# *ON POLITICAL BOOKS*

# You Little Tort

## We clog the courts with crazy liability cases while the real crooks get off

by Daniel Farber

Richard Neely sits on the supreme court of West Virginia. This is how he describes his job: "As a state court judge, much of my time is devoted to designing elaborate new ways to make business pay for everyone else's bad luck. I may not always congratulate myself at the end of the day on the brilliance of my legal reasoning, but when I do such things as allow a paraplegic to collect a few hundred thousand dollars from the Michelin Tire Company—thanks to a one-car crash of unexplainable cause—I at least sleep well at night. Michelin will somehow survive (and if they don't, only the French will care), but my disabled constituent won't make it the rest of her life without Michelin's money."

This passage tells you a lot about Judge Neely's latest book, *The Products Liability Mess*.* The style is brash but disarming. Here are some other Neely gems: "Jesse Jackson is interesting but not powerful; courts are powerful but not interesting." "Senior partners in large firms make money buying young lawyers at wholesale and selling them at retail." "Horse riding is the ideal sport for politicians because at its heart is the skill of convincing the horse to do all the work." As one of the blurbs on the dust jacket says, "It is difficult not to like Judge Richard Neely. . . his blend of learning, irreverence, candor, and common sense would be hard to resist."

One of the reasons Neely is so disarming is that his candor stops short of cynicism. In the Michelin case, he admits to bending the legal rules to help a constituent, with the rueful implication that he's willing to be a bit unprincipled for political reasons. But it's not merely political, because his constituent really *is* destitute, and no one else is willing to help. So he may be a bit of a rogue, we infer, but he's a rogue with a golden heart. How can you help but like the Robin Hood of the state courts?

While it displays Neely's engaging style, the Michelin story also exemplifies his thesis. Neely argues that products liability law has gotten out of hand because of the incentives for state court judges to help out hometown plaintiffs at the expense of out-of-state manufacturers. Like most "beggar thy neighbor" strategies, this one can end up hurting everyone, because the resulting legal rules may ignore the legitimate needs of business. To solve this problem, he calls upon the United States Supreme Court to start reviewing state court decisions in products liability cases. Only the Supreme Court, he suggests, can prevent the state courts from exploiting out-of-state companies.

Most of Neely's attention is devoted to this reform proposal. Before worrying about reform, however, it's important to understand the problems with current law, which is at once too harsh on some companies, too lenient with others, and much too expensive and cumbersome.

## Plain tiffs

Products liability dates from the 1960s, when the courts turned "let the buyer beware" on its head. The theory now is that consumers are entitled to assume that products are safely designed and properly manufactured. Businesses are increasingly beleaguered by lawsuits. Their concerns may be exaggerated, but they do have some foundation. There has been a steady expansion in the scope of liability, and defenses have become harder to establish. According to one study, about 13,500 products liability suits were filed in federal court in 1986, as opposed to 1,500 in 1974. Is the system working better to hold corporations properly accountable? Or have the courts run amok?

Neely's answer is rather guarded. On the one hand, he does believe that products liability has increased consumer safety by deterring unsafe conduct. He tells a long, amusing story about French

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and American horse owners. The Americans can't afford to have riding stables because the insurance is too costly; the French take no precautions against injury because they don't care who gets hurt. Neely concludes that "we are wrong to have a liability law that is so plaintiff-oriented that it makes it nearly impossible for riding schools to operate. Yet I also find that France is a needlessly dangerous society." On the whole, he still thinks that business should be responsible for dangerous products; the problem with product liability law is "the tendency to carry a good thing too far."

It might be more accurate to say that in some ways the law has carried a good thing too far and in other ways not nearly far enough. It's not hard to find examples of socially beneficial activities needlessly hampered by excessive liability. The vaccine situation is a classic example, which Neely discusses in passing. Vaccination has been one of the great success stories of the twentieth century. In 35 years, polio cases dropped from 57,000 a year to four; in 50 years, whooping cough deaths dropped from 7,500 a year to four. Despite this phenomenal success, state courts upheld large verdicts against drug companies when juries concluded either that warnings to patients of dangerous side effects of certain vaccines were not sufficiently detailed or that some other vaccine would have been preferable. As a result of the threat of liability, the availability of vaccines in the United States was threatened. In 1986, Congress responded with legislation intended to protect the industry from excessive liability. Without federal legislation, large-scale vaccination programs might not be possible in this country.

The vaccine story points out one of the weaknesses of the products liability system. The injured plaintiff is in court for everyone to see. The lives saved by the vaccine are invisible. So the natural human tendency is to help out the poor injured plaintiff, while ignoring the effect of the decision on those who are benefiting from vaccination. The dramatic private harm obscures the quieter but larger social benefits.

The vaccine example shows how products liability law can endanger socially beneficial activities. The tobacco cases, however, demonstrate how the law turns a blind eye to major public health hazards. According to the Public Health Service, smoking kills 350,000 Americans every year—seven times the number who die in car crashes and many times the number of AIDS cases reported to date. Yet, only one plaintiff has ever succeeded in recovering damages from a cigarette company, and the damages were so limited that the cigarette industry considered the case a victory. Something is badly amiss in a legal system that is capable of driving essential medicines off the market while ignoring the greatest public health hazard of our time.

