invariably give proper weight to regulatory compliance in their decisions. Perhaps the regulatory process at the FDA, for example, is sufficiently protected from special interest pressures that little danger of error would arise if courts gave greater—perhaps dispositive—weight to compliance with FDA regulations in products actions. But how do we know as an empirical matter that special interest pressures are of little concern at a particular agency? Huber makes no effort to show that particular regulatory agencies are reasonably insulated from special interest pressures. Nor does he make the case for a bright line rule that assumes away the problem of special interest pressures on the premise that on average the problem is minor.

Further, questions invariably arise as to whether regulated entities have withheld information from the regulators, or whether new information developed subsequent to initial regulatory action has received proper regulatory consideration. Thus, it is not at all difficult to imagine scenarios in which compliance with regulation should indeed receive little weight. Once again, the task is to sort cases in a theoretically sound manner that also provides useful guidance to the courts. Huber does not do so.

IV. CONCLUSION

Liability is worth reading, if only for its entertaining though occasionally loose account of the important trends in twentieth century tort law. Where it fails is in its attempt to show that the system is seriously inferior to some feasible alternative. Huber’s one-sided critique of tort does expose its imperfections, but omits to weigh them in any systematic way against its virtues, and ultimately fails to elaborate appealing reforms. Given the complexity of tort law and the wide variety of circumstances to which it ap-

³⁸ Of course, this proposition presupposes some degree of market failure that warrants legislative or regulatory intervention in the first place.

plies, it would be surprising indeed if no improvements could be made. Yet, *Liability* does little to identify them.

Nonetheless, because of its broad based call for curtailment of plaintiffs' rights of action, *Liability* will no doubt be lauded by interests in the business community that perceive themselves besieged by ever expanding tort liability. It is important that academics maintain greater distance from the debate. Those who do will find *Liability* to be of interest, but will also react to its central thesis with skepticism.