The current legal immunity of the tobacco industry is wrong. Smokers are considered responsible for their own illnesses because they knew—or should have known—that cigarettes are hazardous. The reality is that most smokers begin before they are 16 and are addicted by the time they reach adulthood. So smoking can't be said to reflect a rational individual choice. The cigarette companies' virtual immunity from liability sends the message that selling a dangerous, addictive drug is socially approved behavior.

Product liability cases run the gamut from vaccine cases, where there probably should be no liability, to the cigarette cases, where the tort system has failed to come to grips with an enormous public health hazard. In between we find the great mass of everyday products cases. Some scholars believe that in these cases current law provides consumers with excessive insurance: they are covered for product-related injuries but have to pay a higher price for the product to cover the "premium," and are actually getting more insurance than they would really want to buy if they had a choice. These scholars have devoted a great deal of effort to correcting this fault, but to my mind the possibility that consumers are paying for a little "excess" insurance hardly ranks as a major social problem.

This doesn't mean that products liability law works faultlessly. There is a real problem in the system that processes injury claims. A RAND Corporation study estimated that in 1985 Americans spent more than $16 billion on tort litigation. This is almost as much as the total compensation victims ultimately received. According to a study by ALI (a prestigious association of judges and lawyers), "victims receive only between 50 percent and as little as 25 percent of the total amounts expended by society to decide tort disputes and compensate victims."

These figures are appalling. By comparison, Pentagon procurement is a model of efficiency. Even if these estimates turn out to be too high, it is obvious that we are spending vast sums that benefit neither industry nor accident victims.

Where does the rest of the money go? Take a guess. According to the same ALI study, "most of the balance goes to lawyers." At least one prominent law professor has suggested that the system actually is designed to maximize the payout to lawyers. This is too cynical. Rather, products liability is probably a good example of the expense of trying to do perfect justice in every individual case. Hand-tailoring is a lot more expensive than mass production. What we need, in the interests of the accident victims themselves, is a mass production system that will deliver compensation cheaply, so that more money will go to victims and less to lawyers.

A cheaper compensation system must have two attributes. First, it should have simple, clear rules governing liability and damages. Second, it should have streamlined procedures for applying these rules. The task of designing such a system does not exceed the ingenuity of the human mind. Indeed, a number of promising proposals already have been made.

## You better shop around

Judge Neely himself makes an interesting reform proposal to the effect that no punitive damages should be awarded when the defendant has made a prompt, fair settlement offer. (He would make an exception, however, if the plaintiff can provide clear proof that the defendant deliberately endangered the public.) This rule would help plaintiffs, since it would speed up compensation, as well as helping defendants, for whom it would eliminate much of the uncertainty associated with punitive damages.

This brings us back to the main topic of the book. Neely doubts that his colleagues have any incentive to reform tort law, so he wants the federal courts to intervene. He sometimes seems quite cynical about the judicial role: "As long as I am allowed to redistribute wealth from out-of-state companies to injured in-state plaintiffs, I shall continue to do so. Not only is my sleep enhanced when I give somebody else's money away, but so is my job security, because the in-state plaintiffs, their families, and their friends will reelect me." But Neely himself is obviously more principled than that, and he really isn't that cynical about the motivations of most judges. Good judges, he says, "listen open-mindedly to other points of view" while trying to "achieve their vision of the just social contract."

Judge Neely thinks the federal courts should play a much bigger role in developing liability rules, which the states should be required to follow. Why attack the problem at the federal level? The answer, according to Neely, is that no individual state can afford to take the lead in tort reform. A state benefits from having very liberal liability rules, since most of the expense falls directly on out-of-state manufacturers and indirectly on out-of-state consumers. There is something to this argument, though it's a bit overstated, since a company may be headquartered elsewhere but still have local clout.

If federal intervention is needed, you may wonder, why does Neely choose the federal courts rather than Congress? Neely is pessimistic about Congress, which he thinks would be likely to botch the job because of the complexities of tort litigation. Individual legal rules can't operate in a vacuum. Inflated damages for pain and suffering may actually compensate plaintiffs for large attorneys' fees. The threat of draconian punitive damages may be needed to deter defendants from delaying trials indefinitely. Judge Neely doubts that Congress will understand these interrelations. He may be right, but it seems equally unlikely to me that the justices on the U.S. Supreme Court are any more knowledgeable in such matters. They're a long way from life in the litigation trenches.

Judge Neely also suggests that Congress will try to lay down too many detailed rules, which will then be difficult to change if they don't work out. One solution might be for Congress to attack the problem indirectly by creating incentives for states to reform their own liability rules or by using tax rules to change the dynamics of the litigation process. I'm not convinced that a legislative solution is impossible.

Neely's book has gotten a warm reception from the business press. Even before it was published it was the subject of laudatory reviews in *Forbes* and *Fortune*. These reviewers liked Neely's disenchanted view of the status quo. Predictably, they were much less taken with his solution. Most conservatives, after spending years arguing in favor of states' rights and judicial restraint, have a little trouble with the idea that the best way to cure a tough problem is to hand it over to the Supreme Court. Liberals, on the other hand, won't object so much to Neely's treatment as to his diagnosis: they're unlikely to think that products liability is such a mess anyway. In short, conservatives will agree with Neely's diagnosis but reject his cure, while liberals will reject the diagnosis itself.

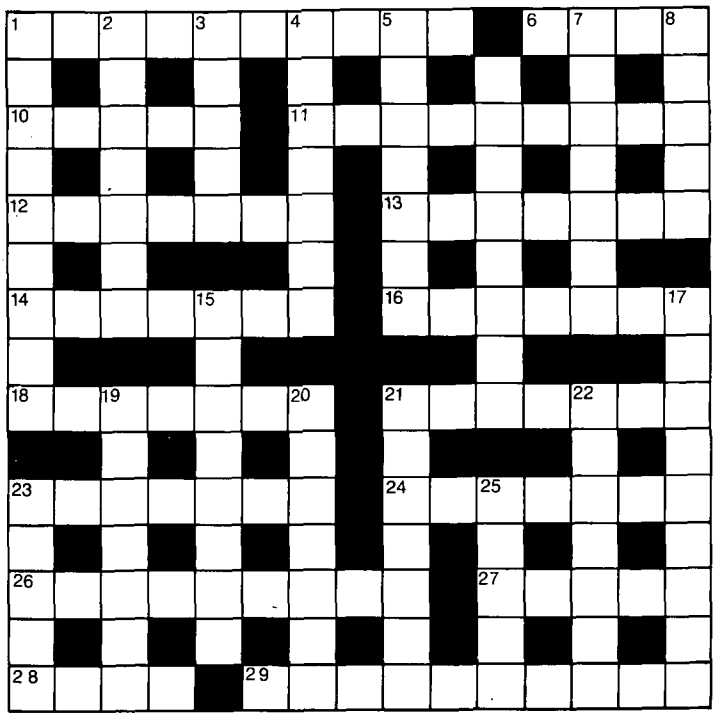
Given these political realities, I doubt that Neely's proposal will be adopted. On the other hand, if he succeeds in making the Supreme Court more skeptical of the motives underlying state tort law, some smaller changes in Supreme Court doctrine may result. For example, the Court might do more to limit the ability of plaintiffs to "forum shop" for a state with the most favorable legal rules, even if that state has no real connection with the accident. More importantly, his book may help to get products liability on the national political agenda.

The huge administrative costs of the present system create a political opportunity for reform that would benefit consumers, insurance companies, and manufacturers, at the expense of trial lawyers and other beneficiaries of the litigation system. A consumer/business alliance against the lawyers has some obvious PR appeal. Admittedly, the Naderites and the Chamber of Commerce might find each other uncomfortable allies. But the stakes are high. There are billions of dollars in cost-savings that could be divided among accident victims and businesses. Some clever politician ought to be able to exploit that potential to put together a winning coalition. □

# *POLITICAL PUZZLE*

## by John Barclay

The numbers indicate the number of letters and words, e.g. (2,3) means a two-letter word followed by a three-letter word. Groups of letters, e.g. USA, are treated as one word.



### ACROSS

1. Artful shoe bugger in position of leadership. (6,4)
6. Mountain fork returning for turn at table. (4)
10. Show last native returning. (5)
11. Untapped oil vein at eruption. (9)
12. Stung, Ted lent composition. (7)
13. Pay point in dispatch. (7)
14. Accommodate 52 near transportation company. (7)
16. Curing rat pelt nonsense. (7)
18. Young animal designed bun coil. (4,3)
21. Graduated pet sped around. (7)
23. Pisa ode about animal fat. (7)
24. Praised delicately the loss of all hope. (7)
26. Kin hearing story? (7,2)
27. A cone reshaped a lot. (5)
28. Smart local gyms, we hear. (4)
29. How 1 use the arrangement to put 1 Across in his new place. (5,5)

### DOWN

1. Endlessly malingered in new way to escape raid. (5,4)
2. One skipping Met trio rehearsal. (7)
3. Rang up over fifty to twist. (5)
4. Streaked animal putting restraint around last of aspirin. (7)
5. Cat climbs around short street and holds back. (5,2)
7. Most meager Latin senate assembled. (7)
8. Give up idly wandering around the East. (5)
9. Artifically made into master. (8)
15. Beginning to misspell 1-H. (8)
17. Strength somehow due canner. (9)
19. Mineral deposits around oil mixture for the birds. (7)
20. Hard bet placed for dimension. (7)
21. No duties assigned for volley ball stage. (4,3)
22. Paul ate judiciously for unchanging figure. (7)
23. Weapon protected in nuclear rowdiness. (5)
25. Sin in eighth compartment? (5)

*Answers to last month's puzzle:*